

***Regards croisés sur la protection nationale et internationale des droits de l'homme / Intersecting Views on National and International Human Rights Protection***

*Liber Amicorum* Guido Raimondi

*Edités par / edited by Lino-Alexandre Sicilianos, Iulia Antoanella Motoc, Robert Spano & Roberto Chenal*

Le mandat de Guido Raimondi en tant que Président de la Cour européenne des droits de l'homme s'achève. À l'occasion de son départ, ses collègues, juges à la Cour et aux juridictions nationales et internationales, ainsi que de ses collègues au Bureau International du Travail et ses nombreux amis souhaitent rendre un hommage particulier à Guido Raimondi, la richesse de son parcours professionnel qui a culminé avec la Présidence de la Cour et son apport exceptionnel à l'institution, la Cour européenne des droits de l'homme.

La diversité des contributions contenues dans ces études témoigne de la multitude des intérêts de prédilection de Guido Raimondi qui touchent non seulement les droits civils et politiques mais aussi les droits économiques et sociaux tout particulièrement dans le domaine du droit du travail. Les différentes formes de dialogue judiciaire qui sont abordées dans le présent ouvrage reflètent par ailleurs l'une des contributions majeures du Président Raimondi.

C'est dans cet esprit que se situent les contributions tendant à rendre hommage à une personnalité exceptionnelle qui a marqué de son empreinte la Cour européenne des droits de l'homme.

Guido Raimondi's mandate as President of the European Court of Human Rights is coming to an end. In view of his departure, his colleagues, judges at the Court, judges in national and international jurisdictions, as well as his Colleagues at the International Labour Organisation and his numerous friends, wish to pay tribute to Guido Raimondi's, the wealth of his professional accomplishments, which culminated with his Presidency of the Court, as well as his exceptional contribution to the latter institution.

The wide range of topics characterising the present work reflects the diversity characterising Guido Raimondi's interests, which include not only civil and political rights, but economic and social rights as well, particularly in the sphere of labour law. The different forms of judicial dialogue addressed in the present work further reflect one of President Raimondi's key contributions.

It is against this backdrop that the contributions seek to honour an exceptional personality who has left his mark on the European Court of Human Rights.

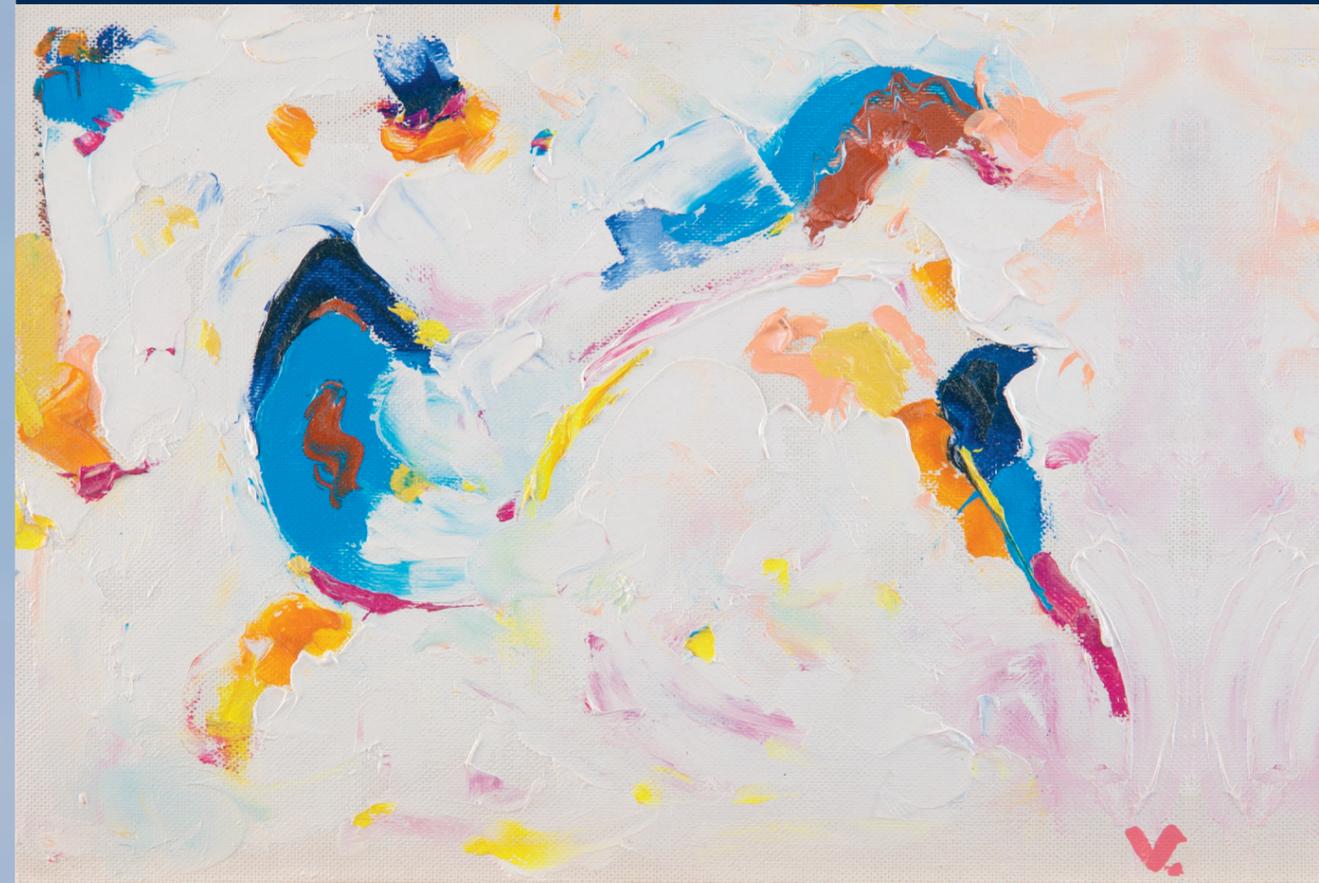


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Iulia Antoanella Motoc  
Robert Spano &  
Roberto Chenal (eds)





Guido Raimondi



# Table des matières / Table of Contents

<b>Préface du comité éditorial</b>	VII
<b>Foreword</b>	IX
<b>Curriculum vitae de Guido Raimondi</b>	XIII
<b>Responsibility to protect and human rights based intervention</b>	I
<i>Paulo Albuquerque</i>	
<b>Dignity and Rights-Should these concepts be linked up?</b>	23
<i>Mary Arden</i>	
<b>The Interaction between the Venice Commission and the European Court of Human Rights</b>	35
<i>Gianni Buquicchio &amp; Simona Granata-Menghini</i>	
<b>Le modèle laïc à Strasbourg. Retour sur une politique jurisprudentielle de la reconnaissance</b>	51
<i>Laurence Burgorgue-Larsen</i>	
<b>Authority and legitimacy of the Regional Human Rights courts: impacts, resistances, difficulties and challenges. The case for the European Court of Human Rights</b>	83
<i>Abel Campos</i>	
<b>La giurisprudenza della Corte europea dei diritti dell'uomo nell'interpretazione del principio del giusto processo da parte della Corte penale internazionale</b>	89
<i>Ida Caracciolo</i>	
<b>L'interpretazione conforme alla Convenzione Europea dei Diritti dell'Uomo dal punto di vista del giudice comune</b>	103
<i>Daniela Cardamone</i>	
<b>The Many and the Few</b>	115
<i>Marta Cartabia</i>	

<b>International Labour Standards and EU labour law: some reflections</b>	127
<i>Giuseppe Casale</i>	
<b>Sulla recente prassi in materia di comunicazioni di deroga alla Convenzione europea dei diritti dell'uomo</b>	145
<i>Giuseppe Cataldi</i>	
<b>Corti nazionali e Corte europea dei diritti dell'uomo: per un dialogo sui diritti</b>	159
<i>Roberto Chenal</i>	
<b>La Corte di Cassazione italiana e il ruolo svolto da Guido Raimondi nel dialogo con la Corte EDU</b>	173
<i>Roberto Giovanni Conti</i>	
<b>Quelle est la nature de la Cour européenne des droits de l'homme ?</b>	189
<i>Jean-Paul Costa</i>	
<b>Les droits de l'homme à La Haye, brèves remarques sur des influences croisées.</b>	201
<i>Yves Daudet</i>	
<b>Self-determination and the world order in the human rights perspective</b>	211
<i>Dmitry Dedov</i>	
<b>The Court's approach to exhaustion of domestic remedies in the age of subsidiarity</b>	231
<i>Tim Eicke</i>	
<b>La tierce intervention dans la procédure devant la Cour européenne des droits de l'homme</b>	255
<i>Françoise Elens-Passos</i>	
<b>Dialogue between national supreme courts and the European Court of Human Rights: a new era</b>	277
<i>María Elósequi</i>	

<b>L’arbre que l’on ne saurait abattre : le rôle de la liberté d’expression, en particulier des journalistes, pour l’Etat de droit, la démocratie et le bien commun</b>	293
<i>Luc Gonin</i>	
<b>Les légataires du respect des droits de l’homme</b>	309
<i>Mattias Guyomar</i>	
<b>Limits of rights and judicial restraint</b>	315
<i>Khanlar Hajiye</i>	
<b>L’immanente tensione tra la tutela delle diversità culturali e l’universalità dei diritti fondamentali: il caso delle mutilazioni genitali femminili</b>	329
<i>Massimo Iovane</i>	
<b>Diritti fondamentali e funzione pubblica europea</b>	343
<i>Marc Jaeger</i>	
<b>The Cooperative Dialogue between the Constitutional Court and the European Court of Human Rights/Lithuanian Perspectives</b>	359
<i>Danutė Jočienė</i>	
<b>L’indépendance du juge. Retour aux fondements d’une garantie essentielle d’une société démocratique</b>	377
<i>Frédéric Krenc &amp; Françoise Tulkens</i>	
<b>Le politiche di respingimento dei migranti alla prova della Corte europea dei diritti dell’uomo</b>	401
<i>Anton Giulio Lana</i>	
<b>Dialogo tra le Corti e il caso Taricco</b>	417
<i>Giorgio Lattanzi</i>	
<b>“Disputes over Rights”</b>	429
<i>Paul Lemmens</i>	
<b>Les limites aux limitations. Le contenu essentiel des droits fondamentaux dans l’UE</b>	449
<i>Koen Lenaerts</i>	

<b>Il principio di sussidiarietà e il margine di apprezzamento</b>	475
<i>Nicola Lettieri</i>	
<b>Are the Convention's authors turning in their grave: European Judges and prisoners' rights?</b>	491
<i>Roderick Liddell</i>	
<b>From the Internationalization of Constitutional Law to the Constitutionalization of International Law on Human Rights: a Short Comment on a Long Subject</b>	507
<i>Luis Lopez Guerra</i>	
<b>The living Instrument Doctrine in the Case-law of the ECHR</b>	519
<i>Branko Lubarda</i>	
<b>Failed pilot judgments: as between the European Court of Human Rights and the Committee of Ministers of the Council of Europe, who is to do what?</b>	539
<i>Paul Mahoney</i>	
<b>Il dialogo tra le corti europee e le corti nazionali tra continuità ed evoluzione di sistema</b>	555
<i>Giovanni Mammone</i>	
<b>Il diritto dell'immigrazione e l'attenzione che la giurisprudenza e la legislazione UE prestano alla giurisprudenza della Corte EDU</b>	577
<i>Paolo Mengozzi</i>	
<b>Interaction between the Highest National Courts and the European Court of Human Rights: Beyond Judicial Dialogue</b>	589
<i>Mārtiņš Mits</i>	
<b>The dialogue between the ECHR and the Italian Constitutional Court</b>	603
<i>Iulia Antoanella Motoc &amp; Markos Valikos</i>	
<b>Retirement age is still a long way off</b>	615
<i>Egbert Myjer &amp; Peter Kempees</i>	
<b>Applicability of Article 5 of the Convention to persons at liberty</b>	637
<i>Stanley Naismith</i>	

<b>Le Protocole n°16 en tant qu'instrument de collaboration entre juges nationaux et européens</b>	657
<i>Bruno Nascimbene</i>	
<b>Three square meters of human dignity?</b>	669
<i>Angelika Nußberger</i>	
<b>The constitutional complaint in Hungary and the exhaustion of domestic remedies</b>	687
<i>Péter Paczolay</i>	
<b>La giustizia amministrativa nel sistema "convenzionale"</b>	695
<i>Alessandro Pajno</i>	
<b>Les explications à la Charte de l'Union européenne et, par extension, également, aux dispositions identiques de la Convention de Rome : faut-il les mettre à jour et comment ?</b>	707
<i>Ezio Perillo</i>	
<b>Judges of the international administrative tribunals</b>	721
<i>Dražen Petrović</i>	
<b>L'"internazionalizzazione" dei diritti umani e il contributo della Presidenza Raimondi alla costruzione di un sistema integrato</b>	733
<i>Valeria Piccone</i>	
<b>The Namibia Exception and the Positive Obligation of the Republic of Moldova to Recognise Certain Judicial Decisions Delivered by the Courts of the Unrecognised Regime of Transdnistria</b>	749
<i>Mihai Poalelungi</i>	
<b>Whether the national court has duly considered the Convention matter – A reason for sanction, for reward and for advisory opinion</b>	767
<i>Søren Prebensen</i>	
<b>Diritti fondamentali, primato e autonomia: il bilanciamento fra i principi "costituzionali" dell'Unione europea</b>	775
<i>Lucia Serena Rossi</i>	

<b>Officially Frozen Memory</b> <i>András Sajó</i>	799
<b>The European Court of Human Rights as a European Constitutional Court: the Margin of Appreciation Doctrine and Beyond?</b> <i>Rosario Sapienza</i>	813
<b>Où va le droit ?</b> <i>Jean-Marc Sauvé</i>	823
<b>Social Rights as Human Rights</b> <i>Silvana Sciarra</i>	843
<b>Social and economic rights under the European Convention on Human Rights and their protection in times of crisis</b> <i>Georgios Serghides</i>	857
<b>Le dialogue entre la Cour européenne des droits de l'homme et les autres organes internationaux, juridictionnels et quasi-juridictionnels</b> <i>Linos-Alexandre Sicilianos</i>	871
<b>Dignity and the Trajectory of Human Life</b> <i>Robert Spano</i>	895
<b>The European Court of Human Rights: Master of the law but not of the facts?</b> <i>Dean Spielmann</i>	909
<b>Les cours constitutionnelles et les cours suprêmes nationales, acteurs de l'Europe des droits de l'homme</b> <i>Bernard Stirn</i>	925
<b>Il ne bis in idem nel dialogo tra le Corti europee</b> <i>Antonio Tizzano</i>	935
<b>La tutela dei diritti fondamentali della persona tra corti europee e giudici nazionali</b> <i>Francesco Vigano</i>	957

<b>The Role of the Government Agent before the European Court of Human Rights</b>	973
<i>Mark Villiger</i>	
<b>European Court of Human Rights at the time of global contemporary challenges to the human rights protection systems</b>	985
<i>Ganna Yudkivska</i>	
<b>Témoignages / Personal accounts</b>	
<b>Guido Raimondi, un magistrato in Italia ed in Europa</b>	997
<i>Paola Accardo</i>	
<b>Guido Raimondi “Costruttore dei diritti umani”</b>	1001
<i>Maurizio de Stefano</i>	
<b>A Guido Raimondi. Magistrato internazionale e amico</b>	1007
<i>Riccardo Fuzio</i>	
<b>L’action de Guido Raimondi en tant que Président de la Cour européenne des droits de l’homme</b>	1013
<i>Patrick Titun</i>	
<b>Una vita per il Diritto</b>	1025
<i>Elisabetta Zamparutti</i>	



## Préface du comité éditorial

La personnalité du Président Raimondi, la richesse de son parcours professionnel qui a culminé avec la Présidence de la Cour, et son apport exceptionnel à l'institution, la Cour européenne des droits de l'homme, nous ont semblé commander un hommage particulier de la part de ses collègues, juges à la Cour et aux juridictions nationales et internationales, ainsi que de ses collègues au Bureau International du Travail et ses nombreux amis.

La diversité des contributions contenues dans les études en l'honneur du Président Raimondi témoigne de la multitude de ses intérêts de prédilection qui touchent non seulement les droits civils et politiques mais aussi les droits économiques et sociaux tout particulièrement dans le domaine du droit du travail.

Les différentes formes de dialogue judiciaire qui sont abordées dans le présent ouvrage reflètent par ailleurs l'une des contributions majeures du Président Raimondi.

On sait en effet à quel point Guido Raimondi a mis l'accent sur les échanges, le dialogue surtout avec les juges nationaux estimant à juste titre que l'avenir du système de la Convention se situe notamment dans les systèmes juridiques nationaux.

Dans cet ordre d'idées, il a mis un accent particulier sur le développement spectaculaire du Réseau des Cours Suprêmes qui a pris un essor exponentiel sous sa Présidence ainsi que sur le Protocole n° 16 à la Convention européenne des droits de l'homme.

Celui-ci est entré en vigueur le 1<sup>er</sup> août 2018 et le Président Raimondi a eu le privilège de signer le premier avis consultatif rendu en vertu de ce Protocole dit « de dialogue judiciaire ».

C'est dans cet esprit que se situent les contributions de ses nombreux amis et collègues à Strasbourg, en Italie, à Genève et ailleurs tendant à rendre hommage à une personnalité exceptionnelle qui a marqué de son empreinte la Cour européenne des droits de l'homme.

Strasbourg, avril 2019

*Linos-Alexandre Sicilianos, Iulia Antoanella Motoc, Robert Spano  
& Roberto Chenal*

## Foreword

Writing a foreword for the *Liber Amicorum* offered to Guido Raimondi is not only an honour, but a genuine pleasure. For decades – and long before he became the President of the European Court of Human Rights – Guido Raimondi has been a true *amicus* of the Council of Europe, whose professional eminence is paralleled by his engaging character.

Guido Raimondi has been a judge at the Strasbourg Court since May 2010 and became its President on 1st November 2015. Prior to this he acted as both Section President and Vice-President of the Court from 1 November 2012.

His exceptional legal career began more than four decades ago – and has been so rich that it would be futile trying to recall here all the steps that led him to the Presidency of the Strasbourg Court. There are however some milestones that I would not like to omit. President Raimondi has been a member of the Judiciary since 1977 – originally in his native Italy. He started in the lower courts, dealing with civil and criminal cases before being seconded, in 1986, to the Ministry of Foreign Affairs. From 1989 to 1997 he was Co-Agent of the Italian Government before the European Court and the European Commission of Human Rights, already posted in Strasbourg to the Permanent Representation of Italy to the Council of Europe, where he was also a legal adviser. Between 1997 and 2003, he served on the Italian Court of Cassation, first in the Advocate General's office and later as a judge. During the same period he was an *ad hoc* judge in a number of cases before the Strasbourg Court. He was also a member of Council of Europe steering and expert committees, including the Steering Committee for Human Rights (CDDH), of which he was a Bureau member from 1993 onwards and an esteemed President (1999-2000). From May 2003 until his election to the Strasbourg bench, it was the International Labour Organization (ILO) which benefitted from Guido Raimondi's skills – first as Deputy Legal Adviser and, from February 2008, as Legal Adviser. On top of his other duties, he was also a member of the Italian Intergovernmental Committee for Human Rights (1998-2003) and of different ministerial commissions created to adapt certain aspects of Italian law to the requirements of international law.

He is also the author of numerous publications in the field of international law, particularly human rights and has taught in a number of Italian universities.

When looking back upon his journey, it is clear that every step – being a judge at all levels of jurisdiction, a government agent, a diplomat, a member of inter-governmental committees, a high-ranking official of an international organisation or a scholar – helped prepare him to be the outstanding President of the European Court of Human Rights that we know today.

When he took up his duties in his current role, many initiatives had already been put in place to render the Court and the Convention system fit for the longer-term. From the European Ministerial Conference on Human Rights in Rome in 2000 to the high-level Conferences on the future of the Court starting in 2010 (Interlaken, Izmir, Brighton, Oslo and Brussels, followed by Copenhagen in 2018 in the course of President Raimondi’s mandate) – it had become clear to all concerned that a prerequisite to a fully-functional Convention system is the correct application of the principle of subsidiarity: all stakeholders playing their part in full. Many things had been done by the Court, the member states, the Committee of Ministers and other actors. Supporting the implementation of the Convention has also always been my priority as Secretary General and in this endeavour President Raimondi has been a wonderful ally.

Assisted by the Court’s Registrar Roderick Liddell, who took up his duties a month after him, he took the remarkable work of his predecessors some important steps further. He led the Court “to use its creativity and expertise even more, streamlining working methods and improving judicial policy and case management”<sup>1</sup> (one recent illustration is the new practice that the Court has been testing since 1 January 2019, involving a non-contentious phase in respect of all Contracting States aimed at facilitating friendly settlements). I remember that in his first speech for the opening of the Judicial Year (2016) he underlined that developing new forms of co-operation with national authorities would be one of his ambitions.<sup>2</sup> It is also in this spirit that he very actively pursued what President Jean-Paul Costa called “judicial diplomacy”, making and receiving around 150 official visits, in a little over three years. These included visits to and from Heads of States or Governments, ministers and high-level judges, from

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1 Speech by Guido Raimondi, High-Level Conference in Copenhagen, April 2018 (Continued Reform of the European Court of Human Rights Convention System – Better balance, improved protection).

2 Speech by Guido Raimondi, Solemn hearing for the opening of the judicial year 29 January 2016.

national and international courts alike, including the Court of Justice of the European Union with which friendly relations have been further enhanced. It seems to me that fostering the authority of the judiciary and reinforcing mutual support with other courts was particularly important to President Raimondi – and rightly so, because it is part of today’s political game in many member states to challenge the authority of the judiciary at both the domestic and the international levels.<sup>3</sup> The Council of Europe as a whole accords the highest priority to safeguarding the authority of the judiciary, as a vital and independent branch of state power in a healthy democracy. The Superior Court Network began its work just one month before the start of Guido Raimondi’s presidency. Under his stewardship it has grown rapidly and is now comprised of over 70 national courts from a total of 35 states. To quote President Raimondi himself, “the Network is now part of the Convention landscape. That it has developed so quickly shows an understanding by our respective courts that the way forward is through deeper dialogue, the recent entry into force of Protocol No. 16 being a further strong indicator in this regard”.<sup>4</sup> And today, Protocol 16 is not only in force: new procedures have been put in place by the Court and the protocol is in active use, since the French Court of cassation lodged a first request for an advisory opinion. I am confident that this practice will spread rapidly and bring good results.

Just as the authors of other contributions to this book have done, I would like to pay tribute to Guido Raimondi and to thank him for what he has achieved for the Court and for the Council of Europe – to the benefit of individuals’ human rights across Greater Europe. I would also like to give my personal thanks for his friendship and co-operation over these past years.

*Thorbjørn Jagland*

Secretary General of the Council of Europe  
January 2019

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3 Speech by Thorbjørn Jagland, European Court of Human Rights’ Judicial Seminar 2018 (The Authority of the Judiciary).

4 Guido Raimondi, message published on the Superior Courts Network dedicated internet page.



# Curriculum Vitae de Guido Raimondi<sup>1</sup>

## I. Etat civil

- Né à Naples (Italie) le 22 octobre 1953.
- Nationalité italienne.

## II. Etudes et diplômes, et autres qualifications

- Maîtrise en droit, *summa cum laude*, le 22 juillet 1975, à l'Université de Naples (thèse en droit international: « *Gli effetti della guerra sui trattati* »).
- En 1976 il suit la session d'été des cours de l'*Université de Sciences Comparées* de Luxembourg, sur « *Le pouvoir exécutif aujourd'hui* ».

## III. Activités professionnelles pertinentes

### a. Description des activités judiciaires

- En 1977 il devient magistrat. Il exerce des fonctions judiciaires (notamment au Tribunal de Naples) jusqu'en mars 1986.
- En 1991 il est nommé, pour deux ans, membre suppléant de la Commission des recours (Tribunal Administratif) de Union de l'Europe Occidentale (UEO), à Londres.
- En 1997 il est nommé magistrat du Parquet Général de la Cour de Cassation, où il exerce la fonction d'avocat général aux audiences de la Cour, principalement devant la 1<sup>ère</sup> Chambre et la Chambre sociale, et rédige des réquisitoires notamment pour les Chambres réunies, en matière de conflits de compétence vis-à-vis du juge étranger, ainsi que pour ladite 1<sup>ère</sup> Chambre.

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<sup>1</sup> Les activités menées actuellement sont soulignées.

- En 1998 il est nommé, pour deux ans (3 septembre 1998 – 3 septembre 2000), membre effectif de la Commission des recours (Tribunal Administratif) de l'Union de l'Europe Occidentale (UEO), à Bruxelles.
- En 2001 il est désigné en tant que juge *ad hoc* de la Cour européenne des droits de l'homme dans plusieurs requêtes concernant l'Italie. Il s'occupe, en particulier, de questions liées à la compatibilité avec la Convention européenne des droits de l'homme des limitations imposées au failli par la loi italienne sur la faillite. Il reste dans cette position jusqu'à sa nomination au BIT, en 2003.
- En 2002 il est nommé Conseiller de la Cour de cassation et assigné à la 5<sup>ème</sup> Chambre civile.
- En janvier 2010 il est élu juge de la Cour européenne des droits de l'homme. Son mandat viendra à échéance en mai 2019. En septembre 2012 il a été élu président de section et vice-président de la Cour pour un mandat de trois ans. En septembre 2015 il est élu Président de la Cour.

#### b. Description des activités juridiques non judiciaires

- Depuis septembre 1976 jusqu'à la fin de l'année 1977 il est assistant à la première chaire de Droit international de la Faculté de droit de l'Université de Naples (Professeur Benedetto Conforti).
- A partir de mars 1986 il est détaché au Ministère des affaires étrangères, Service du Contentieux diplomatique. Au Contentieux diplomatique, où il reste jusqu'à septembre 1989, il s'occupe en premier lieu de toutes les activités liées à la défense de l'Etat italien dans les procédures devant la Cour et la Commission européennes des droits de l'homme, en collaboration directe avec le Chef du Service, Professeur Luigi Ferrari Bravo.
- En outre, il coopère avec le Chef du Service dans ses fonctions de conseiller juridique du Ministre des affaires étrangères, notamment dans les domaines du droit international et du droit pénal. Pendant cette période, il collabore à des travaux législatifs dans le domaine international et participe, en tant que membre de la délégation italienne, à plusieurs négociations internationales, soit au niveau bilatéral soit au niveau multilatéral (ONU, Conseil de l'Europe, OACI, OMI).
- Membre de différents Comités Directeurs et Comités d'experts du Conseil de l'Europe, il a été membre en particulier, depuis le 1er janvier 1993, du Bureau du Comité Directeur des droits de l'homme, dont il a été, du 1er janvier 1999 jusqu'au 31 décembre 2000, Président.

- Le 20 juillet 1989 il est nommé par le Ministre des affaires étrangères co-Agent du Gouvernement italien devant la Cour et la Commission européennes des droits de l'homme et muté à la Représentation Permanente d'Italie auprès du Conseil de l'Europe à Strasbourg. Il exerce ces fonctions – en assurant la défense du Gouvernement italien auprès des organes de Strasbourg – jusqu'au mois de septembre 1997. Au même temps, il est conseiller juridique de la Représentation italienne auprès du Conseil de l'Europe.
- Depuis septembre 1997 et son affectation au Parquet Général de la Cour de Cassation, il est au même temps expert consultant auprès du Service du Contentieux diplomatique du Ministère des affaires étrangères.
- En 1998 il donne des cours à la Faculté de droit de l'Université de Naples, en tant que professeur “à contrat”, sur “*Le système européen de protection des droits de l'homme*”.
- Membre de la délégation italienne à la Conférence diplomatique pour l'institution d'une Cour pénale internationale (Rome, 15 juin – 17 juillet 1998) ainsi qu'au “Prep-Com” sur les Eléments du crime et sur les Règles de procédure et preuve.
- Membre du Comité interministériel italien pour les droits de l'homme (1998-2003).
- Membre de la Commission créée en février 1998 par le Ministre italien des Affaires Etrangères pour adapter la législation italienne aux traités et aux règles de droit international humanitaire.
- Membre de la Commission créée en juillet 1999 par le Ministre de la Justice d'Italie pour adapter le droit italien aux actes internationaux en matière de procédure pénale. Au sein de la Commission, il est coordinateur du Groupe “Transfer des procédures pénales”.
- Membre de la délégation italienne à la Conférence mondiale contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée (Durban, 31 août – 7 septembre 2001).
- Professeur de « Droit européen » auprès des écoles de spécialisation pour les professions légales des Universités « La Sapienza », « Tor Vergata » (2002-2003) et « LUISS » de Rome.
- Depuis le mois de mai 2003, Conseiller juridique adjoint et, à partir du 1<sup>er</sup> février 2008, Conseiller juridique et Directeur du Bureau des services juridiques du *Bureau international du Travail* (BIT), à Genève. Dans cette position il assure la direction du service juridique de l'Organisation internationale du Travail. Ce service est responsable, entre autres: (a) de fournir la consultation juridique nécessaire pour les organes de direction, à savoir la

Conférence internationale du Travail et le Conseil d'administration ainsi que pour le Secrétariat ; (b) de la coordination et de la présidence des comités de rédaction des conventions et des recommandations internationales du travail , et au niveau interne du Secrétariat et au niveau de la Conférence internationale du Travail ; (c) des relations avec les autorités de l'Etat Hôte (la Suisse) ainsi qu'avec tout autre Etat membre dans toutes les matières ayant une dimension juridique, y compris le statut de l'Organisation sous l'angle de ses privilèges et immunités selon le droit international et la négociation d'accords de siège pour les bureaux de l'Organisation ou pour d'autres besoins particuliers ; (d) de la gestion du contentieux du personnel auprès du Tribunal administratif de l'Organisation internationale du Travail ; (e) du fonctionnement de ce dernier Tribunal, qui est aujourd'hui responsable de 60 organisations internationales, y compris en ce qui concerne la sélection des candidatures des juges appelés à y siéger.

- En tant que juge de la Cour européenne des droits de l'homme il est souvent sollicité à participer comme orateurs à des conférences, séminaires et autres rencontres d'études.

**c. Description des activités professionnelles non juridiques**

- Pendant son service auprès de la Représentation italienne à Strasbourg, il exerce également des fonctions diplomatiques. Il participe notamment aux réunions du Comité des Ministres, y compris au niveau ministériel, ainsi qu'aux Groupes des Rapporteurs "Droits de l'Homme" et "Affaires Juridiques". Dans certaines occasions, il préside le premier de ces Groupes.

**IV. Activités publiques**

Membre de l'*Associazione nazionale dei magistrati* (ANM).

## V. Autres activités

- Membre de la Société française de droit international (SFDI).
- Membre de la *Società italiana di diritto internazionale* (SIDI).
- Expert dans le contexte des programmes d'assistance du Conseil de l'Europe aux Pays de l'Europe centrale et orientale dans le domaine des droits de l'homme (notamment activités en Croatie, Albanie, Bulgarie et Fédération de Russie).

## VI. Travaux et publications

### PRINCIPALES PUBLICATIONS

Plusieurs ouvrages, dont:

#### Livres

- 1 WACHSMANN, EISSEN, FLAUSS, ABRAHAM, PETTITI, STRASSER, RAIMONDI, COHEN-JONATHAN, *Le Protocole n. 11 à la Convention européenne des droits de l'homme. La mise en oeuvre de la réforme*, Bruxelles, 1995, En particulier: *La procédure d'autorisation au réexamen des arrêts des Chambres*, p. 115 et ss.
- 2 BARTOLE, CONFORTI e RAIMONDI (eds.), *Commentario alla Convenzione europea dei diritti dell'uomo*. Padoue, CEDAM, 2001. En particulier: *Articolo 28, Articolo 29, Articolo 30, Articolo 31, Articolo 34*.
- 3 RAIMONDI, *Il Consiglio d'Europa e la Convenzione europea dei diritti dell'uomo*, Naples, Editoriale Scientifica, 2005 (première édition) et 2008 (deuxième édition).

#### Articles

- 1 *Sui limiti della giurisdizione italiana in materia di provvedimenti cautelari*, *Rivista di diritto internazionale*, 1978, p. 74 ss.
- 2 *Il regime penale e disciplinare dei militari italiani in Libano*, in *Le forze multinazionali nel Libano e nel Sinai*, a cura di A. MIGLIAZZA, Milano, Giuffré, 1988, p. 237 ss. (en collaboration avec G. GIACALONE).
- 3 *Un nuovo accordo contro il terrorismo internazionale: La Convenzione di Roma del 10 marzo 1988 sulla repressione degli atti illeciti diretti contro la sicu-*

- rezza della navigazione marittima, *Rivista di diritto internazionale*, 1988, p. 379 ss.
- 4 *La Convenzione europea dei diritti dell'uomo nella gerarchia delle fonti dell'ordinamento italiano*, *Rivista internazionale dei diritti dell'uomo*, 1990, p. 36 ss.
  - 5 *Una Corte penale europea?* Dans *Europa e terrorismo internazionale*, a cura di N. RONZITTI, Milano, Franco Angeli, 1990, p. 127 ss.
  - 6 *L'informatica alla Corte ed alla Commissione europee dei diritti dell'uomo*, communication au 5ème Congrès international «INFORMATICA E ATTIVITA' GIURIDICA», *Corte Suprema di Cassazione, Centro elettronico di documentazione – Informatica e attività giuridica – 5° Congresso internazionale Roma 3-7 maggio 1993*, Roma, 1994, Vol. II p. 443 ss.
  - 7 *Un nuovo status nell'ordinamento italiano per la Convenzione europea dei diritti dell'uomo*, *Cassazione penale* 1994, p. 443 ss.
  - 8 *Il Protocollo n. 11 alla Convenzione europea dei diritti dell'uomo*, *Rivista internazionale dei diritti dell'uomo*, 1994, p. 61 ss.
  - 9 *Defence of the Italian Government and the Problems of General Measures*, Council of Europe, *Government Agents before the Organs of the European Convention on Human Rights* (Prague, 31 October and 1<sup>st</sup> November 1995), Strasbourg, 1996, p. 30 ss.
  - 10 *Le bureau de l'Agent du Gouvernement italien devant la Cour et la Commission européennes des droits de l'homme*, Scritti in onore di G. VEDOVATO, *Rivista di Studi Politici Internazionali*, fuori serie I,II,III – Firenze, 1997, Vol. III, Contributi, p. 401-418.
  - 11 *Effetti del diritto della Convenzione e delle pronunce della Corte europea dei diritti dell'uomo*, *Rivista internazionale dei diritti dell'uomo*, 1998, p. 422 et ss.
  - 12 *La Dichiarazione Universale e il sistema europeo di protezione dei diritti umani: La Corte europea dei diritti dell'uomo*, SIOI, *Il sistema universale dei diritti umani all'alba del XXI secolo*, Atti del Convegno nazionale per la celebrazione del 50° Anniversario della Dichiarazione Universale dei Diritti Umani – Roma. 10/11 dicembre 1998, Roma, 1999, p. 61 ss.
  - 13 *La reconnaissance automatique des décisions en matière d'état des personnes et de droit de la famille: expérience de deux années d'application de la nouvelle loi de droit international privé*, Actes du Colloque de la CIEC (Commission internationale de l'état civil) *Questions d'actualité en droit des personnes dans les Etats de la CIEC* – Strasbourg, 26 mars 1999, Strasbourg, 1999, p. 28 ss.
  - 14 *Le dessaisissement de la Chambre au profit de la Grande Chambre de la Cour européenne des droits de l'homme: l'article 30 de la Convention européenne des droits de l'homme révisée par le Protocole N° 11*, in MAHONEY, MATSCHER, PETZOLD et WILDHABER (Eds), *Protection des droits de l'homme: la perspec-*

- tive européenne, Mélanges à la mémoire de Rolv Ryssdal*, Köln, Berlin. Bonn, München, 2000, p. 1153 ss.
- 15 *L'Italia e La Convenzione europea dei diritti dell'uomo*, *Affari Esteri*, n. 129, janvier 2001, p. 33 ss.
  - 16 *La Corte europea dei diritti dell'uomo*, *Enciclopedia del diritto*, VI aggiornamento, Milan, 2002, p. 327 ss. (en collaboration avec B. CONFORTI).
  - 17 *La Carta di Nizza del 7 dicembre 2000 nel quadro della protezione dei diritti fondamentali in Europa*, *Cassazione penale*, 2002, p. 1885 ss.
  - 18 *L'expérience du Conseil de l'Europe*, dans *Dossier sur la peine de mort*, *Travaux et jours* (publication de l'Université Saint-Joseph de Beyrouth), No. 70, 2002, p. 205 ss.
  - 19 *Una figura discussa: l'esperto governativo*, dans ZANGHI' e VASAK (eds), *La Convenzione europea dei diritti dell'uomo: 50 anni di esperienza. Gli attori e i protagonisti della Convenzione: il passato, l'avvenire* (Messina, 20-22 ottobre 2000), Torino, 2002, p. 63 ss.
  - 20 *La Corte europea dei diritti dell'uomo e le Corti nazionali*, in *Il Consiglio di Stato*, 2002, p. 1891 ss. (en collaboration avec G. BARBAGALLO).
  - 21 *L'obbligo degli Stati di conformarsi alle sentenze definitive della Corte europea dei diritti umani negli affari nei quali essi sono parti: l'art. 46, primo comma, della CEDU*, *Quaderno No.7 de La Comunità internazionale, La Corte europea dei diritti umani e l'esecuzione delle sue sentenze* (Palazzetto Venezia, Roma, 6/7 giugno 2002), Naples, 2003, p. 39 ss.
  - 22 *Réserves et conventions internationales du travail*, dans *Les normes internationales du travail: un patrimoine pour l'avenir*, *Mélanges en l'honneur de Nicolas Valticos*, Genève, 2004, p. 527 ss.
  - 23 *Article ILO (International Labour Organization)*, dans *Dizionario di diritto pubblico*, dirigé par S. CASSESE, Milano, 2006, Giuffrè, Vol. IV, p. 2871 ss.
  - 24 *The ILO's Legal Activities Towards the Eradication of Child Labour: an Overview*, in G. NESI, L. NOGLER e M. PERTILE (eds.), *Child Labour in a Globalized World, a Legal Analysis of ILO Action*, Aldershot, Ashgate, 2008, p. 17 ss. (et collaboration avec TREBILCOCK).
  - 25 *L'Organizzazione internazionale del lavoro ed i fenomeni migratori*, contribution au volume *Studi in onore di Umberto Leanza*, Naples, 2008, Editoriale Scientifica, p. 691 et ss.
  - 26 *La Dichiarazione di Brighton sul futuro della Corte europea dei diritti dell'uomo*, in *AIC, Rivista dell'Associazione italiana dei costituzionalisti*, 2012, no. 3, pp. 1 ss.

- 27 *Portata ed effetti della Convenzione europea e delle decisioni della Corte europea sul diritto italiano, Relazione alla Conferenza di San Pietroburgo del 28 maggio 2012*, in *Temi Romana*, anno LX, 2012, N° 1.2.3, p. 68-71.
- 28 *Freedom of religion in the case-law of the European Court of Human Rights: The Italian Experience*, in RUIZ-RICO (G.) y RUIZ RUIZ (J.J.) (Directores), *La libertad religiosa en las sociedades multiculturales, las jurisprudencias nacional y europea*, Valencia, 2013, Tirant Lo Blanch, p. 95-110.
- 29 *Organisation internationale du Travail, Cadre constitutionnel*, in THOUVENIN (J.-M.) et TREBILCOCK (A.), *Droit international social*, Paris, Pedone, in particolare, nella *Sous-section 2*, Bruxelles, Bruylant, 2014.
- 30 *Benedetto Conforti prima Commissario e poi Giudice dei diritti umani a Strasburgo*, in *Diritti umani e diritto internazionale*, vol. 10, 2016.
- 31 *La jurisprudence de la Cour européenne des droits de l'homme sur le droit de la fonction publique internationale in Une contribution de 90 ans du Tribunal administratif de l'Organisation internationale du Travail à la création d'un droit de la fonction publique internationale*, Geneva : International Labour Organization, 2017 – p. 99-108.
- 32 *Il dialogo tra le corti e l'attuazione del diritto convenzionale nell'ordinamento interno*, in *I diritti dell'uomo : cronache e battaglie*, anno 29, 1 (2018), p. 11-37.
- 33 *Cour de justice de l'Union européenne et Cour européenne des droits de l'homme: "condamnées à s'entendre et à coopérer" ?* in ROBERTO ADAM et al., *Liber amicorum Antonio Tizzano : de la Cour CECA à la Cour de l'Union : le long parcours de la justice européenne*, Torino, G. Giappichelli, 2018 – p. 797-813.
- 34 *La notion de dignité dans la jurisprudence de la Cour européenne des droits de l'homme in Human rights in a global world : essays in honour of Judge López Guerra*, Oisterwijk : Wolf Legal Publishers, 2018, p. 41-49.

# Responsibility to protect and human rights based intervention

*Paulo Albuquerque\**

The present text puts forward the thesis according to which there is a customary rule on human rights based intervention (I.). This thesis is demonstrated by an analysis of the United Nations practice (a), the state practice (b) and the *opinio iuris* (c). In the light of this rule, the text assesses the obligations of the States (II.) and of the international community (III.) when confronted with grave human rights violations as a threat to international peace and security, including the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. A particular attention is given to the case of secession, when the seceding population alleges grave breaches of their human rights committed by the parent State.

## **I. Formation of the customary rule on human rights based intervention**

### **(a) United Nations practice**

1. Article 2 § 4 of the United Nations Charter on prohibition of the use of force is a *jus cogens* rule, which applies in both inter-State and intra-State cases. This rule may be restricted only by another rule of a similar nature (see Article 53 of the Vienna Convention on the Law of Treaties). The targeting of a population by their own government, which perpetrates, seeks to perpetrate or allows the perpetration of genocide, crimes against humanity or war crimes, directly or through private agents acting under its direction or with its connivance, constitutes criminal conduct under treaty and customary law. The prevention and punishment of such crimes is a *jus cogens* obligation of a non-derogable,

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imperative nature, in times of both peace and war. In case of the deliberate selection of a part of the population on the basis of a racial, ethnic, religious or other identity-based criterion as a target of a systematic attack, the unlawfulness of the conduct is compounded by the discriminatory intent, which also calls for mandatory prevention and punishment.<sup>1</sup> Thus, the *jus cogens* prohibition of the use of force may be restricted for reasons of protecting a population from the commission of *jus cogens* crimes, the application of Article 103 of the UN Charter being excluded in this conflict of norms.

2. Shortly after the end of the Second World War, the UN General Assembly expressed the view that “it [was] in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination”, and that therefore governments should “take the most prompt and energetic steps to that end”.<sup>2</sup> In the context of the fight against colonialism, bolder statements were made expressing the same principle. In paragraph 3 (2) of the Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, approved by General Assembly Resolution 2621 (XXV) (12 October 1970, A/RES/2621 (XXV), see also A/8086), it was affirmed that States “shall render all necessary moral and material assistance” to the oppressed population of another State “in their struggle to attain freedom and independence”.<sup>3</sup> The Basic Principles of the legal status of the combatants struggling against colonial and alien domi-

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1 Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 89 of the Protocol additional I to the Geneva Conventions. See also on *jus cogens* crimes, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), § 11 (“States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”); International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 26, p. 85 (“Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”); and Rules 156 to 161 in the ICRC Study on Rules of customary international humanitarian law, in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, volume I, Geneva, 2005.

2 UN General Assembly Resolution 103 (I), on Persecution and Discrimination, 19 November 1946.

3 A notable example is General Assembly Resolution ES-8/2 on the question of Namibia (14 September 1981, A/RES/ES-8/2), which “calls upon Member States, specialized agencies and other international organizations to render increased and sustained support and material, financial, military and other assistance to the South West Africa People’s Organization to enable it to intensify its struggle for the liberation of Namibia”.

nation and racist regimes, approved by General Assembly Resolution 3103 (12 December 1973, A/RES/3103 (XXVIII)), even declared that

“[t]he struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination and independence [was] legitimate and in full accordance with the principles of international law”

stating that

“[a]ny attempt to suppress the struggle against colonial and alien domination and racist régimes [was] incompatible with the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitute[d] a threat to international peace and security”.

More recently, the “right” of peoples forcibly deprived of the right to self-determination, freedom and independence, “particularly peoples under colonial and racist regimes or other forms of alien domination”, to struggle to that end and to seek and receive support was reiterated in paragraph 3 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, approved by General Assembly Resolution 42/22 (18 November 1987, A/RES/42/22).

Step by step, the Security Council has enshrined this same “right” to use force in a non-colonial context as well. On the one hand, it referred to grave human rights violations as a threat to international peace and security, since the seminal Resolution 688 (1991), 5 April 1991, S/RES/688 (1991), later confirmed by many others, such as Resolutions 733 (1992), 23 January 1992, S/RES/733 (1992), 794 (1992) on the situation in Somalia, 3 December 1992, S/RES/794 (1992), and 1199 (1998) on the situation in Kosovo, 23 September 1998, S/RES/1199 (1998). On the other hand, it authorised the use of “all necessary means” or the taking of “all necessary measures”, including military measures, to put an end to human rights violations, ensure humanitarian aid and restore peace, for example in Resolutions 678 (1990), 29 November 1990, S/RES/678 (1990); 770 (1992), 13 August 1992, S/RES/770 (1992); 794 (1992), 3 December

1992, S/RES/794 (1992); 940 (1994), 31 July 1994, S/RES/940 (1994); and 1529 (2004), 29 February 2004, S/RES/1529 (2004).

General Assembly Resolution 43/131 (8 December 1988, A/RES/43/131), considering that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitute[d] a threat to human life and an offence to human dignity”, Resolution 45/100 (14 December 1990, A/RES/45/100), with the first reference to “humanitarian corridors”, and Resolution 46/182 (19 December 1991, A/RES/46/182), approving the “guiding principles” on humanitarian assistance, and stating that “[e]ach State ha[d] the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory”, reinforced that trend.

3. In other words, a government’s treatment of the population living under its authority is no longer an issue which lies within the reserved domain of States. As the Abbé Grégoire also wrote, in his lesser-known Article 15 of the *Déclaration du droit des gens* (1795), “*Les entreprises contre la liberté d’un peuple sont un attentat contre tous les autres*” (an assault on the freedom of one people is an attack against all peoples). States cannot remain indifferent in the face of situations of systematic discrimination and human rights violations. Having been introduced by the International Commission on Intervention and State Sovereignty (ICISS),<sup>4</sup> advocated in the Secretary-General’s note presenting the report of the High-level Panel on Threats, Challenges and Change<sup>5</sup> and adopted in the 2005 World Summit Outcome Document, the rule concerning the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was formally enshrined in General Assembly Resolution 60/1 of 24 October 2005, which adopted the Outcome Document (A/RES/60/1), and Security Council Resolution 1674 on the protection of civilians in armed conflict (28 April 2006, S/RES/1674 (2006)), which

4 ICISS, “The Responsibility to Protect”, cited above, 2001, §§ 2.24, 4.19-4.36 (“emerging guiding principle”). In the Commission’s view, military intervention for human protection purposes is justified in order to halt or avert “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape” (§ 4.1).

5 “A more secure world: our shared responsibility”, 2 December 2004, A/59/565, §§ 201-08 (“the emerging norm of collective international responsibility to protect”). In the High-level Panel’s view, “[t]here is a growing recognition that the issue is not the ‘right to intervene’ of any State, but the ‘responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease” (§ 201).

endorsed paragraphs 138 and 139 of the World Summit Outcome Document.<sup>6</sup> In undertaking to provide a “timely and decisive” response, the world political leaders affirmed their determination to act not only when the crimes in question were already occurring but also when they were imminent, by using all the permissible and necessary means, including those of a military nature, to avert their occurrence. Conceptually and practically, this responsibility entailed the prevention of such crimes, including the incitement to commit them, as the normative statement of paragraph 138 clarified, reinforced by the statement of political support to the Special Adviser of the Secretary-General on the Prevention of Genocide in paragraph 140. The nature of the requisite response was not left indefinite, since it must be all-inclusive in order to be “decisive”, and obviously to encompass the full range of coercive and noncoercive enforcement actions available to the Security Council, as shown by the express reference to Chapters VI, VII and VIII of the Charter. Needless to say, the requirements of proportionality were applicable to the international community’s response.

With this degree of specificity, the Outcome Document established not only an unambiguous political commitment to use those powers, but set a universally binding obligation to protect populations from the most atrocious human rights violations. This protection extended to all “populations” within the territory of the State, including refugees, migrants, displaced persons and minori-

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6 It should be noted that Resolution 1674 contains the first official reference by the Security Council to the responsibility to protect and that this reference is made in connection with the protection of civilians in armed conflict. Thus, the responsibility to protect and the protection of civilians have mutually reinforced their respective legal dimensions. The protection of civilians in armed conflict was first promoted by the Security Council under a comprehensive package of measures approved by Resolutions 1265 (1999), 17 September 1999, S/RES/1265 (1999), and 1296 (2000), 19 April 2000, S/RES/1296 (2000). This latter Resolution emphasised, for the first time, the Security Council’s responsibility to take “appropriate steps” for the protection of civilians during armed conflict, since “the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security”. The same position of principle was affirmed in Resolution 1894 (2009) (11 November 2009, S/RES/1894 (2009)), which reiterated the Security Council’s “willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures”.

ties, and not only to “groups”, “civilians” or “citizens”.<sup>7</sup> The indissoluble link between international human rights law, the rule of law and the responsibility to protect was confirmed by placing the latter issue under the heading “IV. Human rights and the rule of law” in the Outcome Document. The apparent casuistic approach (“on a case-by-case basis”) referred to the individual assessment of the adequate and necessary means of addressing each specific situation, and evidently not to the legal rule set out in the Outcome Document, whose normative language (“responsibility”) reflected that of Article 24 of the UN Charter. After imposing an affirmative duty on the Security Council to react to the catalogued international crimes, the Outcome Document omitted to mention the consequences of any Security Council failure to respond. But that omission is highly significant in legal terms. Having regard to the preparatory materials for the Vienna meeting, namely the ICISS and High-level Panel reports, as well as the previous practice of international organisations in Africa, the silence of the Outcome Document left the door open to the possibility of regional or individual enforcement alternatives if the Security Council failed to act. Such regional or individual enforcement measures could, in any event, not be excluded in view of the cogent nature of the international crimes at stake. Finally, by stressing the need for the General Assembly to continue its consideration of the responsibility to protect populations, the Outcome Document enhanced its subsidiary role in this field in the light of the Charter principles and, more broadly, of the general principles of international law and customary international law.

The Security Council’s reaffirmation of paragraphs 138 and 139 of the Outcome Document, in the operative part of Resolution 1674, reinforced the binding nature of the legal obligations resulting therefrom and the obligations of member States of the United Nations to implement decisions taken in accordance with the Outcome Document (under Article 25 of the UN Charter). The later statement by the UN Secretary-General that “the provisions of paragraphs 138 and 139 of the Summit Outcome [were] firmly anchored in well-es-

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7 These less inclusive expressions were used in the ICISS Report (“The Responsibility to Protect”), cited above, “A more secure world”, cited above, and “In Larger Freedom: Towards Development, Security and Human Rights for All”, Report of the Secretary-General, 21 March 2005, A/59/2005. The word “populations” avoided the exclusion of non-civilians from the ambit of beneficiaries of the responsibility to protect. The emphasis on “its populations” envisaged the inclusion of all permanent or temporary residents within the national territory and the territories over which the State had effective control.

established principles of international law” served only to acknowledge their intrinsic legal strength.<sup>8</sup>

Subsequently, the Security Council,<sup>9</sup> the General Assembly<sup>10</sup> and the Secretary-General<sup>11</sup> applied the rule of responsibility to protect profusely in binding and non-binding documents. In 2007 the Secretary-General appointed a Special Adviser on the Responsibility to Protect, whose office was recently merged with the office of the Special Adviser on the Prevention of Genocide, paving the way for a more comprehensive and coordinated approach to the core problem faced by these offices. In his landmark report, “Implementing the responsibility to protect” (12 January 2009, A/63/677), the Secretary-General interpreted the Outcome Document, acknowledging the role of the General Assembly under the “Uniting for peace” procedure to resolve the impasse of the Security Council (paragraphs 11, 57 and 63).<sup>12</sup> By its Resolution 63/308 (2009) (7 October 2009, A/RES/63/308), the General Assembly took note of the Secretary-General’s report, accepting it tacitly.

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8 “Implementing the responsibility to protect”: Report of the Secretary-General, 12 January 2009, A/63/677, § 3. As to the legal nature of the obligation of the international community, see ICISS Report, cited above, § 2.31; “A more secure world”, cited above, §§ 201-02; and General Assembly Resolution 60/1, cited above.

9 For example, Resolution 1706 on the situation in Darfur, 31 August 2006, S/RES/1706 (2006); Resolution 2014 on the situation in Yemen, 21 October 2011, S/RES/2014 (2011); Resolution 1970, 26 February 2011, S/RES/1970 (2011), Resolution 1973, 17 March 2011, S/RES/1973 (2011), Resolution 2016, 27 October 2011, S/RES/2016 (2011), and Resolution 2040, 12 March 2012, S/RES/2040 (2012) on the situation in Libya; Resolution 1975 on the situation in Côte d’Ivoire, 30 March 2011, S/RES/1975 (2011); and Resolution 2085 on the situation in Mali, 20 December 2011, S/RES/2085 (2011).

10 For example, Resolution 66/176, of 23 February 2011 (A/RES/66/176), and Resolution 66/253, of 21 February 2012 (A/RES/66/253).

11 In “Larger Freedom: Towards Development, Security and Human Rights for All”, cited above, § 132; “Implementing the responsibility to protect”: Report of the Secretary-General, cited above; “Early Warning, Assessment and the Responsibility to Protect”: Report of the Secretary-General, 14 July 2010, A/64/864; “The role of regional and sub-regional arrangements in implementing the responsibility to protect”: Report of the Secretary-General, 28 June 2011, A/65/877-S/2011/393; “Responsibility to protect: timely and decisive response”: Report of the Secretary-General, 25 July 2012, A/66/874-S/2012/578; “Responsibility to protect: State responsibility and prevention”: Report of the Secretary-General, 9 July 2013, A/67/929-S/2013/399; “Fulfilling our collective responsibility: international assistance and the responsibility to protect”: Report of the Secretary-General, 11 July 2014, A/68/947-S/2014/449.

12 In addition, two references make it clear that, according to the Secretary-General, the UN system concurs with regional and individual enforcement initiatives: “In a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through ‘timely and decisive’ action” (§ 50), and “this will make it more difficult for States or groups of States to claim that they need to act unilaterally or outside of United Nations channels, rules and procedures to respond to emergencies relating to the responsibility to protect.” (§ 66).

4. The United Nations practice teachings are clear: if human rights have prevailed over sovereignty and territorial integrity in order to liberate colonised populations from oppression and tyranny, the same applies with regard to non-colonised populations faced with governments that do not represent them and carry out a policy of discrimination and human rights abuses against them. The principle of equality warrants such a conclusion. In both situations, human rights protection comes first, the dignity of the women and men who are the victims of such a policy trumping the interest of the State. Although peace is the primary concern of the international community and the United Nations, which seeks “to save succeeding generations from the scourge of war”, this must not be a rotten peace, established and maintained on the basis of the systematic sacrifice of the human rights of the population of a State, or part of it, at the hands of its own government. In these cases, the international community has a responsibility to protect, with all strictly necessary means, the victims.

#### (b) State practice

5. Less recent international practice of military intervention in favour of non-colonised populations by third States includes such examples as the military intervention of Great Britain, France and Russia to protect the Greek nationalists in 1827, the French military intervention in Syria in favour of the Maronite Christians in 1860-61, the intervention of the United States of America in Cuba in 1898, and the joint military intervention of Austria, France, Great Britain, Italy and Russia in the Balkans in favour of Macedonian Christians in 1905. More recent practice includes the examples of the military intervention of Vietnam in Kampuchea in 1978-79, that of Tanzania in Uganda in 1979, or that of the United States of America, the United Kingdom, France and others in favour of the Kurdish population in Iraq in 1991.

In the context of secession, the military intervention of India in the conflict with Pakistan is the most cited example, since Pakistan had not only denied the right of internal self-determination of the East Bengali population, but had also abused their human rights.<sup>13</sup> Neither Security Council Resolution 307 (1971) (21 December 1971, S/RES/307 (1971)), nor General Assembly Resolution 2793 (XXVI) (7 December 1971, A/RES/2793 (XXVI)), considered India as

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13 On this particular situation, see International Commission of Jurists, *The events in East Pakistan, 1971*, Geneva, 1972.

an “aggressor” or “occupant”, nor did they ask for the immediate withdrawal of troops.<sup>14</sup>

6. The paradigm shift at the end of the twentieth century is remarkable, most notably in Africa. With the vivid memory of the Rwanda genocide and of the uncoordinated response of the international community to tragedy, African leaders decided to take action, by creating mechanisms for humanitarian intervention and military enforcement operations in intra-State conflicts, including genocide, crimes against humanity, ethnic cleansing, gross violations of human rights and military coups, as follows.

(a) As regards the Economic Community of West African States, see Articles 3 (d) and (h) and 22 of the 1999 ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security:

“ECOMOG [ECOWAS Cease-Fire Monitoring Group] is charged, among others, with the following missions:

...

- b) Peace-keeping and restoration of peace;
- c) Humanitarian intervention in support of humanitarian disaster;
- d) Enforcement of sanctions, including embargo;
- e) Preventive deployment;
- f) Peace-building, disarmament and demobilisation;”

(b) As to the Economic Community of Central African States, see Article 5 (b) of the 2000 Protocol relating to the Establishment of a Mutual Security Pact in Central Africa:

“Aux fins énoncés ci-dessus, le COPAX :

...

*b. peut également engager toute action civile et militaire de prévention, gestion et de règlement de conflits ;”*

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<sup>14</sup> At this juncture, it is important to note that a modern conception of customary international law, especially in such domains where there is a lack of State practice, like those of State secession, admits the relevance of non-binding resolutions like those of the General Assembly, for the formation of a customary rule (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, §§ 70-73).

(c) As regards the Southern African Development Community (SADC), see Articles 3 § 2 (e) and (f) and 11 § 2 (a) of the 2001 Protocol on Politics, Defence and Security Co-operation:

“The Organ may seek to resolve any significant intra-state conflict within the territory of a State Party and a ‘significant intra-state conflict’ shall include:

- (i) largescale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights;
- (ii) a military coup or other threat to the legitimate authority of a State;
- (iii) a condition of civil war or insurgency;
- (iv) a conflict which threatens peace and security in the Region or in the territory of another State Party.”

(d) For the Organisation of African Unity, see Article 4 (h) of the Constitutive Act of the African Union and Articles 4 (j) and 7 § 1 (f) of the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union:

“The Peace and Security Council shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights. It shall, in particular, be guided by the following principles:

...

j. the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4 (h) of the Constitutive Act.”

According to the so-called Ezulwini Consensus, approval by the Security Council can be granted “after the fact” in circumstances requiring “urgent action” and, thus, Article 53 § 1 of the UN Charter is not always applicable.<sup>15</sup> By lending its institutional authority to the Ezulwini Consensus, the African Commission on Human and Peoples’ Rights Resolution ACHPR/

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15 African Union, Common African Position on the Proposed Reform of the United Nations (The Ezulwini Consensus), Executive Council, 7th Extraordinary Session, 78 March 2005 (Ext./EX.CL./2(VII)).

Res.117 (XLII) 07 on Strengthening the Responsibility to Protect in Africa, 28 November 2007, further enhanced the lawfulness of this interpretation.

Central to these initiatives is the decisive political will to avoid the tragic inaction of the United Nations in the past, if necessary by replacing its universal peace and security mechanism by regional multilateral action.<sup>16</sup> The Security Council reacted positively, and has even approved *ex post facto* military interventions implemented within the framework of these regional and sub-regional mechanisms. For example, it did so explicitly with the ECOWAS intervention in Sierra Leone and in Liberia<sup>17</sup> and the African Union intervention in Burundi,<sup>18</sup> as well as implicitly with the SADC intervention in the Democratic Republic of the Congo.<sup>19</sup> This coherent and consistent practice embodies a positive belief that such intervention is required by international law.

### (c) *Opinio juris*

7. Having in mind the genocide of the Armenian population by the Ottoman Empire, Fenwick once stated that lawyers generally believed that there should be a right to stop such massacres, but were unable to determine who had the responsibility to intervene.<sup>20</sup> Sir Hersch Lauterpacht gave the correct answer.<sup>21</sup> Recalling Grotius's lesson, he admitted that intervention by any State was lawful when a ruler "inflict[ed] upon his subjects such treatment as no one [was] warranted in inflicting", adding:

16 On the United Nations reaction to the Rwanda events, see the UN Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (Carlsson Report), 15 December 1999, S/1999/1257.

17 Security Council Resolution 788 (1992), 19 November 1992, S/RES/788 (1992), and Resolution 1497 (2003), 1 August 2003, S/RES/1497 (2003), both on the situation in Liberia, and Resolution 1132 (1997), of 8 October 1997 (S/RES/1132/1997 (1997)), and Resolution 1315 (2000) on the situation in Sierra Leone, 14 August 2000, S/RES/1315 (2000).

18 Security Council Resolution 1545 (2004), S/RES/1545 (2004), which paid tribute to the African Union intervention, encouraged it to "maintain a strong presence in Burundi to accompany the efforts of the Burundian parties" and authorised the deployment of the United Nations Operation in Burundi (ONUB) for an initial period of six months.

19 Security Council Resolution 1234 (1999), 9 April 1999, S/RES/1234 (1999), which neither endorses nor condemns the operation.

20 C.G. Fenwick, "Intervention: Individual and Collective", *American Journal of International Law*, vol. 39 (1945), pp. 650-51. That question had already been addressed by the founding fathers of international law: H. Grotius, *De jure belli ac pacis, libri tres*, 2.2.25; F. de Vitoria, *De jure belli*, qt. 3, Article 5, § 15; and M. de Vattel, *Le droit des gens ou les principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, book II, chapter IV, § 56.

21 H. Lauterpacht, "The Grotian Tradition in International Law", *The British Year Book of International Law*, vol. 23, (1946), p. 46.

“This is, on the face of it, a somewhat startling rule, for it may not be easy to see why he (Grotius) permits a foreign state to intervene, through war, on behalf of the oppressed while he denies to the persecuted themselves the right of resistance. Part of the answer is, perhaps, that he held such wars of intervention to be permitted only in extreme cases which coincide largely with those in which the king reveals himself as an enemy of his people and in which resistance is permitted.”

In the year of the fall of communism in eastern Europe, the question resurfaced again with much ado on the agenda of the international community. With the Institute of International Law (IIL) approving Article 2 of the 1989 Resolution on The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, it was admitted that States, acting individually or collectively, were entitled to take diplomatic, economic and other measures *vis-à-vis* any other State which had committed grave violations of human rights, notably large-scale or systematic violations, as well as those infringing rights that could not be derogated from in any circumstances, provided such measures were permitted under international law and did not involve the use of armed force in violation of the UN Charter. *A contrario*, any initiative in accordance with the UN Charter for the purpose of ensuring human rights in another State can be taken by States acting individually or collectively, and should not be considered an intrusion in its internal affairs. Some years later, quite restrictively, Article VIII of the 2003 IIL Resolution on Humanitarian Assistance reformulated the rule, with much caution, as follows: in the event that a refusal to accept a *bona fide* offer of humanitarian assistance or to allow access to the victims leads to a threat to international peace and security, the Security Council may take the necessary measures under Chapter VII of the

Charter of the United Nations. Meanwhile, both humanitarian intervention<sup>22</sup> and the responsibility to protect doctrine<sup>23</sup> have received attention and support from reputed scholars and experienced practitioners.

8. In view of the practice and *opinio* mentioned above, the rule of the responsibility to protect shows some important differences with regard to the “right to humanitarian intervention”: firstly, responsibility to protect presup-

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22 In the twentieth century, most notably: A. Rougier, “La théorie de l’intervention d’humanité”, *Revue générale de droit international public*, 17 (1910), pp. 468-526; E.C. Stowell, *Intervention in International Law*, Washington, 1921; T.M. Franck and N.S. Rodley, “After Bangladesh: the Law of Humanitarian Intervention by Military Force”, *American Journal of International Law*, vol. 67 (1973), pp. 275-303; J.-P.L. Fonteyne, “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter”, *California Western International Law Journal*, vol. 4 (1974), pp. 203-70; G. Klintworth, *Vietnam’s Intervention in Cambodia in International Law*, Canberra, 1989; B.M. Benjamin, “Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities”, *Fordham International Law Journal*, vol. 16 (1992), pp. 120-58; Torrelli, “De l’assistance à l’ingérence humanitaires”, *International Review of the Red Cross*, vol. 74 (1992), pp. 238-58; I. Forbes and M. Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, London, 1993; F.R. Tesson, *Humanitarian intervention: an inquiry into law and morality*, second edition, IrvingtonOnHudson, 1997; A. Cassesse, “*Ex inuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in World Community”, *European Journal of International Law*, vol. 10 (1999), pp. 23-30; Independent International Commission on Kosovo, *The Kosovo Report*, Oxford University Press, 2000, pp. 167-75; N.J. Wheeler, “Legitimizing Humanitarian Intervention: Principles and Procedures”, *Melbourne Journal of International Law*, vol. 2 (2001), pp. 550-67; *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, 2002; F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, New York, 2002; B.D. Leppard, *Rethinking Humanitarian Intervention*, Penn State University Press, 2002; J.M. Welsh, *Humanitarian Intervention and International Relations*, Oxford, 2006; and R. Thakur, “Humanitarian Intervention”, in T.G. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations*, Oxford, 2007, pp. 387-403.

23 Among others: F.M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, 1996; T.G. Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, Lanham, 2005; O. Jütersonke and K. Krause (eds), *From Rights to Responsibilities: Rethinking Interventions for Humanitarian Purposes*, Geneva, 2006; Société Française pour le Droit International (ed.), *La Responsabilité de Protéger*, Paris, 2008; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, 2008; L. Arbour, “The responsibility to protect as a duty of care in international law and practice”, *Review of International Studies*, vol. 34, pp. 445-58; A.J. Bellami, *Responsibility to Protect*, London, 2009, and *Global Politics and the Responsibility to Protect: From Words to Deeds*, New York, 2010; D. Kuwali, *The Responsibility to Protect, Implementation of Article 4 (h) Intervention*, Leiden, 2011; E.G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Washington, 2011; J. Hoffmann and A. Nollkaemper (eds), *Responsibility to Protect From Principle to Practice*, Amsterdam, 2012; W.A. Knight and F. Egerton (eds), *The Routledge Handbook of the Responsibility to Protect*, New York, 2012; A. Francis et al. (eds), *Norms of Protection, Responsibility to Protect, Protection of Civilians and their Interaction*, Paris, 2012; J. Genser and I. Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, Oxford, 2012; G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect*, Cambridge, 2013; N. Hajjami, *La Responsabilité de Protéger*, Brussels, 2013; and the Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2011, and the *Core Humanitarian Standard on Quality and Accountability*, 2014.

poses the primary State's obligation to respect and protect the human rights of its population, which emphasises the subsidiary preventive and protective role of the international community; secondly, responsibility to protect departs from the concept of the "right" of each State to intervene in another State's internal affairs, by establishing the specific conditions for intervention and hence limiting the discretion of a State to take action against another State; thirdly, responsibility to protect shifts the focus from the "right" of the target State to territorial integrity to the rights of the victims in peril; and, fourthly, and most importantly, sovereignty becomes instrumental to the welfare of the population, and is not an end in itself, the use of force constituting the last-resort instrument to safeguard the fundamental rights and freedoms of the victimised population in the target State.

9. Hence, responsibility to protect corresponds to a customary norm which has benefited from three different but converging lines of development of international law: firstly, human rights do not belong to the reserved domain of sovereignty of States (Article 2 § 7 of the UN Charter),<sup>24</sup> which excludes from this domain "the outlawing of acts of aggression, and of genocide" and "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination", respect for which constitutes an *erga omnes* obligation of States,<sup>25</sup> and where disrespect may constitute a threat to international peace; secondly, State officials have a personal responsibility to protect the population under their political authority, on pain of international criminal responsibility for the *delicta juris gentium*: genocide, crimes against humanity and war crimes (Articles I, IV, V, VI and VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and Articles 6 to 8 of the Rome Statute of the International Criminal Court), whose

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24 The reserved domain is an evolving concept, defined negatively by the lack of international norms regulating a certain issue and not positively by its inclusion in a closed catalogue of issues (*Aegean Sea Continental Shelf*, Judgment, *ICJ Reports* 1978, § 59; and Institute of International Law, 1954 Resolution on *La détermination du domaine réservé et ses effets*).

25 See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, *ICJ Reports* 1970, §§ 33-34; and Institute of International Law, Article 1 of the 1989 Resolution on The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States.

prevention and prosecution is also an *erga omnes* obligation;<sup>26</sup> thirdly, the protection of civilians in armed conflicts is a responsibility of the international community, requiring States to take action jointly or individually to suppress serious violations of the Geneva Conventions or Protocol I thereto (Article 89 of Protocol I additional), as well as any other serious violations of international humanitarian law embodying elementary considerations of humanity, with *erga omnes* effect, including in non-international armed conflicts between the government of a State and “dissident armed forces or other organized armed forces” (Article I § 1 of Protocol II additional to the four Geneva Conventions) and between the government and non-organised forces, and even in civil strife outside of armed conflict (common Article III of the Geneva Conventions).<sup>27</sup> This customary rule applies both to action by a State in foreign territories under its effective control and to the conduct of private persons, in national or foreign territories, when they act under the control of the State.<sup>28</sup>

10. In international law, States have a duty to cooperate to bring to an end, through lawful means, any serious breach by a State of an obligation arising under a peremptory norm of general international law (see Article 41 § 1 of the Draft articles on Responsibility of States for Internationally Wrongful Acts of

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26 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, § 430 (“the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible”); *Barcelona Traction, Light and Power Company, Limited*, cited above, § 34; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *ICJ Reports* 1951; and Resolution ICC-ASP/5/Res.3, adopted at the 7th plenary meeting on 1 December 2006, by consensus. As the International Court of Justice (ICJ) put it, when referring to genocide, States must cooperate “in order to liberate mankind from such an odious scourge”. The obligation to prevent and prosecute war crimes resulted already from the Geneva treaty and customary law. The obligation to do likewise regarding crimes against humanity is a direct consequence of the Rome Statute. Ethnic cleansing may be criminally punished both as a war crime or a crime against humanity.

27 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, §§ 155-58, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, § 178. Most of the universally ratified Geneva treaty law codifies customary law, which means that every State, whether or not it is party to the specific conflict, is obliged to ensure respect for these rules and to take action, jointly or individually, in order to protect civilians in armed conflict. Admittedly, this obligation requires States to ensure that no other State commits genocide, war crimes or crimes against humanity. The action undertaken must evidently be in accordance with the State’s obligations under the UN Charter (Article 109).

28 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)* (Merits), Judgment, *ICJ Reports* 1986, §§ 109-10; *Democratic Republic of the Congo v. Uganda*, cited above, §§ 178-80; and *Bosnia and Herzegovina v. Serbia and Montenegro*, cited above, §§ 399-406; see also Article 8 of *International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts*. The extent of the effective-control test will not be dealt with in this opinion.

the International Law Commission (ILC)). Any State other than the injured State may invoke the responsibility of the perpetrator State when “[t]he obligation breached is owed to the international community as a whole” and claim from the responsible State the cessation of the internationally wrongful act (*ibid.*, Article 48 § 1 (b)).<sup>29</sup>

Mass atrocities committed or condoned by a government against their own population entail such legal consequences in view of the *jus cogens* nature of these crimes and the *erga omnes* nature of the corresponding human rights protection obligation. In this context, the legal status of both the collective State responsibility and the extraterritorial individual State responsibility for preventing and stopping *jus cogens* crimes is unambiguous. As a matter of principle, all States are to be considered as the “injured State” in the case of the *delicta juris gentium*, whose perpetrators are deemed to be *hostis humani generis*.<sup>30</sup> In the words of Lauterpacht, “the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins”.<sup>31</sup>

ii. International human rights law, international criminal law and international humanitarian law have evolved in such a way that they converge into acknowledging the legal obligation to take, collectively or individually, preventive and coercive action against a State which systematically attacks, or

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29 As the ILC explained, Article 48 § 1 (b) “intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew ‘an essential distinction’ between obligations owed to particular States and those owed ‘towards the international community as a whole’. With regard to the latter, the Court went on to state that ‘[i]n 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*” (see ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 127). These Draft articles apply to breaches of inter-State obligations of a bilateral character, as well as to international responsibility for breaches of State obligations owed to an individual, groups of individuals or the international community as a whole.

30 Both General Assembly Resolution 2840 (1971) on the question of the punishment of war criminals and of persons who have committed crimes against humanity, 18 December 1971, A/RES/2840 (XXVI), and its Resolution 3074 (1973) on Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, A/RES/3074 (XXVIII), underscore the States’ obligation to take steps for the arrest, extradition, trial and punishment of these criminals.

31 H. Lauterpacht, cited above, p. 46.

condones an attack on, all or part of its population.<sup>32</sup> The human rights based intervention is strictly limited to preventing or stopping mass atrocities in the form of genocide, crimes against humanity, war crimes and ethnic cleansing, and does not purport to change the constitutional system of the target State.<sup>33</sup>

As an *ultimum remedium* mechanism, human rights based intervention presupposes that where human rights are protected by international conventions, that protection does not take the regular form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the international conventions themselves. The use of force by the international community is thus limited by a double subsidiarity, in view of the failure of both the national human rights protection mechanisms and the common international human rights treaty mechanisms.

The international community's subsidiary reaction may take place, in decreasing order of authority, by way of a Security Council resolution,<sup>34</sup> a General

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32 This should not be confused with a right to a State-building, pro-democracy intervention, aimed at expanding a certain model of political governance (see *Nicaragua v. the United States of America*, cited above, § 209). The ICJ admitted humanitarian intervention to “prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need” in Nicaragua, and not merely to the contras and their dependants (§ 243). Nevertheless, it is obviously unrealistic to suppose that it will be possible to eradicate a policy of systematic human rights abuse without some change in terms of the political regime of the target State.

33 This should also not be confused with a right to intervention based on a general negative assessment of the human rights situation in a particular country (contrast with *Nicaragua v. the United States of America*, cited above, § 268). There must be an element of systematicity in the infringement of human rights (see on this systematic element, my separate opinion in *Mocanu and Others*, cited above). Such an element is present in the types of crimes which trigger the responsibility to protect.

34 The 2005 World Summit Outcome Document, § 139. The clause urging the five permanent members of the Security Council not to veto action aimed at preventing or stopping genocide or ethnic cleansing was not included in the final version. The ICISS report (“The Responsibility to Protect”, cited above, § 6.21), the High-level Panel report (“A more secure world”, cited above, § 256) and the Secretary-General (“Implementing the responsibility to protect”, cited above, § 61) have voiced their agreement with that restriction of the veto power.

Assembly recommendation,<sup>35</sup> an action by a regional organisation whether or not authorised beforehand under Article 53 of the UN Charter, both *ad intra* or *ad extra*,<sup>36</sup> and an action by a group of like-minded States or an individual State.<sup>37</sup> Whenever the more authoritative means of response is deadlocked, or it seriously appears that this will be the case, a less authoritative means may be used. Inaction is not an option in the face of a looming or actual tragedy, putting at risk the lives of untold numbers of victims. Not only does the UN Charter not cover the whole area of the regulation of the use of force,<sup>38</sup> the Charter itself also pursues other aims such as the protection of human rights

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35 General Assembly Resolution 377 (V) A, 3 November 1950, or the “Uniting for Peace” Resolution (A/RES/377 (V), see also A/1775 (1951)). On the role of this Resolution, see ICISS, “The Responsibility to Protect”, cited above, § 6.30, Independent International Commission on Kosovo, “The Kosovo Report”, cited above, p. 166, and the Secretary-General’s report, “Implementing the responsibility to protect”, cited above, § 56. In fact, the General Assembly has already made significant use of this Resolution, such as by calling upon all States and authorities “to continue to lend assistance to the United Nations action in Korea”, which meant military assistance (Resolution 498 (V), 5 November 1951, A/RES/498 (V)), “establishing” peacekeeping operations in Egypt (Resolution 1000 (ES-I), 5 November 1956, A/RES/1000 (ES-I)), “requesting” the Secretary-General “to take vigorous action ... to assist the Central Government of the Congo in the restoration and maintenance of law and order throughout the territory of the Republic of Congo”, thus confirming the mandate of the UN Operation in the Congo (Resolution 1474 (ES-IV), 16 September 1960, A/RES/1474 (ES-IV)), and condemning South Africa for the occupation of Namibia and calling for foreign military assistance to the liberation struggle (Resolution ES-8/2, cited above). The so-called “Chapter VI ½ measures” relied on the target State’s consent, but neither the text nor the spirit of Resolution 377 excludes its use in order to recommend the use of force in situations of breach of the peace even where consent is lacking.

36 ICISS, “The Responsibility to Protect”, cited above, §§ 6.31-6.35 (“there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard”), “A more secure world”, cited above, § 272, Report of the Security Council *Ad Hoc* Working Group on conflict prevention and resolution in Africa, of 30 December 2005 (S/2005/833), § 10, and “Fourth report on responsibility of international organizations” by the Special Rapporteur Giorgio Gaja, § 48 (A/CN.4/564). The Secretary-General’s report, “Implementing the responsibility to protect”, cited above, § 56, referred to the use of force by regional or subregional arrangements “with the prior authorization of the Security Council”. The World Summit Outcome Document envisages cooperation between the Security Council and the “appropriate” regional organisation, meaning one from within the geographical area of the conflict. But practice has shown that the Security Council may pick another choice. For example, Resolution 1484 (2003), of 30 May 2003, (S/RES/1484/2003), authorised the European Union-led Operation Artemis in the Democratic Republic of the Congo during the Ituri conflict.

37 The World Summit Outcome Document did not exclude these possibilities. As explained above, they derive not only from the *jus cogens* nature of the crimes at stake, but also from the *erga omnes* nature of the human rights protection obligation.

38 *Nicaragua v. the United States of America*, cited above, § 176, and ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 85: “But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.”

(Articles I § 2, I § 3 and 55), and the systematic flouting of these rights by a State within its own borders jeopardises international peace and security as well. In such circumstances, States must take joint and separate action to secure the observance of the violated human rights of the victimised population (Article 56 of the UN Charter).

## II. Responsibility of the States to protect

12. Sovereign States are entitled to defend their national territory and protect their populations. This is not only their right, but their obligation as well. Each government has the obligation to maintain or re-establish law and order in the State or to defend its national unity and territorial integrity by “all legitimate means”.<sup>39</sup> While fulfilling these obligations, “all reasonable precautions” are due to avoid any losses of civilian lives and damage to civilian objects.<sup>40</sup> When absolutely necessary, civilian property may be destroyed for military purposes.<sup>41</sup> Civilians should not be arbitrarily displaced from their homes or places of habitual residence, imperative military reasons being necessary to justify such displacement.<sup>42</sup> In the case of forced displacement of civilians, their rights to return to and enjoy their homes and property should be implemented as soon as the reasons for their displacement cease to exist.<sup>43</sup>

13. In the context of secession, military action by the parent State against the seceding movement and intervening third States is, in principle, justified. The obligation to defend territorial integrity applies unless the secession complies with the following requirements: (1) the seceding population fulfil the Monte-

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39 Article 3 § 1 of the 1977 Protocol additional II to the Geneva Conventions.

40 Article 13 of the 1977 Protocol additional II to the Geneva Conventions and Article 57 of the 1977 Protocol additional I to the Geneva Conventions, and Rules 1 to 10 and 15 of the ICRC Study on Rules of customary international humanitarian law (cited above).

41 Article 52 of the 1977 Protocol additional I to the Geneva Conventions, Article 14 of the 1977 Protocol additional II to the Geneva Conventions, Article 53 of the 1949 Fourth Geneva Convention relative to the protection of civilian persons in time of war, Article 6 (b) of the Charter of the International Military Tribunal, Articles 46 and 56 of the Hague Regulations Respecting the Laws and Customs of War on Land, and Rules 51 and 52 of the ICRC Study on Rules of customary international humanitarian law (cited above).

42 Article 17 of the 1977 Protocol additional II to the Geneva Conventions, Rules 129 and 130 of the ICRC Study on Rules of customary international humanitarian law, and Principle 6 of the Guiding principles on internal displacement (E/CN.4/1998/53/Add.2), 11 February 1998.

43 Article 49 of the Fourth Geneva Convention and Rule 132 of the ICRC Study on Rules of customary international humanitarian law (cited above).

video criteria<sup>44</sup> for statehood, namely they constitute a permanent population and have a defined territory, a government and the capacity to enter into relations with other States; (2) prior to secession the seceding population were not allowed fair participation in a government that represented the whole population of the former State; and (3) the seceding population were systematically treated by the government, or by a part of the population of the parent State whose action was condoned by the government, in a discriminatory manner or in a manner disrespectful of their human rights.<sup>45</sup>

When secession complies with these requirements, military action of the government of the parent State against the seceding population and intervening third States is no longer lawful. A State forfeits the right to defend its territory when it systematically breaches the human rights of a part of its population, or condones such breaches by private agents.

### III. Responsibility of the international community to protect

14. Sovereignty, equality of all States and prohibition of the threat or use of force against another State are the founding principles of the UN Charter of the United Nations. These principles have a practical consequence, already set out in the well-known Article 7 of *La Déclaration du Droit des Gens* (1795): “*Un peuple n’a pas le droit de s’immiscer dans le gouvernement des autres*” (no people has the right to interfere in the government of others). An allegation of human rights violations in another State may evidently provide a convenient pretext for intrusion into its internal politics and, even worse, for the overthrow of legitimate governments, as the “manifestation of a policy of force, such as has,

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44 Article 1 of the Montevideo Convention on the Rights and Duties of States (“the Montevideo Convention”), 26 December 1933, 165 LNTS 19.

45 See my separate opinion appended to *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16 June 2015.

in the past, given rise to most serious abuses”.<sup>46</sup> Nevertheless, the mere circumstance that the right to intervene may be abused is not *per se* decisive of its existence or otherwise in international law. One should remember the wisdom of Grotius:

“We know, it is true, from both ancient and modern history, that the desire for what is another’s seeks such pretexts as this for its own ends; but a right does not cease to exist in case it is to some extent abused by evil men.”<sup>47</sup>

During the first decade of the twenty-first century, the following rule of customary international law crystallised:

States have the legal obligation to prevent and stop the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. When a State commits these crimes, condones the commission of these crimes or is manifestly unable to oppose their commission in the national territory or the territories under its effective control, the international community has a legal obligation to react with all adequate and necessary means, including the use of military means, in order to protect the targeted populations. The reaction must be timely, effective and proportionate. By order of precedence, the power to take action is vested in the following authorities: the UN Security Council under Chapters VI and VII of the UN Charter, the UN General Assembly under the “Uniting for Peace” Resolution and regional or sub-regional organisations in accordance with their respective statutory framework, whether *ad intra* or *ad extra*. When the primary authorities are deadlocked, or it seriously appears that this will be the case, any State or group of States will be competent to take action.

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46 On the principle of non-intervention, see Article 15 § 8 of the Covenant of the League of Nations, Article 8 of the 1933 Montevideo Convention on Rights and Duties of States, Article 1 of its 1936 Additional Protocol on Non-Intervention, and Article 3 § 2 of Protocol II additional to the Geneva Conventions. In the UN practice, United Nations General Assembly Resolution 36/103, 9 December 1981, A/RES/36/103, approving the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, Resolution 2625 (XXV), 24 October 1970, A/8082 (1970), containing the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter, and Resolution 2131 (XX), 21 December 1965, which adopted the Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States, and Article 4 of the 1949 ILC Draft Declaration on Rights and Duties of States. In the ICJ caselaw, see *Nicaragua v. the United States of America*, cited above, § 246, and *Corfu Channel case*, Judgment, *ICJ Reports* 1949, from where the citation in the text is taken.

47 H. Grotius, *op. cit.*, 2.2.25.

15. In the context of secession, third States are prohibited from taking military action against the parent State on the pretext that the seceding population is entitled to self-determination. Thus, the territory of a State cannot be the object of acquisition by another State resulting from the threat or use of force, no territorial acquisition resulting from the threat or use of force shall be recognised as legal, and every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.<sup>48</sup>

The rule of non-interference in favour of a seceding population has an exception, namely the situation where the government of the parent State is not representative of the seceding population and systematically abuses its human rights or condones a systematic attack by private agents against them. In this situation, strictly necessary military action taken by third States in favour of the seceding population is lawful after the latter have established control of their territory and declared their secession. Military action by third States prior to that time constitutes prohibited intervention in the internal affairs of another State.<sup>49</sup>

If, in addition to the above-mentioned requirements, the interference envisages the protection of a seceding population which is ethnically the same as that of the third-party State, the lawfulness of the interference is even less questionable, because it closely equates to a situation of self-defence. In any event, as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct of the intervening third State.<sup>50</sup>

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48 Article 11 of the Montevideo Convention, *op. cit.*, paragraph 5 of the Declaration on the Strengthening of International Security adopted by the General Assembly Resolution 2734 (XXV), 16 December 1970, A/RES/25/2734, and Article 5 (3) of the General Assembly Resolution 3314 (XXIX) on the definition of the crime of aggression, 14 December 1974, A/RES/3314 (XXIX).

49 For the prohibition on recognising as a State a secessionist territory which is the result of the use of unlawful force by a third State, see the case of the “Turkish Republic of Northern Cyprus” after Turkey’s invasion of Cyprus (Security Council Resolutions 541 (1983), 18 November 1983, S/RES/541 (1983), and 550 (1984), 11 May 1984, S/RES/550 (1984).

50 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 74.