AN INTRODUCTION TO THE LAW OF NATIONS:
NATURAL LAW AND PUBLIC INTERNATIONAL LAW

V.D. DEGAN

CONTENTS

PREFACE (3)

Part One
DEVELOPMENTS OF BASIC LEGAL CONCEPTS

1. INTRODUCTION (6)

2. ST. THOMAS AQUINAS (1225-1274) (7)
   2.1. Eternal Law (8)
   2.2. Divine (positive) Law (11)
   2.3. Natural law (12)
   2.4. Human (positive) law (14)

3. HUGO GROTIIUS (1583-1645) (21)
   3.1. Introduction (21)
   3.2. Jus naturale (25)
   3.3. Jus voluntarium (30)
   3.4. Summing up (35)

4. EMMERICH DE VATTEL (1714-1767) (38)

5. A SHORT-LIVED RENAISSANCE OF NATURAL LAW (46)
   5.1. Codifying efforts in the period of the French Revolution and afterwards (46)
   5.2. Declaration of the Rights of Man and of the Citizen of 1789 (48)
   5.3. Draft Declaration of the Law of Nations by Abbé Grégoire of 1795 (52)

6. VOLUNTARISM IN INTERNATIONAL LAW AND ITS IMPLICATIONS (57)
   6.1. Distinctive features of voluntarism in law creating (57)
   6.2. Inhumane laws (61)
   6.3. Unreasonable legal rules (63)
Part Two

SOME OBJECTIVE FEATURES IN POSITIVE INTERNATIONAL LAW

7. INTRODUCTION (70)

8. GENERAL PRINCIPLES OF LAW (71)

9. FUNDAMENTAL RIGHTS AND DUTIES OF STATES (77)

9.1. Development of rules of positive international law on fundamental rights of States (77)
9.2. "Principles of international law" in practice of The Hague Court (84)

10. FUNDAMENTAL RIGHTS OF INDIVIDUALS (93)

10.1. Introduction (93)
10.2. Human rights v. intervention in the internal affairs of States (97)
10.3. International crimes: common elements (99)
10.4. Legal consequences of State responsibility for international crimes (105)
10.5. Some features of personal responsibility of individuals (107)
10.7. The crimes of genocide and aggression (113)
10.8. The principle of non-discrimination (118)
10.9. Peremptory norms on civil and political rights (jus cogens) (119)
10.10. Other mandatory rules (120)
10.11. Economic, social and cultural rights of individuals (121)
10.12. Conclusion (122)

11. A LEX FERENDA: FUNDAMENTAL RIGHTS AND DUTIES OF ETHNIC GROUPS WITHIN A STATE (124)

11.1. Introduction (124)
11.2. Right to existence (132)
11.3. Right to equality (137)
11.4. Right to proportionate sharing in decision-making (140)
11.5. Right to free use of national language (141)
11.6. Right to institutions (143)
11.7. Summing up (146)

CONCLUSION (148)

BIBLIOGRAPHY (151-153)

/Manuscript terminated on 21 January 2019/
PREFACE

Most of present day legal writers have very loose idea on natural law. Some of them comprise under this term all concepts and facts which they do not understand well.

However, some principles and rules of positive international law are universally recognized and adopted as such exactly because of their deep roots in natural law. The outstanding example is the "inherent right of individual and collective self-defense", provided in Article 51 of the United Nations Charter. The term "inherent right" has been translated into the equally authentic French version of the Charter as "droit naturel". Nobody is willing now to contest this right, although one can reasonably doubt that the right to collective self-defense is being equally "inherent" or "natural", as everybody's right to divert an attack against him in a situation of urgent necessity.¹

Yet in another domain the naturalist origin supports the "positivity" of legal rules and ads to their universal approval, or in other words amounts in the absence of its denial as such. The concordance of provisions from modern conventions and declarations on human rights with respective stipulations in the French Declaration of the Rights of Man and of the Citizen of 1789, are admitted as a proof of universally recognized imperative character of these rules in positive international law in question, which should not be denied on any voluntaristic ground.

There are however still more opposite examples, where the misunderstandings and repugnance of the concept of the law of nature were a direct cause for denial of "positivity" of some legal rules. Thus, some authors reject the doctrine of fundamental rights and duties of States altogether, exactly because they discern in this teaching a relic of the abhorred naturalist thinking. And that in spite of the fact that all these fundamental rights of States have been

¹ However, the International Court of Justice stated in its 1986 Judgment in Nicaragua case that, "in the language of Article 51 of the United Nations Charter the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defense." I.C.J. Reports 1986, p.102, para 193. It has furthermore stressed that "whether the response to the attack is lawful depends on observance of the criteria of necessity and proportionality", ibid., p.103, para.194. Throughout that Judgment the Court treated this right as one of customary international law.
solidly confirmed in conventions in force and declarations, as universally obligatory legal rules, are not at present denied by any State.  

For the same reason there is still no universal agreement on general principles of law, one of three main sources of international law. Many writers discard these principles as independent source of positive international law, because they regard in them a kind of rules of natural law which have not been consented as such and in this quality by sovereign States.  

Only these examples could justify a new research of past doctrines in order to offer to present-day readers a fresh view on natural law.

But we found for that some additional and even weightier reasons. When studying medieval legal doctrines one can discern a fascinating relationship between the teachings on law by St. Thomas Aquinas - generally ignored by jurists - and these of Hugo Grotius - who is better known among jurists but not always properly understood. That relationship greatly helps a critical approach to all doctrines of the law of nature throughout centuries. But it also helps in reassessment of some features of voluntarism in law creating in our times.

Prosper Weil discussed in an article on "pathology of international law" and its structural weaknesses. Even more serious problem is that of municipal laws and other regulations with large-scale inhuman consequences, which are nowadays happily outlawed by written international instruments on human rights. But that development of positive inter-

---

2 Hence, Charles ROUSSEAU: *Droit international public*, tome premier, Paris 1971, p.50, asserted that this theory is to day universally discarded. He therefore expressed his surprise that it has been sustained by positive law. Yet he started the fourth volume of his treatise on "Relations internationales", with three "principes directeurs" of these relations, namely of independence, equality and non-intervention. Cf., ibid., vol. IV, Paris 1980, p.5.

3 That has been the mark of the Soviet doctrine on International Law until its end. Cf., among others - I.I. LUKASHUK: "Sources of Present International Law", in G. Tunkin (Ed.): *Contemporary International Law*, Moscow 1969, pp.186-187; G. TUNKIN: "Soviet Theory on Sources of International Law", in *Völkerrecht und Rechtsphilosophie*, Internationale Festschrift für Stephan Verosta, Berlin 1980, pp.76-77. All Soviet authors understood under this term general principles of international law. See also a restrictive approach to this source, following the same reasoning, of - Geza HERCZEGH: *General Principles of Law and the International Legal Order*, Budapest 1969, pp. 33, 64, 121-126.

4 Cf., Prosper WEIL: "Towards Relative Normativity in International Law?", *AJIL* 1983, No.3, pp.413-442. See also the original French version of this article - "Vers une normativité relative en droit international?", *RGDIP* 1982, No.1, pp.5-47.
national law cannot always prevent the implementation of such kind of "laws" in all parts of the world. Fresh examples are some States issued from former Yugoslavia.

The present writing is therefore dedicated not only to diligent students of history of legal and political doctrines. We hope that it can be equally useful to any student of law. It is however addressed above all to those who participate in creation and in implementation of rules of positive international law.

* 

In clarifying the concept of natural law nobody is able to take into account all teachings and all ideas expressed on it. We shall therefore lean on the doctrines of only a few the most prominent writers, whose teachings were relevant for the development of concepts of rights of individuals near the end of the eighteenth century. In that crucial period some legal texts, - not only in international law - were adopted which still after two centuries exert their influence on positive law.

The reader will discover that the writings of St.Thomas, Grotius, Vattel and others appeared mostly with the aim of suggesting solutions to some urgent needs and problems of the times in which they lived. These theories were a kind of reaction to excesses of harsh reality and to dominant legal teachings up to then. For that reason they sometimes easily glided into the opposite extreme. That is perhaps the explanation of the phenomenon that inclinations in favor of naturalism or of voluntarism in dominant teachings throughout centuries can be compared with motion of pendulum of an old clock that never calms down. Hence, each of these doctrines should be appreciated, taking into account the time and circumstances of their appearance, and in an endless development.
Part One

DEVELOPMENTS OF BASIC LEGAL CONCEPTS

1. INTRODUCTION

Some famous roman jurists have already ascertained relationship between the law of nature (jus naturale) and the positive law (jus positivum). Thus the roman lawyer Gaius begins his Institutes with a well-known statement that all peoples who are governed by the rule of laws and customs, make partly use of their own law, and partly of the law, which is common to all peoples. The law created by one people for its own needs is its own law and is called civil law (jus civile), and it is peculiar to citizens of that very State (civitas); whereas the law which has been established among all peoples, as being in conformity with the natural reason (naturalis ratio), and which is equally observed by all peoples, is called the law of nations (jus gentium), being the law used by all peoples. Thus, Roman people make use partly of his own law and partly of the law common to all peoples.5

Hence, jus gentium, which was developed in practice of Roman judge praetor peregrinus, who dealt with commercial affairs between Roman citizens and peregrines (members of subjugated peoples within the Empire), was believed to be in conformity with "natural reason". Some other Roman jurists did not make any difference between jus gentium and jus naturale (law of nature), which was partly developed by Greek Stoic philosophers. According to Ulpian: jus naturale est, quod natura omnium animalis docuit. That means that it is common not only to human beings, but to other animals as well.

* 

During the Middle Ages and before Reformation, peculiar for international relations was the absence of sovereign States in modern sense. Instead of national and territorial States there existed feudalism, based on the land tenure and on mutual rights and duties of vassals and

5 Cf., GAIUS: Institutiones, Liber I, 1.
suzerains of service and defense. The Church was the only cohesive factor in that society, which was perhaps more important as such than the loose power of the Holy Roman Empire and its emperor.⁶ The medieval man was in addition deeply religious, that what did not necessarily exclude sins and conduct deeply in conflict with Christian teaching.

In the twelfth century appeared within the Church the so-called hierocratic doctrine of pope as the Vicar of Christ on Earth. According to that doctrine the division of spiritual and temporal power of pope was practically abolished. It was claimed that pope could not be judged by anyone, and that he had a full freedom to change laws, even these of his predecessors. He could excommunicate princes, kings and even emperor. He claimed the power to declare treaties between kings null and void, to annul secular laws, to order kings to dispatch armed troops in support of another king or against pagans and heretics.⁷

Such claim for absolute papal power was very near to modern voluntarism in law creating, according to which the will of sovereign States is the law itself. Law derived from papal authority, and it was that what that authority prescribed in a given time. To a present-day student at least it seems that the papal authority of that period was practically not subject to any superior law.

That claim for unlimited papal authority could not persist indefinitely, even as a doctrine only. If it has survived as such, it could be fatal for Catholic Church. The Church should vanish, as vanished in the course of history many States and other temporal institutions.

* * *

2. ST. THOMAS AQUINAS (1225-1274)

In the thirteenth century, due to economic development and expansion of trade, especially in Northern Italy, the Roman law was revived. The school of glossators emerged

---


there. From the Roman law was restored the concept of individual as a citizen, and not only as a subject (sub-ditus) of a higher power. Aristotle's philosophy, preserved by Arabs, contained the concept of State as a body of citizens sufficing for the purpose of life.

The Church sought to canalize that huge interest in Aristotle, accommodating his philosophy to Christian cosmology. As Walter Ullmann stated, it "appeared as one of the urgent tasks in the thirteenth century". Dominican friar Thomas Aquinas accomplished that “Great Synthesis” with lasting effect. He created within the Church itself an irreparable fissure in the hierocratic doctrine of the unlimited power of pope.

In his monumental writing - *Summa Theologiae* - St.Thomas developed a division between Eternal Law, Divine (positive) Law, natural law, and human (positive) law.

2.1. **Eternal Law**

It is the mark of laymen to confuse some terms that embrace several and diverse meanings. Thus, they sometimes confound laws that govern natural processes with alleged "laws" of economic and social development of the society according to Marxist teaching. And they in addition confuse these two different concepts with laws, which are ordered by the legislator in a State. These imbroglios are made fun by persons who believe in their own erudition. But the concept of Eternal Law of St.Thomas roughly corresponds with laymen's understanding of laws in general.

"...(T)he eternal concept of divine law bears the character of a law that is eternal as being God's ordination for the governance of things he foreknows...The end of divine governments is God himself, and his law is none other than himself; consequently the Eternal Law is not subordinated to an outside end." Thus, "...the Eternal Law is nothing other than the

---


The doctrines of St.Thomas, of Grotius and Vattel will be explained here abundantly citing their passages such as they are. This is not at random at all. Many authors - describing these doctrines - impoverish, reduce or misinterpret them, quoting the most often one or a few passages isolated from the
exemplar of divine wisdom as directing the motions and acts of everything... Consequently the
divine mind is true of itself, and hence the exemplar there is truth itself." (1a 2ae, 93, 1) This
last idea can be explained in another way that God himself, exactly because of his divine nature
cannot act unreasonably.

"...(E)very motion and every act it the whole universe is subject to the Eternal Law. In
this fashion even non-rational creatures are subject to it through being moved by divine
Providence, though they are not like rational creatures, which are subject through some
understanding of the divine command... Non-rational creatures do not share the workings of
human reason, nor do they obey them, yet they participate in the divine reason by way of
obedience: the power of divine reason extends to more things than come under human reason...
And because the Eternal Law is the exemplar in divine Providence... it follows that even
failures in natural process come under its rules." (1a 2ae, 93, 5).

"As appears from what has been said, there are two ways of being subject to the Eternal
Law, one by being a companion by way of knowledge, the other by way of being acted upon
and acting from having received from it an inner principle of motion. In this last way, as we
have shown, non-rational creatures submit to the Eternal Law.

Now because there is something proper to rational beings together with what they
possess in common with all creatures, they are subject to the Eternal Law on both counts. First,
as we have said, in some manner they have a notion of the Eternal Law, and secondly, there is
also within each of them a natural bent to what is consonant with the Eternal Law. It is
remarked in the Ethics that we are adapted by nature to receive the virtues.

Both manners of sharing in the Eternal Law are imperfect and, as it were, decayed in
the wicked; their natural instinct for virtue is spoilt by vice and their natural knowledge of what
is right is darkened by the passions and habits of sin...

(continued)

context. And most authors uncritically adopt these delusive descriptions and transmit them in chain to
future generations. It seems that Grotius is the main victim of those misunderstandings. The choice of
citation and their interpretation explained here are of course subject to critical assessments of anybody
who deems to be able to dispute them on the basis of different quotations from the same teachings.
So therefore good men come completely under the Eternal Law as always acting in conformity to it, whereas the wicked are subject to it incompletely, since their actions are lacking in knowledge and desire of what is right...” (1a 2ae, 93, 6).

Thus St. Thomas casts to man as rational creature an exceptional position among other creatures and things, between the nature and God himself. In this light must be considered his ideas of three other categories of law, namely of Divine (positive) Law, natural and human law. But we are going first to explain some other details on relationship of man and the Eternal Law.

"The human reason cannot fully grasp the meaning of God's command, but partially holds it after its own fashion. The consequence is that just as the theoretic reason by its nature partakes of divine wisdom, and therefore we have from within an awareness of certain general principles, though not that proper knowledge of every single truth which divine wisdom comprehends, so on the part of the practical reason we enter into the Eternal Law according to some general principles without knowing all individual directives, though these are comprehended in the Eternal Law. Hence the need for human reason to proceed further and sanction particular enactments of law.

The human reason is not of itself the measure for things. Yet principles instilled in it by nature provide general rules and measures for what men should do. It is of those human deeds, not of the nature of things, that human law is the measure." (1a 2ae, 91, 3).

A thing may be known in two ways, the first, in itself, the other, in its effects, in which some likeness to it is discovered, as when to seeing the sun itself we nevertheless see daylight. So then it should be said that no one, except God himself and the blessed that see him in his essence, could know the Eternal Law as it is in itself, but that every rational creature can know about it according to some dawning, greater or lesser, of its light.

For every knowing of truth catches some radiance from the Eternal Law, which is unchangeable truth, as Augustine says, and everybody in some manner knows truth, at least as regards the general principles of natural law. As for its other commands, people share in the truth in varying degrees, and accordingly know the Eternal Law, some more, some less...

...Though everyone according to his capacity knows about the Eternal Law in the
manner indicated, nevertheless none comprehends it, for it is not completely manifested through its effects..." (1a 2ae, 93, 2).

"...(N)ot every law, then proceeds from the Eternal Law... (But) all laws in so far as they share in right reason to that extent derive from the Eternal Law... A human law has the force of law to the extent that it falls in with right reason: as such it derives from the Eternal Law. To the extent that it falls away from right reason it is called a wicked law; as such it has the quality of an abuse of law, rather than of law. Nevertheless even wicked law keeps some trace of legality, since it is backed by the established order, which is supported by the Eternal Law... The conclusion should be that human law cannot reach to the Eternal Law, not that it does not descend from it." (1a 2ae, 93, 3).

We are here faced with a radical theocentrism: all comes from God, all holds by God's grace, and all returns to God. That conclusion seems to be correct except in regard to man as a rational creature.

Thus, already the foregoing quotations indicate relationship of the Eternal Law with natural and with human law. Human reason is here essential in catching some radiance from the Eternal Law. It shall be however seen that since Grotius, human intellectual capacity will be largely overestimated and abused in inferring rules of natural law.

2.2. Divine (positive) Law

From the Eternal Law that is essential, St.Thomas nevertheless distinguishes the so-called Divine (positive) Law, which has according to him a much narrower sense.

"...(B)ecause of the untrustworthiness of human judgment, notably on contingent and particular issues, different people come to differing decisions about human conduct, with the result that diverse and conflicting laws are passed. That man may know without any doubt what should or should not be done there was required a divinely given law carrying the assurance that it cannot be mistaken...

Although through natural law the Eternal Law is shared in according to the capacity of human nature, nevertheless in order to be directed to their ultimate supernatural end men have to be lifted up, and through the divine grant of an additional law which heightens their sharing in the Eternal Law." (1a 2ae, 91, 4).

A part of this Divine (positive) Law consists of the so-called Old Law, comprising Mosaic legislation and moral, liturgical and political precepts from Old Testament (1a 2ae, 2, 3, 4, 5). The Seven Sacraments, commanded by Jesus Christ himself, were named by St.Thomas in other parts of his book - New Law. They are visible signs, instituted by Christ, to confer grace or Divine life on those who worthily receive them.

2.3. Natural law

The teaching of St.Thomas does not admit the identity of natural law with God's Law, that what is claimed by most modern authors who tend to confuse concepts which seem to be similar. Natural law has in St.Thomas's theory an incomparably lesser importance than the Eternal and the Divine (positive) Law, because of its essentially human features.

According to St.Thomas, "this sharing in the Eternal Law by intelligent creatures is what we call 'natural law'" (1a 2ae, 91, 2). Therefore, as a form of imperfect and very poor human sharing through the "right reason" in the Eternal Law, natural law is incomparably narrower and inferior to it (although it derives from it), as the human reason is according to him imperfect in regard to all individual directives of the Eternal Law. Therefore, in grasping natural law one must start from man.

According to St.Thomas: "...'Man is a rational animal' is a self-evident proposition of its nature, since to say 'man' is to say 'rational'".

"...And so this is the first command of law, 'that good is to be sought and done, evil to be avoided'; all other commands of natural law are based on this.

...The order in which commands of the law of nature are ranged corresponds to that of our natural tendencies. Here there are three stages. There is in man, first, a tendency towards the good of the nature he has in common with all substances; each has an appetite to preserve
its own natural being. Natural law here plays a corresponding part, as is engaged at this stage to
maintain and defend the elementary requirements of human life.

Secondly, there is in man a bent towards things which accord with his nature considered
more specifically, that is in terms of what he has in common with other animals; correspond-
ingly those matters are said to be of natural law which nature teaches all animals, for instance
the coupling of male and female, the bringing up of the young, and so forth.

Thirdly, there is in man an appetite for the good of his nature as rational, and this is
proper to him, for instance, that he should know truths about God and about living in society.
Correspondingly whatever this involves is a matter of natural law, for instance that a man
should shun ignorance, not offends others with whom he ought to live in civility, and other
such related requirements.

...Accordingly -- concludes St.Thomas -- the precepts of natural law, though manifold
when considered in themselves alone, all have one single root (1a 2ae, 94, 2), i.e. that good is
to be sought and done, evil to be avoided.

In a scholastic manner, St.Thomas raised the question: can natural law be changed. In
this regard he alleges:

"A change can be understood to mean either addition or subtraction. As for the first,
there is nothing against natural law being changed, for many things over and above natural law
have been added by divine law as well as by human laws, which are beneficial to social life.

As for change by subtraction, meaning that something that once was of natural law later
ceases to be so, here there is a room for a distinction. The first principles of natural law are
altogether unalterable. But its secondary precepts, which we have described as being like par-
ticular conclusions close to first principles, though not alterable in the majority of cases where
they are right as they stand, can nevertheless be changed on some particular and rare occasions,
as we have mentioned in the preceding article, because of some special cause preventing their
unqualified observance." (1a 2ae, 94, 5).

"...(N)atural law cannot be canceled in the human heart; nevertheless it can be missing
from a particular course of action when the reason is stopped from applying the general
principle there, because of lust or some other passion...

As for its other and secondary precepts, natural law can be effaced, either by wrong persuasions - thus also errors occur in theoretical matters concerning demonstrable conclusions - or by perverse customs and corrupt habits; for instance robbery was not reputed to be wrong among some people, nor even, as the Apostle mentions, some unnatural sins.

Hence: - finally concludes St. Thomas - 1. Sin cancels natural law on some specific points, not as to its general principles, unless perhaps with regard to secondary precepts in the manner we have touched on.

2. Though grace is more powerful than nature, nevertheless nature is more essential to man, and therefore more permanent.

3. This argument is true of secondary precepts of natural law, against which human legislators have sometimes passed wrongful enactments." (1a 2ae, 94, 6).

These last few remarks, which do not seem equally congruous and intelligible as the explanation of the Eternal and of the Divine (positive) Law, suggest that St. Thomas's concept of natural law does not perhaps result from the pure reason. It rather results from human heart, as being his impulse that good is to be sought and done. In some circumstances, or at wicked persons, that natural intuition is spoiled or darkened. Therefrom occur perverse customs, corrupt habits or unnatural sins, which are at some people expressed as secondary precepts of natural law (if we understood all those ideas correctly). But here we come already to the domain of human positive law.

*

2.4. Human (positive) law

The last in this hierarchy is human (positive) law, about which St. Thomas explained some interesting, although not very original ideas. Some of them seem to be accurate even in modern times.

As we have already stressed, according to St. Thomas "all laws in so far as they share in right reason to that extent derive from the Eternal Law" (1a 2ae, 93, 3). This is therefore valid
not only for natural, but for human law as well.

In regard to human law itself: "...some commands are drawn like conclusions from natural law, for instance, 'You must not commit murder' can be inferred from 'You must do harm to nobody'. Others, however, are based like constructions of natural law, which for instance, pronounces that crime has to be punished without deciding whether this or that should be the penalty; the punishment settled is like a determinate form given to natural law.

Both processes are at work in human positive law. Commands, however, that issue according to the first have part of their force from natural law, and not only from the fact of their enactment. Whereas commands that issue according to the second have their force only by human law." (*1a 2ae, 95, 2*).

St. Thomas cited several elements that belong to the essence of human law. He makes by this a qualification and classification of that what he considers to be parts of human law. Some of his ideas are probably more important to present-day politologists than for lawyers.

"First of all, to depend on natural law is of the essence of human law... (O)n this head positive law and justice is divided into the *jus gentium* and the civil law, and according to the two processes of derivation from natural law explained... Those precepts belong to the *jus gentium*, which are drawn like conclusions from the premises of natural law, such as those requiring justice in buying and selling and so forth, without which men cannot live sociably together; this last is a condition of natural law, since, as is shown in the *Politics*, man is by nature a sociable animal. Constructions, however, put upon natural law are proper to civil law, and here each political community decides for itself what is fitting." (*1a 2ae, 95, 4*).

The foregoing distinction is the same as it has been previously adopted in the Roman law. *Jus gentium* is not yet that what is meant nowadays as positive international law (or the "law of nations"), but rather a set of legal rules and customs, universally valid and observed by all peoples, because it directly derives from natural law. Neither the *jus civile* is that what is now understood in Continental Europe as civil law. It is a kind of law that emanates from a State power, which is called today municipal "public law" within a State. However in order to be valid, it must according to St. Thomas be a construction put upon the natural law. As it shall
be seen, in case that it contradicts it, it does not oblige in the court of conscience.

"Secondly, it is of the essence of human law to be ordered to the benefit of the commonwealth; on this head it can be divided according to the diversity of those whose special business it is to work for the common good; for instance, priests who pray to God for the people, rulers who govern them, soldiers who fight for their welfare. Correspondingly these men enjoy special rights adapted to such duties.

Thirdly, it is of the essence of law to be instituted by the governor of the political community...; on this count law can be divided according to the type of the régime. One is kingship or royalty where, says Aristotle, the State is governed by a monarch, and corresponding to this you have princely ordinances; another is aristocracy, or the rule of the best or politically best, and corresponding to this you have the advice of learned counsel and senatorial resolutions; another is oligarchy, where a few rich or powerful men are in control, and from this you get praetorian law, also called honorary law; another is popular rule, called democracy, and from this come decrees of the commonalty (*summuntur plebiscita*). Another régime is tyranny, which is so thoroughly corrupt that it affords no law. There is another type of régime blended of the others, and this is the best, and provides law as Isidore understood it, namely that *which men of birth together with the common people have sanctioned*.

Fourthly, it is of the essence of law to be the directive of human acts; matching the various subject matters of legislation there are several laws which are entitled from their authors, thus the *Lex Julia* about adultery, the *Lex Cornelia* about assassination, and so forth, which are differentiated by the things to which they refer, not by their authors.

Hence - St.Thomas concludes - "The *jus gentium* is indeed natural to man in the sense that he is reasonable, and it is reasoned out like a conclusion from principles without being far-fetched, hence men may readily agree about it. Nevertheless it is distinguished from natural law, very much so from the natural law which is common to all animals." (*1a 2ae, 95, 4*).

St.Thomas largely discussed the issue of the power of human law. He has tackled here a problem set before by Aristotle in The Nicomachean Ethics. First, he alleged that: "...It would seem to be the business of human law to restrain all the vices..." Then he proceeds:
"Law is laid down for a great number of people, of whom the majority has no high standard of morality. Therefore it does not forbid all vices, from which upright men can keep away, but only those grave ones, which the average man can avoid, and chiefly those that do harm to others and have to be stopped if human society is to be maintained, such as murder and theft and so forth.

The purpose of human law is to bring people to virtues, not suddenly but step by step. Therefore it does not all at once burden the crowd of imperfect men with the responsibilities assumed by men of the highest character, nor require them to keep away from all evils, lest, not sturdy enough to bear the strain, they break out into greater wrongs..."

At the end of this explanation St. Thomas repeats his general conclusion that: "Natural law is a kind of sharing by us in the Eternal Law, from which human law falls short..." (Ia 2ae, 96, 2).

The next question put by St. Thomas in his scholastic manner is: does human law bind a man in conscience? His reply is the following:

"Human positive laws are either just or unjust. If they are just, they have binding force in the court of conscience from the Eternal Law from which they derive...

Now laws are said to be just on three counts; from their end, when they are ordered to the common good, from their authority, when what is enacted does not exceed the lawgiver's power, and from their form, when for the good of the whole they place burdens in equitable proportion on subjects. Since an individual is part of a group, each in all that he is and has belongs to the community, as also is any part what it is because of the whole: nature itself offers hurt upon a part for the health of the whole. Accordingly laws which apportion in due measure the burdens of responsibility are just, legitimate, and oblige at the bar of conscience.

Laws are unjust in two ways, as being against what is fair in human terms and against God's rights. They are contrary to human good on the three counts made above; from their end, when the ruler taxes his subjects rather for his own greed or vanity than for the common benefit; from their author, when he enacts a law beyond the power committed to him; and from their form, when, although meant for the common good, laws are inequitably dispensed. These
are outrages rather than laws; Augustine remarks, *There never seems to have been a law where justice was not present.* Such commands do not oblige in the court of conscience, unless perhaps to avoid scandal or riot; on this account a man may be called to yield his rights, according to the text of Matthew, *If any one forces you to go one mile, go with him two miles, and if any one would sue you to take your coat, let him have your cloak as well."

With that last conclusion St. Thomas was certainly not a fervent advocate of the natural right of resistance to oppression.

"Laws can be unjust because they are contrary to God's rights; such are the laws of tyrants which promote idolatry or whatsoever is against divine law. To observe them is in no wise permissible, for as is said in the Acts, *We must obey God rather than men." (1a 2ae, 96, 4).

In this respect the advice to obey unjust laws in order to avoid scandal or riot is not valid. The observance of these laws is sinful in itself.

Then follows a very interesting question: is everybody subject to laws? Here St. Thomas explains first a general presumption according to which: "A sovereign is described as being exempt from laws with respect to its coercive power, for, to be precise, nobody is compelled by himself, and law has its restraining force only from the sovereign's power..."

The solution to this dilemma, which is equally valid in all historical epochs, St. Thomas finds on a moral ground. He alleges: "Yet of his own will a sovereign is subject to the directive power of the law..." according to the Decretals by pope Gregory IX who ordained that: *"Whoever establishes a law for another, the very same he should practice himself."* He then supports his conclusion referring to *"a wise authority"* (probably Cato) according to which: *"Be open yourself to the law you produce"*. Finally he says: "Our Lord reproaches those who do not practice what they preach, and who lay heavy burdens on men's shoulder, but they themselves will not stir a little finger to move them." (1a 2ae, 96, 5).

All of that refers *inter alia* to pope's law making authority.

The last question is: may one subject to a law rightly act against its letter?

In this respect St. Thomas repeats that, "...every law is ordained for the common well-
being, and to that extent gets the force and quality of law; in so far as it falls short here it has no
binding force..."

Here St.Thomas puts again the same problem as Aristotle in The Nicomachean Ethics: "Since he cannot envisage every individual case, the legislator frames a law to fit the majority
of cases, his purpose being to serve the common welfare. So that if a case crops up where its
observance would be damaging to that common interest, then it is not to be observed... (I)f
observing the letter of the law does not involve a sudden risk calling for instant decision and to
be dealt with at once, it is not for anybody to construe the law and decide what is or what is not
of service to the city. This is only for the governing authorities that, because of exceptional
cases, have the power to grant dispensation from the laws. If, however, the danger is urgent,
and admits of no delay, or time for recourse to higher authority, the very necessity carries a
dispensation with it, for necessity knows no law."

The solution of this problem proposed by St.Thomas differs from that of his teacher
Aristotle. According to Aristotle: When the law speaks universally and a case arises on which it
is not covered by the universal statement, then it is right to resort to equity. The nature of the e-
quitable is "a correction of law where it is defective owing to its universality."11 The solution of
St.Thomas seems more legalistic than Aristotle's only at first glance, because according to him
unjust laws do not oblige in the court of conscience.

St.Thomas has drawn at the end several conclusions:

"1. He who acts counter to the letter of the law in case of need is not questioning the
law itself, but judging the particular issue confronting him, where he sees that the letter of the
law is not to be applied.

2. A man who follows the lawmaker's intention is not interpreting the law simply
speaking as it stands, but setting it in its real situation; there, from the prospect of the damage
that would follow, it is evident that the lawmaker would have him act otherwise. If he is in

11 Cf., The Nicomachean Ethics of ARISTOTLE, translated and introduced by Sir David Ross,
Oxford University Press 1959, Book V, 1137b, para.10, (p.133).
doubt then he should follow the letter and consult his superior.

3. Nobody is so wise as to be able to forecast every individual case, and accordingly he cannot put into words all the factors that fit the end he has in view. Even were the legislator able to take every event into consideration, he still should not set them all dawn in detail, for this would lead to muddle; but he should frame a law according to the usual run of things." (\textit{1a 2ae, 96, 6}).

It seems however those lawmakers even et the present times has not learned that lesson given by Aristotle in the third century B.C., and repeated by St.Thomas in the thirteenth century A.D. In case that they continue to produce general rules by their laws in order to embrace all possible individual situations that may appear in practice, and if they in addition strive to regulate all details of everyday human life by legal norms, perhaps a new great thinker will have to repeat this truth in the twenty-ninth century A.D.

* 

The ideas of St.Thomas on law that were explained here form only a small fraction of his monumental work \textit{Summa Theologiae}. We used here its English translation with original Latin text, published in sixty volumes. And the majority of that what was cited here is encompassed in its 28th volume.

One cannot hide his admiration for this all-embracing systematization of legal concepts and categories. Certainly, not all of these ideas are of equal importance in the present days. Some of them might seem to a modern lawyer totally unacceptable and obsolete.

However no other prominent legal thinker has so far linked in his legal theory so many metajuridical concepts and phenomena, as St.Thomas did. They are, \textit{inter alia}: laws of nature including those which operate in the entire universe; relationship of morality, justice and equity; application of general legal norms into individual situations; law in regard to men of different virtues and characters; law \textit{versus} unnatural habits; etc.

Positivist legal thinking of the nineteenth and twentieth century has simply been blind for most of these phenomena. For Hans Kelsen for instance, who was himself of Jewish origin and was compelled to escape from his native Austria, even obligatory character of the Nazi law
in Germany should not be contested. This was one of deep reasons why so many German jurists -- disciples of the schools of positivism and normativism -- have blindly applied Nazi laws as they were, not disputing their morality, or their inhuman consequences.

Shortly before the birth of St. Thomas appeared the Gothic arch in architecture. Instead of massive Romanic buildings, during his lifetime were erected first monumental Gothic cathedrals. St. Thomas's system of law is like a high Gothic cathedral, which until the present time, has nothing lost in its harmony, elegance and grandiosity.

*  

3. HUGO GROTIUS (1583-1645)

3.1. Introduction

As one modern scholar has shrewdly remarked, it was barely a generation after Aquinas for severing the link between God as author and creator of nature and nature itself. This appears as the thesis that there was a natural law which was in any case valid and persuasive enough without any recourse to divinity, "simply because the natural law was reasonable in itself."  

With Reformation in Europe in the sixteenth century almost totally disappeared the medieval idea of a World State and of the Church unity with pope as its supreme moral authority. Instead of feudal "order", a number of secular, territorial and as a rule national States appeared. Even in States where protestant religion was rejected, the Church was defeated as a rival political force, and it was never again able to menace the political power of absolute monarchs. Thus, the conditions were met for the rise of genuine international law between sovereign and equal States, on the basis of their mutual recognition of the right to existence.

*  

The first author of a complete system of rules of international law, who is still largely considered as its "father", was famous Dutch jurist, theologian and poet Hugo Grotius.


13 Cf., BRIEFLY, op. cit., n.6, pp.5-7.
It was common to St. Thomas and to Grotius of having been both theologians and legal writers. It is however paradoxical that St. Thomas is today known almost exclusively as a theologian and philosopher, while his teaching on law has until quite recently fallen into oblivion at jurists. On the contrary, Grotius is now famous mostly with his legal writings, while his theologian works got him during his lifetime into embarrassment and sufferings. There is a lapse of time between them of four centuries, which is still larger that the period dividing Grotius from our epoch.

Grotius lived in a chaotic time of religious intolerance and of bloody Thirty Years War (1618-1648), of which he has not lived enough to see the end. With all his writings - theologian as well as legal - he endeavored to promote the idea of peace and tolerance.

In his younger age, after becoming famous with his writing *Mare liberum* published in 1609, he took part in religious controversies of his native country between hostile protestant sects of Gomarists and Arminians. He has joined Arminians, who were after then defeated. As a result, he was sentenced in 1619 to life imprisonment. After almost two years spent in the old fortress Loevestein, he adventurously escaped. He mostly spent the rest of his lifetime in France, with short intervals elsewhere. Since 1634 he had been Swedish Ambassador to Paris. On a return from Stockholm he suddenly died near Rostock on 29 August 1645, hence before the Peace of Westphalia was reached in 1648.

The first edition of his magisterial book *De jure belli ac pacis* appeared in 1625 in Paris. Curiously, after its publication he did not produce new legal writings, but he persistently dealt with theologian questions. During all his lifetime he advocated tolerance among Christians. Protestants called him derisively *advocatus Romae*. In some theologian writings, in particular in his pamphlet *De veritate religionis christianae* (The Truth on the Christian Religion), he advocated these principles of creed only that were common to all religious groups, in order to be acceptable to each of them. He thus even left out the Holy Trinity dogma

---

to avoid the exclusion of Arians from the Christian community as a whole.15 Such an approach would probably produce some effects in China or in India, but in Europe the circumstances have always been different. Protestants accused him of being ready to sacrifice truth for peace, and for the Catholic Church he was unacceptable simply because of being protestant.

* 

We shall focus since now our attention to Grotian ideas on law on the basis of his book *De jure belli ac pacis*. Like other great thinkers, Grotius synthesized in that book all previous doctrines and experience accessible to him. However, in building his own system of law he has shown a high degree of originality. Throughout his book he quoted a great number of authorities, among them orators, poets, historians, and theologians and juristic, since the times of Ancient Greece until his own time. He has thus quoted among them the Church Fathers and even his predecessor in the law of nations the Spanish Jesuit Francisco Suarez, who was intolerant himself towards protestant heresy.

In the *Prolegomena* of his book Grotius had a critical view of Scholastical authors or "Schoolmen", in general. He alleged that: "The Schoolmen... often show how strong they are in natural ability. But their lot was cast in an unhappy age, which was ignorant of the liberal arts; wherefore it is less to be wandered at if among many things worthy of praise there are also some things that we should receive with indulgence. Nevertheless when the Schoolmen agree on a point of morale, it rarely happens that they are wrong, since they are especially keen in seeing what may be open to criticism in the statements of others..." (*Prolegomena, para.52*).

Grotius has been definitely acquainted with the *Summa Theologiae* of St. Thomas Aquinas, which he largely quoted in his book. It will however here be proved that the correlations between these two doctrines on law was much more essential than all these quotations might indicate. And exactly this fact escaped the attention of legal historians and even of philosophers. The cognizance of this correlation seems to be essential for a proper understan-

---

ding of Grotius himself. Namely, most modern readers who start their research of natural law with Grotius only, do not find in his writings a great deal of that what can be linked with rules of positive international law of our times. And all his other ideas seem strange to them, and therefore the concept of natural law in general.

The approach of St. Thomas and of Grotius to legal rules was different. While St. Thomas has only incidentally quoted some particular rules of natural and of human (positive) law, merely for illustrating his categories of law, yielding to his reader the charge to deduce the rest of them, Grotius had a quite different objective. On the basis of reason and of man's social and rational nature he has hastened to create himself a complete system of material rules of the law of nations. He thus started his book with the following observation:

"The municipal law of Rome and of other states has been treated by many, who have undertaken to elucidate it by means of commentaries or to reduce it to a convenient digest. That body of law, however, which is concerned with the mutual relations among states or rulers of states, whether derive from nature, or established by divine ordinances, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished." (Prolegomena, para. 1).

He had a sincere belief that his system of law will restrain waging wars or at least humanize them. He thus stressed:

"Fully convinced by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restrain in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes." (Ibid., para. 28).

Devoted to this immediate goal - prevention and humanization of wars by means of
legal rules - Grotius had a somewhat different approach then St.Thomas to the very nature of law. His system of various categories of law is narrower, and does not form a firm cohesion like that in *Summa Theologiae*. His arguments are less penetrating, although his way of reasoning and of inferring legal rules is still very close to the scholastics.

* The division by St.Thomas between Eternal, Divine (positive), natural and human (positive) law is already known to the reader. In the theory of Grotius the concept of Eternal Law entirely disappears as independent category. It is in fact assimilated into a larger idea of superior law of nature. He divides all law into a law of nature (*jus naturae*), and voluntary law (*jus voluntarium*). He further divides the last concept into divine voluntary law (*jus voluntarium divinum*) and human voluntary law (*jus voluntarium humanum*).

* 3.2. *Jus naturae*

There is a paradox in description by Grotius of relationship between God and natural law. Although he was himself a prominent theologian of his time, and although all his writings were penetrated by the sincere belief in God, his idea of the law of nature was in a sense remote from God.

The law of nature is according to Grotius: "a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God." (*Lib.I, Cap.I, para.X, 1*).

It seems at the first glance that the elementary idea of natural law is almost the same at St.Thomas and at Grotius. St.Thomas said that the first command of natural law, from which all its other precepts derive, is that good is to be sought and done, and evil to be avoided. According to Grotius, the law of nature points out that a human act is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the creator of nature.

Nevertheless the differences between these two concepts are much deeper. St.Thomas
asserted that only God can know the Eternal Law in his own mind. Natural law is for him an imperfect and incomplete perception and sharing by intelligent creatures in the Eternal Law. Grotius has put his concept of the law of nature, which is "a dictate of right reason" - and thus intelligible to all human beings - in some way even above God's will.

During the nineteenth and twentieth century there was much discussion about one single sentence from Prolegomena. It reads as follows: "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him...." (Prolegomena, para.11).

Probably because of that, in advance rejected blasphemous assumption, that book was put in 1626 to the Index of the Catholic Church, though with the notice donec corrigatur, i.e. until amended. And the amendment ensued not before 1899.16 Unlike Catholic Church, when discussing the legal and political conceptions of the Middle Ages, Karl Marx included Grotius with Hobbes and Spinoza in the group of writers who, following the example of Copernicus "began to see the state with human eyes and derive its laws from reason and experience".17

It is likely that much more important than the above discarded hypothesis, is the Grotian concept of natural law in relation to God. According to Grotius, God does not create the rules of the law of nature directly, but only indirectly. The law of nature is unchangeable in the sense that even God cannot change it. "...Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil." (Lib.I, Cap.I, para.X, 5).

Hence, Grotius has subordinated God to at least some immutable rules of natural law, which are, in addition, intelligible to all human beings. However, even in that respect the


17 Cf., BIERZANEK, supra, op.cit., n.15, p.8.
difference with St. Thomas is perhaps only formal, St. Thomas asserted that God, exactly because of his divine nature could do nothing unreasonably.

As it was said, according to St. Thomas these principles belong to *jus gentium* which are drew like conclusions from the premises of natural law. Others are derived from natural law, and they are proper to *jus civile* (*1a 2ae, 95, 4*). However both these types of legal principles fall into his larger concept of human (positive) law.

Grotius developed the same basic idea, establishing two lines of proof that something is in accordance with the law of nature: (a) *a priori*, i.e. from reason directly deduced from that thing; and (b) *a posteriori*, i.e. from reason deduced outside it. The former is subtler and more abstract. It consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature (of man, our remark). The later is more familiar and it consists in concluding if not with absolute assurance, at least with every probability that is according to the law of nature, which is believed, to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling that is called the common sense of mankind. (*Lib.I, Cap.I, para.XII, 1*)

Hence, these two lines of proof serve to Grotius for inferring particular rules of the law of nature, and therefore not expressly these of voluntary law. But it will be proved that the second line can be useful also for deduction of rules of the law of nations, as a branch of human voluntary law.

It is important to underline that most of successors of Grotius during the seventeenth and eighteenth century followed his example in inferring their own rules of natural law, based either on "dictates of right reason" or on their perceptions of rational and social nature of man, or of both. Needless to say that these subjective statements of "unchangeable" rules of natural law, allegedly being of "eternal character", were not precise enough in order to govern legal relations of sovereign States.

Ascribing so much importance to rational and social nature of man in deducing individual rules of natural law, Grotius discarded the division in this unchangeable law between
the law common to animals and men and to a law peculiar to men only (Lib. I, Cap. I, para. XI, 1). He strongly linked his concept of the law of nature to men only, which appears in the books on Roman law and also at St. Thomas. "Man is, to be sure an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another." Among the features characteristic of man is an impelling desire for society (aptitutus societatis), that is, for the social life, "not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind." (Prolegomena, para. 6). Man unlike other animals, has in addition a special instrument - speech. "He has also been endowed with the faculty of knowing and acting in accordance with general principles." (Prolegomena, para. 7).

"This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligations to fulfill promises (promissorum implendorum obligatio), the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts." (Prolegomena, para. 8).

Grotius repeats elsewhere that - "it is a rule of law of nature to abide by pacts", - for it was necessary that among men there be some method obliging themselves and to another, and no other natural method can be imagined. (Prolegomena, para. 15).

He discards the assertion that expediency is allegedly the mother of what is just and fair. In his view - the mother of the law of nature is - "the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of the society." And the mother of civil law (i.e. municipal voluntary law) "is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law." (Prolegomena, para. 16).

Grotius also examines the assumption that right consists in that what is acceptable to the stronger, that is to say that law fails of its outward effect unless it has a sanction behind. This is
in fact the essential trait of all law in force for voluntaristic school of law during the nineteenth and twentieth century. To this Grotius cites Solon who admitted that the law-giver does not accomplish great results if he does not wisely combine force and law together. (*Prolegomena, para.19*).

Commenting this assumption, he has stressed that even law without a sanction is not entirely void of effect. "For justice brings peace of conscience, while injustice causes torments and anguish... Justice is approved, and injustice condemned, by the common agreement of good men. But, most important of all, in God injustice finds an enemy, justice a protector. (*Prolegomena, para.20*). In Grotius's view that is not the sole sanction. Even natural law was for him something more than precepts of ethics. Natural law, together with rules of the law of nations, which are closely interconnected, is a real law,¹⁸ in the sense that it is protected by true sanction.

The sanction lays in just war, being a sort of punishment of wrongdoer. There are according to Grotius three main justifiable causes of just or lawful war: defense, recovery of property and punishment (*Lib.II, Cap.I, para.2*). But not wishing to betray his belief in peace and tolerance, he nevertheless warns not to undertake even for just cause war rashly. Among these warnings are - that he who is not much stronger ought to refrain from exacting penalty; that the war is not to be undertaken unless in necessity and only for most weighty causes, at a most opportune time (*Lib.II, para.XXIV, 7-9*).

But as a matter of principle, Grotius is very determined: "Where therefore the punishment is just, all use of force necessary for the infliction of penalty is likewise just; and everything which is a part of the penalty, as the destruction of property by fire or by other means, is certainly within the limit of that which is just and befits the crime (*Lib.III, Cap.I, para.3, 3*). Here, and in regard to many customs of war that he explained, he permits the indiscriminate violations of rights of innocent individuals, mostly on the ground of lesser evil.

This kind of rules of human positive law seem to be in obvious contradiction with his idea of natural law derived from man's social nature.19

Nevertheless Grotius suggests, of the balance - not as a matter of law but merely as his propositions de lege ferenda - some temperaments or moderations in waging just war. These moderations are suggested in regard to the right of killing people, in laying waste, with respect to captured property, prisoners of war, in the acquisition of sovereignty, etc. (Lib.III, Cap.XI-XVI). And curiously enough, these propositions have influenced the later development of positive humanitarian international law more than all his precepts of the law of nature derived from reason and from man's social nature.

*  

3.3. Jus voluntarium

Let us get now into Grotian idea of voluntary law. The matter is of a kind of law, which has its origin in the will. Grotius further divides it into divine and human voluntary law (Lib.I, Cap.I, para.13).

*  

Divine voluntary law consists in the free will of God, which is, besides the source of nature, a separate source of law "to which... our reason tells us we must render obedience". According to Grotius, even natural law - comprising alike that which relates to the social life of man and which proceeds from the essential traits implanted in man - can rightly be attributed to God, "because of His having willed that such traits exist in us" (Prolegomena, para.12). "(B)y means of the law which He has given, God has made those fundamental traits more manifest, even to those who possess feeble reasoning powers" (Prolegomena, para.13). One can clearly reveal the same idea at St.Thomas.

Again, at another place of his book Grotius distinguishes the law of nature from divine voluntary law, which "does not enjoin or forbid these things which in themselves and by their
own nature are obligatory or not permissible, but by forbidding things it makes them unlawful, and by commanding things it makes them obligatory" (Lib.I, Cap.I, para.10, 2).

This kind of law has its origin in the divine law, and: "God does not will a thing because it is lawful (in Latin original text "justum"), but that a thing is lawful ("justum") - that is obligatory - because God willed it" (Lib.I, Cap.I, para.15, 1). This means that man must not judge these commands by his reason, he must simply obey them as they are.

"This law, moreover, was given either to the human race, or to a single people." To the human race, according to Grotius, it was given by God three times: immediately after the creation of man, after the Flood, and "lastly in the more exalted renewal through Christ" (Lib.I, Cap., para.15, 2).

Among all other peoples there is only one to which God graciously gave laws in a special manner. That is the Jewish people. Then follows an interesting explanation of Hebraic divine law to which Jews only are subject, unlike Christians and others, and a description of relationship of this special divine law and that, which was ordained by Jesus Christ (Lib.I, Cap.I, paras. XVI, XVII). This explanation might attract nowadays historians of religion only. Unlike Summa Theologiae it is not a part of any existing religious congregation in the world. This is the fate of his theologian writings, and of Grotius himself as a theologian.

*

Much more important is Grotian explanation of human voluntary law (jus voluntarium humanum), because it embraces the idea of international law. Human law is subject to the law of nature: "...Thus ownership, such as now obtains, was introduced by the will of man; but once introduced, the law of nature points out that it is wrong for me, against your will, to take away that which is subject to your ownership..." (Lib.I, Cap.I, para.X, 4).

There are three kinds of human law that is familiar to the greater number of men. There is "civil law" (jus civile) which emanates from the civil power, and which governs the State. In fact, that was still not the civil law in the present sense, but rather a kind of public law emanating from State's power. In that respect Grotius was not different of St.Thomas.

Besides "civil law" there are according to Grotius two bother human voluntary laws,
one which is less extensive, and another which is more extensive than "civil law". The first is subordinated to the law of the State and embraces orders given by father to his son, or by master to his slave or servant (Lib.I, Cap.I, para.XIV, 1).

The law more extensive than the "civil law" is the voluntary law of nations (jus gentium). It comprises rules which acquired obligatory force by means of the will of all peoples or at least of the will of several peoples. He emphasizes "several", because except the law of nature, which is also called jus gentium, it is almost impossible to find other law, which is common to all peoples. That what is the law of nations in one part of the world very often is not in another, as with regard to prisoners of war (Lib.I, Cap.I, para.XIV, 1). The law of nations is proved by the same way as the unwritten "civil law", i.e. by a continuous usage and by the testimony of experts. Thus, it is a product of time and usage (Lib.I, Cap.I, para.XIV, 2).

Already in the introductory part of his book Grotius has done an extensive explanation of the law of nations: "...just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of their great society" (magnae illius universitatis) (Prolegomena, para.17).

And in the very first paragraph of his Prolegomena, Grotius inter alia speaks of customs accompanied with tacit agreements of men. It seems therefore, when discussing the law of nations as a branch of human voluntary law that Grotius has in mind customary law, established by a tacit agreement of all or of most States. It is not likely that what is stipulated in agreements, reached by States and princes, is also a part of jus gentium. Everybody is according to his teaching obliged to fulfill his promises on the basis of the law of nature, and not of the voluntary law.

Jus gentium is for Grotius something quite opposite to jus gentium in Roman law and in the mind of St.Thomas. In that former sense, it was a set of rules, believed to have a universal character, and was therefore a part of jus naturae, as is called by Grotius himself. In Grotian sense and up to the present time, jus gentium has been the public international law, agreed by
States and governing their mutual relations.

*  

According to Grotius, in so far as the voluntary law of nations, or *jus gentium*, is in conformity with the dictates of right reason, it is in fact assimilated into the law of nature, being its expression. It follows from the sum of his teaching that in case of a conflict, the law of nature should prevail because nothing else is superior to it. If it’s unchangeable rules cannot be challenged by the will of God, still less it can be abrogated by the practice of nations.20

Grotius was in fact unable to make a sharp distinction between these two legal categories, although he advocated it merely as a matter of idea. That was perhaps the inner reason that his entire system of the law of nations did not survive for a longer period.

In the introductory part of his book Grotius explained himself how he deduced legal rules: "First of all, I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in them manifest and clear, almost as evident as are those things which we perceive by the external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions requisite to perception are present..." (*Prolegomena, para.39*).

He acknowledged furthermore that he used the testimony of philosophers, historians, poets and orators. "...Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interests of their sects, their subject and their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations." (*Prolegomena, para.39*).

20 The main exception to that seem to be the savage customs admitted by Grotius as a part of positive law of warfare, which were in obvious contradiction to the law of nature. *Cf.*, REMEC, *op.cit.*, *supra*, n.18, p.242.
Some latter writers praised Grotius for establishing dichotomy between natural law and positive law of nations. They consider him in this sense as being in a way forerunner of modern international law.\textsuperscript{21} However, the foregoing method of inferring legal rules does not only demonstrate his inability to distinguish rules of these two separate categories. He was indeed not positivist in any modern sense, not because perhaps of his own conviction. In fact, he was unable in his own time to establish an entire system of positive rules of international law entirely based on consent of sovereign States. Their mutual practice, their agreements reached, and customary rules agreed, did not play a major part in law-creating in the seventeenth century, simply because they were too rare. In addition, the actual conduct of princes in their mutual relations was still largely irresponsible.\textsuperscript{22}

Then Grotius enumerates in detail thinkers and their testimony on the basis of which he deduced legal rules. Among philosophers, an outstanding place deserves in his view Aristotle (\textit{Prolegomena, paras. 42-44}). He follows in general the teaching of Aristotle on commutative and distributive justice ("\textit{justicia expletrix}", and "\textit{justicia attributrix}") from The Nicomachean Ethics (\textit{Lib.I, Cap.I, para.VIII}).

History is useful in two ways, because it supplies both illustrations and judgments (\textit{Prolegomena, para.46}). The views of poets and orators do not have so great weight. As he confessed, he frequently made use of them not so much in order to purport his own argument, as for adding from their words some embellishment to that what he himself wished to say (\textit{Prolegomena, para.47}).

For understandable reasons a weighty source for him were Old and New Testament, the synodal cannons and the works of Church Fathers, as well as those of Scholastics of which


\textsuperscript{22} That situation was perhaps the most accurately described by C. van VOLLENHOVEN: \textit{The Three Stages in the Evolution of the Law of Nations}, The Hague 1919, pp.1-21, as being its first stage.
there has been discussion (Prolegomena, paras 48-52). Among legal books he quotes Pandects, the Codes of Theodosius and Justinian, and Novelae. He referred to a huge number of his predecessors, like Accursius, Bartolus, Covarrubias, Vaskes, and many others until Jean Bodin.

Grotius finished the introductory part of his book with the following statement: "I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty which I have assumed in passing upon the opinions and writings of others. They who shall find me in error will not be quicker to advise me than I to avail myself of their advice. And now if anything has here been said by me inconsistent with piety, with good morals, with Holy Writ, with the concord of the Christian Church, or with any aspect of truth, let it be as if unsaid." (Prolegomena, para.61).

Before that ultimate acknowledgment Grotius stated: "If anyone thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me injustice. With all truthfulness I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact." (Prolegomena, para.58).

This acknowledgment is hardly conceivable to a modern lawyer who is always eager to compare abstract norms of international law with actual politics of States, based on power relations. Yet this position is understandable having in mind that the ultimate goal of Grotian system of the law of nations was the prevention and resolution of armed conflicts. Grotius, thus, did not want to give rise by his writings to new disputes and mischief. He was definitely a man of peace and tolerance.

*  

3.4. Summing up

Hence the process of creation and formulation of legal rules by Grotius and his followers was based almost entirely on deduction. His law of nations was of a too much speculative character.

It was already underlined that he sought to find solutions with his monumental work of
the problems of his time. That was the period of the bloody Thirty Years War, a product of religious intolerance. Unfortunately, history has proved that every single war is a victory of human arrogance and stupidity over reason. Thus, legal rules inferred from reason and from man's social nature could not in themselves defeat human corruption and wickedness.

It would be an exaggeration to pretend that the book of Grotius was a direct source of rules of international law of his time and that which followed him. The reality seems to be quite different. His book was much more though at universities than it served for practical purposes to legal practitioners in their everyday business. A very small part of his teachings transformed latter on into rules of positive international law. It was first the doctrine of mare liberum and some temperamenta that he suggested in warfare. Hence, until the present time, Grotius has had an ill fate of being more glorified than read.

Nevertheless, from his outstanding intellectual and noble achievement ensued the first great system of rules of the Law of Nations. Grotius thus paved the way for its further development, though on an entirely different basis. He thus deserves the title of being father of international law.

* * *

We must finally assess Grotius as creator of rules of the law of nature in particular. As was said, St.Thomas resorted like Grotius to reason and to a lesser degree to man's social nature, in order to deduce rules of natural law. But these rules were for him nothing more than an imperfect and very partial human perception and sharing of intelligent creatures in the Eternal Law. That is because of the argument that superior rules of Eternal Law only God know in his own mind. Unlike St.Thomas, Grotius unreservedly deduced rules of natural law from

---

23 Van Vollenhoven, *op.cit., supra*, n.22, p.20, said: "...What new decrees do we find inserted in the Law of Nations about 1625 and about 1770? Regulations regarding maritime warfare, contraband, blockade, right of search, prize, trade of neutrals, navigation to the colonies in time of war and the like. What of all this can be traced back to Grotius? Nothing... The Netherlands, France and England are again and again confronted by new problems in their dealings with tropical empires and nations; when do they suffer themselves to be guided by Grotius's rules? Never...”

human reason and from man's social nature.

Thus, supposedly there really exists a set of legal rules of objective nature. In St. Thomas's mind human reason serves as an unreliable tool for their perception, while for Grotius these rules are identical to human reason.

Grotius was followed in that by some of his successors. They wrote equally or even more extensive treatises on the law of nature. Mention deserve here Samuel Pufendorf (1632-1694) with the book *De jure naturae et gentium libri octo* of 1672, and Christian Wolff (1679-1754) first with his five volumes of *Jus naturae methodo scientifico pertractatum* published between 1740 and 1748, followed with new five volumes of *Jus gentium methodo scientifico pertractatum*.

All these authors believed in immutable and eternal character of rules of the law of nature. All of them furthermore believed that all these rules were superior to any human law, regardless the power of sovereigns who had to enact and support them by temporal sanctions.

But being subjective perceptions of their authors, these statements of rules of natural law were mutually inconsistent, imprecise, and of a too general character for practical purposes in order to regulate human affairs. As such, they did not seem to be either unchangeable or eternal. Besides, there was no empirical proof of superiority of these subjective revelations of natural law over commands, which were issued by power of sovereigns and protected by their force. This feature of a blurred content and scope of natural law was already disclosed in the eighteenth century by Emmerich de Vattel.

Maybe the most important mischief of Grotius and his followers was the fact, that for more than two centuries to come they discredited all ideas of objective law, which could exist apart from sovereign will of States. And above all, inaugurating the subjectivism of scholars in formulating rules of natural law, Grotius unwittingly opened the door to another kind of subjectivism, to unlimited voluntarism in law-creating by sovereign States.

*
4. EMMERICH DE VATTLE (1714-1767)

The author who exerted a more lasting influence than Grotius on the practice of States, and who was more often cited as authority in international arbitral awards, was Swiss Emmerich de Vattel.\textsuperscript{25}

This successful diplomat and courtier of lively spirit and elegant style bridged the classical science with modern epoch in international law. His book - \textit{Principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains} - was first published in 1758.\textsuperscript{26}

That book could probably never appear without the works of the predecessor of Vattel, German philosopher, mathematician and jurist, Christian Wolff, who was already mentioned. Wolff was one of last universal scholars, such as were before him St.Thomas and Grotius. Unfortunately for him, and happily for Vattel, he was one of last writers in Latin language. In Wolff's time Latin gradually fell into oblivion in favor of French and other spoken languages.

Wolff was perhaps the greatest visionary in international law among German legal writers of all times. But his thought was too deep; his expression was dry and not easy to understand. That was the reason that his voluminous writings remained largely unknown except for a very few erudite of his own time.

Vattel, who was like Wolff a philosophic disciple of Leibnitz, had first intention to be a translator and commentator of monumental work of Christian Wolff. The book, which he wrote, was something between a compilation of Wolff's ideas and his own critical and original thoughts. Some parts of his book consist in a free interpretation of concepts of Wolff, accompanied with fresh and penetrating views. But on some essential issues Vattel strongly criticizes,

\textsuperscript{25} It is significant that Vattel gained a very great authority in English speaking countries. A. NUSSBAUM, \textit{supra, op.cit.}, n.16, p.161, exposes a statistics of citations of authorities in pleadings by American cases decided in the period between 1789 and 1820 only. Grotius was cited 16 times, Pufendorf 9, Bynkershoek 25, and Vattel 92 times.

\textsuperscript{26} We shall cite from now the translation by Charles Fenwick, published by the Carnegie Institution of Washington - E. de VATTLE: \textit{The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns}, Washington 1916. Very useful for its research is the extensive introductory text to this edition, written by Albert de Lapradelle.
derides and repudiates the ideas of his teacher on the basis of arguments, which seemed to be acceptable to many generations after him. He had an equally critical stand towards Grotius and other naturalist writers.

Here is one important example. The basic thesis of Wolff - for which he was discarded by German disciples of Hegel in the nineteenth and twentieth century - was his idea of *Civitas maxima* ("Great civil society", or "great republic"), to which all nations of the world allegedly belong. According to Wolff it is essential to every civil society that each member should yield certain of his rights to the general body and that there should be some authority capable of giving commands, prescribing laws, and compelling those who refuse to obey.

In the Preface of his book Vattel rejects that idea of *Civitas maxima* as unsound: "Such an idea is not to be thought of as between Nations. Each independent State claims to be, and actually is, independent of all the others". On that way he deprives in fact the natural law of any sanction proceeding from itself. Nevertheless, he affirms the right of all Nations to unite themselves on their free will against one which openly contempt justice (*Book II, paras 53 and 70*). On the basis of originally Vattel's but not Wolff's idea were latter established the Holy Alliance in 1815, and the League of Nations and the United Nations Organization in the course of twenties century. However, the international practice proved that these free associations of sovereign States with the purpose of punishing offenders of international legal order are not too efficient in the long run.

Vattel was a legal writer of individualism and liberalism, and a herald of capitalism. He did not always clearly discern the term of "Nation" from that of "State," and he mostly used them as synonyms. But he definitely distinguished the notion of sovereignty of a State from the international personality of its ruler, which he in fact discards.

He never undermines the fact that each Nation is composed of free individuals: "Nations or States are political bodies, societies of men who have united together and combined their force, in order to procure their mutual welfare and security" (*Book I, Introduction, para. 1*).

---

The objective of a good government is to procure the true happiness of the Nation (*Book I, Chap.XI*) and not of sovereign himself. "The end or aim of civil society is to procure for its citizens the necessities, the comfort, and the pleasures of life, and in general their happiness; to secure to each the peaceful enjoyment of his property and a sure means of obtaining justice; and finally to defend the whole body against all external violence." (*I, para.15*).

State is furthermore a political body of citizens based on constitution (*I, paras 26, 27*). "(H)ence the chief interest of a Nation which forms a political society, and its first and most important duty to itself, is to choose the best possible constitution, and the one most suited to its circumstances..." (*I, para.28*). The Nation has the right to change the constitution, and those who dissent are at liberty to leave the country.

"Every man has the right to leave his country and take up his abode elsewhere, when by so doing he does not endanger the welfare of his country. But a good citizen will never take such a step without necessity or without urgent reason. It is dishonorable to take advantage of one's liberty and abandon one's associates upon slight grounds, after having received considerable benefits from them..." (*I, paras 220*).

From the postulate of equality of men Vattel shrewdly deduced the principle of equality of all States. That on the following reasons: "Since men are by nature equal, and their individual rights and obligations are the same, as coming equally from nature, Nations which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom." (*Intr., para.18*). And therefrom the principle of non-intervention: "...foreign Nations have no right to interfere in the government of an independent State..." (*II, para.57*).

On such a very modern legal basis Vattel develops his own theory of mutual rights and duties between Nations. His concept of the Law of Nations is based on the right of each State to self-preservation. That is in fact supreme duty of any Nation towards itself (*I, paras 13, 14*). From this individual right proceeds the common and mutual duty to respect the preservation of
others (*II, para.4*). It must however be acknowledged that it was Christian Wolff who was the author of the modern theory of fundamental rights and duties of States, based on his naturalist concept of *Civitas maxima*. As was stressed, Vattel rejects this idea in favor of sovereignty and liberty of all States. However, the supreme duty of self-preservation in order to avoid conflicts claims in his mind the respect of the same right of others.

He, however, asserts a set of far reaching duties or offices of humanity between Nations in order to provide their co-existence: "...(M)en united in society, remain subject to obligations of the Law of Nature. This society may be regarded as a moral person, since it has an understanding, a will, and a power peculiar to itself; and it is therefore obliged to live with other societies or States according to the laws of natural society of the human race, just as individual men before the establishment of civil society lived according to them; with such exceptions, however, as are due to the difference of subjects." (*Intr., para.11*). "The general law of this society is that each member should assist the others in all their needs... just as men have the duty to add and assist one another" (*Intr., para.10*). "The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations" (*Intr., para.13*).

He then enumerates some common duties between Nations. Each Nations "should assist another Nation suffering from famine and other disasters" (*II, para.5*); it should impart its laws to others "when the occasion arises" (*II, para.6*); it has a general obligation to trade with others (*II, para.21*), and should not monopolize the trade (*II, para.24*); it should foster the institution of consuls (*II, para.34*); it should furthermore give assistance to an oppressed people who asks for its aid against insupportable tyranny (*II, para.56*); etc.

The matter is here of far reaching obligations which, do not seem at the first glance to be in perfect harmony with the sovereignty and liberty of each State. But Vattel finds the solution to this dilemma on his own way: "In consequence of that liberty and independence it follows that it is for each Nation to decide what its conscience demands of it, what it can or cannot do; what it thinks well or does not think well to do; and therefore it is for each Nation to consider and determine what duties it can fulfill towards others without failing in its duty
towards itself." (Intr., para.16). Furthermore, "in any matter which a Nation can manage for itself, no help is due it from others" (II, para.3). And finally: "The surest means of succeeding in this duty is for each one to labor first for himself and then for others" (ibid.). Hence, egoism takes precedence over altruism. And, although a Nation has a duty to contribute to the advancement of others (II, para.6), "it has no right to force them to accept its offer of help" (II, para.7).

Duties towards others are further weakened by the right of necessity, the distinction of perfect and imperfect rights, and by Vattel's own definition of natural, i.e. "necessary" Law of Nations.

*

The right of necessity "is the right which mere necessity gives to certain acts, otherwise unlawful, when without the doing of these acts it is impossible to fulfill an indispensable obligation" (II, para.119). Here are comprised first of all obligations which a Nation has towards itself. And thus, the exercise of this right overwhelms all duties towards others.

"When, therefore, a Nation is in absolute need of supplies of food at a just price, it can force its neighbors, who have an over-supply, to furnish its food at a just price" (II, para.120). It means that therefore such a Nation decides itself what is "just price". "Likewise, if a Nation has urgent need of vessels, wagons, horses, or even of the personal labor of foreigners, it may make use of them, by force if consent cannot be had, provided the owners are not under a like necessity themselves..." It must pay for the use it makes for them "if it is able to do so" (II, para.121). On the example of Sabinians, a "Nation of men is... justified in procuring women, who are absolutely necessary to its preservation", because it cannot maintain its continuous existence except by procreation of children. However, no Nation is obliged to furnish Amazons with men. "That nation of women, if it ever existed, put itself, by its own fault, in a position where it could not maintain itself without foreign help." (II, para.122).

Necessity furthermore permits the right of forcible passage over foreign private property. "But if the owner is compelled by an equal necessity to refuse you access the refusal is just, since his right prevails over yours". Equally, if the vessel under stress of weather is
carrying persons infected with the plague, the owner of the port may drive it off by firing upon it (II, para.123). It seems obvious that the right of necessity thus exercised, belongs to the Nation, which is in actual circumstances more powerful.

* 

The duty to offer help to others is even more restrained by Vattel's distinction of internal and external obligations, and likewise of perfect and imperfect rights. Christian Wolff established that last distinction, but Vattel attributes to it his own interpretation. The basis of this distinction by Vattel lays in the fundamental right to self-preservation, in regard to which the duty towards others is always an exception to the rule.

"...Obligations are internal in so far as they bind the conscience and are deduced from the rules of our duty; they are external when considered relatively two other men as producing some right on their part. Internal obligations are always the same in nature, though they may vary in degree; external obligations, however, are divided into perfect and imperfect, and the rights they give rise to be likewise perfect and imperfect. Perfect rights are those, which carry with them the right of compelling the fulfillment of the corresponding obligations; imperfect rights cannot so compel. Perfect obligations are those which give rise to the right of enforcing them; imperfect obligations give but the right to request."

"It will not be easily understood -- Vattel proceeds -- why a right is always imperfect when corresponding obligation depends upon judgment of him who owes it; for if he could be constrained in such a case he would cease to have right of deciding what are his obligations according to the law of conscience. Our obligations to others are always imperfect when the decision as to how we are to act rests with us, as it does in all matters where we ought to be free." (Intr., para.17).

Thus, according to Vattel, a mere possibility of requesting some office from others is still a "right", but as being "imperfect", it is of little use because it cannot be enforced. The most important of all is that on this concept Vattel based his theory of mutual rights and duties of Nations.

Following his teacher Christian Wolff, Vattel advocated a mode of transformation of
imperfect into perfect rights. That is by means of treaties. That mode is at the same time a way of providing the respect of a right based on natural law itself: "Under the conviction of the little reliance that can be placed upon the natural obligations of political bodies and upon the mutual duties which their moral personality imposes upon them, the most prudent Nations seek to obtain through treaties that help and those benefits which would be secured to them by the natural law where that law not rendered ineffective by the mischievous designs of dishonest statement." (II, para.152). In this very quotation Vattel reveals his personal view on the force of natural law itself.

And inversely, in regard to a perfect right treaty is not indispensable, although it still can be useful: "Treaties by which a Nation merely agrees not to do any evil to the other contracting party, to refrain from injury or offense, are not necessary and create no new rights, since each of the parties already possess a perfect natural right to resist an injury, affront, or real offense of any kind. Nevertheless, it may be of great use, and at times necessary, to have such treaties with those uncivilized Nations which think themselves at liberty to treat foreigners as they like..." (II, para.171).

*  

After all what was explained there is no dilemma with regard to Vattel's ideas on the Law of Nature, and on the Law of Nations as being its part.

The Law of Nations (Droit des Gens) is in its origin nothing else but - "the Law of Nature applied to Nations" (Intr., para.6). As such, it is not subject to changes (Intr., para.8), and therefore - "Nations can not alter it by agreement, nor individually or mutually release themselves from it" (Intr., para.9). So far Vattel did not disagree with his naturalist predeces-sors.

But the application of a rule cannot, according to him, be "just and reasonable" unless we do not take account of differences of subjects to which it is applied. In this respect he gives some precision on the relationship between abstract rules of natural law and his concept of the Law of Nations which is based on them: "A civil society, or a State is a very different subject from an individual person, and therefore, by virtue of natural law, very different obligations and
rights belong to it in most cases. The same general rule, when applied to two different subjects, cannot result in similar principles... Hence there are many cases in which the natural law does not regulate the relations of States as it would those of individuals..." (Intr., para.6).

After this far-reaching reservation, Vattel offers more precision in regard to natural law that is applied by Nations. In order to distinguish it from the positive Law of Nations, he calls it necessary law (droit nécessaire): "Thinks which are just in themselves and permitted by the necessary Law of Nations may form the subject of an agreement by Nations or may be given sacredness and force through practice and custom... But all treaties and customs contrary to the dictates of the necessary Law of Nations are unlawful..." (Intr., para.9). States are therefore supposed to have right to seek the respect the rules of necessary law, as being probably a kind of jus cogens.

It seems however that even all rules of this kind do not give rise to perfect rights, because Vattel's general reservation applies even to them: "Since Nations are free, independent and equal... each has the right to decide in its conscience what it must do to fulfill its duties..." (Intr., para.21; cf. also para.16).

The positive Law of Nations proceeds, according to Vattel, from the agreement of States, and it is of three kinds: "the voluntary law" proceeding "from their presumed consent"; the conventional law which proceeds from their express consent; and the customary law issued from their tacit consent.

This trichotomy roughly corresponds to the tree main sources of international law, which were first provided in 1920 in Article 38(1). of the Statute of the Permanent Court of International Justice. They are: general principles of law, conventions and customary international law.

"And since there are no other modes of deducing a law from the agreement of Nations, there are but these three divisions of the positive Law of Nations", was Vattel's conclusion (Intr., para.27).

Vattel thus draws logical conclusions from the speculative character of rules of the Law of Nature as being deduced by Grotius and his naturalist successors, and that in favor of
sovereignty, equality and liberty of Nations and States. Although he preaches the necessary law as allegedly being immutable and superior to the positive Law of Nations, he in fact pays a lip service to it. He eventually reduces it into a pure morality, whose observance depends exclusively on the conscience of States, and of their rulers, if any.

By his doctrine Vattel has set up the firm bases for voluntarism in law-creating by sovereign and free States since the nineteenth century onward. That voluntarism has wiped out all remnants of natural law in theory as well as in practice.

*  

5. A SHORT-LIVED RENAISSANCE OF NATURAL LAW  

5.1. Codifying efforts in the period of the French Revolution and afterwards

Near the end of the eighteenth century in which both Wolff and Vattel lived, in a period which roughly corresponds with the larger period of the French Revolution, a revival of natural law has ensued. That short time has left to the humanity some legal texts in written form of lasting importance. That period does not seem to be evaluated enough by legal historians. But the celebration of bicentenary of the French Revolution in 1989 threw some light on it.

It was the period of fecund law-creating between two epochs: the time of subjective and free determination of rules of natural law by scholars, and the time which followed that of voluntaristic creation of positive law by sovereign States. The matter was in fact of an era of sublimation of natural law itself, and of genius transformation of its precepts into written rules of positive law.

These rules, which were provided in constitutions, codes and declarations, were couched in a very precise language and were in perfect harmony with man's rational and social nature, as well as with the reason. They were free both of excessive subjectivism of their drafters and of inhumane voluntarism of sovereign States. In fact they all restrain arbitrariness of State power. Their roots in natural law are proved, either by their lasting duration as parts of positive municipal law, or by their incorporation into positive international law in recent times.
after long years of their oblivion.

The first of these acts has little immediate importance for international law, but is worth of mentioning as an example. That is the Constitution of the United States of America, adopted in 1787 and entered into force in 1789. During two long centuries it governs all relations between the Union government and its component States. The equilibrium between legislative, executive and judiciary power within the Union was so carefully provided, that it efficiently prevents all anti-constitutional changes and tyranny. That text of seven large articles, with 26 amendments adopted so far, and with the practice of the U.S. Supreme Court in its interpretation, makes of it always modern and living constitution which has survived all political, social, economic and technological changes during two hundred years.

In the aftermath of the French Revolution ensued a movement of codification of Civil Law in the Continent of Europe, first in Prussia in 1794, then in France in 1803, in Austria in 1812, etc. The codification encompassed much earlier codified rules of Roman law, local statutes and customs, judicial practice, etc. But the rules as codified did not exceed the limits of the reason. Hence the French Civil Code of 1803 has survived all latter constitutional and political turmoil in France until present days.

France in fact was not equally successful with its constitutional acts, to the extent that even the present Constitution of the Fifth Republic of 1958 does not seem to be the last one. But during that long period of almost two centuries, the Civil Code of 1803 has never been abrogated. Its extensive text of some 2281 articles has been occasionally amended by new enactments and by new judicial interpretations. It has been on that way permanently adjusted to changing economic, social and political circumstances. Nobody even now in France seeks its recasting, or a new codification of Civil Law. Its original text is a masterpiece of precision, clearness and simplicity. It is literally intelligible to every person, that what cannot be asserted for some recent instruments adopted by the UN General Assembly.

The codified civil law in France and in other countries has introduced necessary precision in legal concepts and rules, which before that time offered only Corpus Juris Civilis, compiled between 529 and 535 A.D. under Byzantine Emperor Justinian. Modern international
law owes much to these codified municipal legal rules for the development of its own concepts and institutions, and for its own consolidation as a system of legal norms.

International arbitrators applied these concepts and principles from municipal civil law by analogy already in the nineteenth century, who then lacked the substantive rules of international law. Since 1920 they figure as one of independent sources of that law in Article 38(1c) of the Statute of The Hague Court, as being "general principles of law, recognized by civilized nations". There will be more discussion on them.

5.2. Declaration of the Rights of Man and of the Citizen of 1789

However, the most important domain of sublimation of rules of natural law and of their transformation into written rules in that period, were legal texts concerning human rights. To this stream belongs the American Declaration of Independence of 1776. But far most important is, no doubt, the Declaration of the Rights of Man and of the Citizen. The French National Assembly has approved it on 26 August 1789, therefore less than a month subsequent to the storming of the Bastille.

That Declaration is again a masterpiece of concision, clearness and precision, entirely based on reason and on rational and social nature of man. Here is its entire text in English translation.28

"DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, 1789

The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, inalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be respected, and lastly, in order that the grievances of cit-

izens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.

Therefore the National Assembly recognizes and proclaims in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen:

**Article 1.** Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

2. The aim of all political associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

3. The principle of all sovereignty resides essentially in the nation. Nobody nor individual may exercise any authority which does not proceed directly from the nation.

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

5. Law can only prohibit such actions as are harmful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representatives, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

7. No person shall be accused, arrested, or imprisoned except in the case and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offence.

8. The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence.

9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.
10. No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

11. The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

12. The security of the rights of man and of the citizen requests public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted.

13. A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion of their means.

14. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.

15. Society has the right to require of every public agent an account of his administration.

16. A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

17. Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified." 29

This Declaration has proved to be of a historical and lasting importance first of all because it does not provide only rights of individuals. Its legal and trans-temporal value rests upon an ingeniously conceived balance between affirmations of rights and of duties. Without

---

29 It seems nevertheless that exactly this right has not been later on proved as inviolable and sacred in the sense of this article. Thus, Article 1(2) of the Protocol to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms of 1952, after proclaiming this right, has added the following reservation: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." Some restrictions to this right were provided also in Article 21 of the American Convention on Human Rights "Pact of San José, Costa Rica", of 1969.
statement of interlinked duties, its account of rights would very soon fall into oblivion.

We find in this text first of all, duties of individuals in regard to their alike (Art.4). Then are provided duties of political associations and other bodies in regard to individuals (Art.2 and 3). Not less important are statements of obligations of State legislative and other bodies in favor of freedoms and rights of individuals (Art. 5, 7, 8, etc). Exactly these obligations, formulated on such a way, have a superior value even to constitutional acts of States. No democratic majority expressed by a referendum, nor a majority of representatives in a legislative body should modify, abrogate, suspend or restrain these duties without dangerous risks.

This Declaration is therefore in fact a declaration of duties, i.e. obligations, in regard to man and the citizens. Hence it is more than a simple declaration of rights. That is its primary advantage.

Curiously enough, this Declaration proved to be of little value in the very years of the Revolution in France. During the Reign of Terror by Jacobins in 1793 and 1794 it was not more than a piece of paper. And even after 1815 and 1830, the adoption of its basic guarantees in constitutions, in penal laws and laws on procedure, and their implementation, were a slow, durable and painstaking process in France itself.

It is however interesting that all subsequent attempts in France to reformulate and expand civil and political rights proved unsuccessful. It was already tried in the framework of the Gironadin Draft Constitution of 15 and 16 February 1793;\(^{30}\) then within the Montagnard Constitution of 26 June 1793;\(^{31}\) and many years later in the Draft Constitution of the Fourth Republic of 19 April 1946,\(^{32}\) which was rejected by the subsequent popular referendum in the same year. The Constitution of the Fourth Republic of 28 October 1946 has solemnly con-

\(^{30}\) That was the draft of "Declaration of Natural, Civil and Political Rights of Man" in 33 articles.

\(^{31}\) The matter was of the text of the "Declaration of the Rights of Man and of the Citizen" in 35 articles.

\(^{32}\) That was the "Declaration of Rights", comprising first thirty-nine articles of that Draft Constitution. Articles 1-21 related to freedoms, and articles 22-29 provided social and economic rights of citizens.
firmed rights and duties of the citizens from the Declaration of 1789, and on this ground this Declaration is the component part of the Constitutional Law of the present Fifth Republic as well.

The foregoing does not mean that the text of this Declaration offers readymade solutions to all complex problems of civil and political rights in a modern State. Nevertheless, the principles set up in it, taken in their context and in mutual relationship, are undoubtedly the necessary minimum of guarantees of human rights, which no responsible government should ever discard. Even more than that, its all-embracing text is fit for creative judicial interpretation in any time, in the light of changing circumstances of a society.

The substantive rights and duties from that Declaration of 1789 were later on adopted in constitutions and in statutory law of many other States. As such, they gradually generated into general principles of law as being recognized by all civilized nations. After entering into force of the UN Charter in 1945, these rights were codified and developed in the texts of international instruments, beginning with the Universal Declaration of Human Rights of 1948. There will be more words on this aspect too.

The text of the 1789 Declaration is worth of comparison with any modern international legal instrument. Such a comparison would certainly prove the advantage in clearness, precision and universal applicability of the French Declaration. It has encompassed in seventeen brief articles fundamental and the most important civil and political rights of individuals, as well as legal guarantees for their protection. It can directly be applicable as such now, as it was in 1789, and it will be equally applicable in centuries that come.

5.3. **Draft Declaration of the Law of Nations of 1795 by Abbé Grégoire**

In that very period of the fertile synthesis of natural and positive law, ensued an attempt of codification of principles of international law, on the same naturalist basis. The matter was of the Draft Declaration of the Law of Nations, formulated and proposed by Abbé Grégoire to the French National Convent on 4 Floréal of year III (23 April, 1795). It has however never
been submitted to vote.\textsuperscript{33}

That text, taken as a whole, is not so much congruous, articulated and clear, as is the 1789 Declaration. It still remains as an excellent example of setting forth principles of natural law in the best tradition of that school. It is for this reason of primary importance for our topic.

Curiously enough, Abbé Grégoire had no legal education. In formulating his Draft Declaration he has obviously been inspired by the book of Vattel. One can even discern the same phrases at both of them, couched in French. It is less likely though not excluded, that Abbé Grégoire had a direct access to the writings of Christian Wolff. However, as will be seen, he entirely ignored the doctrine of Vattel on the right of necessity, and the doctrines of both Wolff and Vattel on duties of a Nation towards itself and on the division between perfect and imperfect rights. It is therefore the most likely that Abbé Grégoire inherited wolffian universalism, solidarism and altruism through individualist and egoist teaching of Vattel, that what a paradox is in itself.

Here is our translation of that Draft Declaration into English:\textsuperscript{34}

\begin{quote}
"DRAFT DECLARATION OF THE LAW OF NATIONS OF 1795

1. Peoples are mutually bound by the Law of Nature; their common link is universal morality.\textsuperscript{35}

2. Peoples are respectively independent and sovereign, whatever the number of individuals they count and the extent of the territory they occupy.

This sovereignty is untransferable.

3. A people must behave in regard to others just as he likes that others behave in its
\end{quote}


\textsuperscript{34} Cf., original French texts - LE FUR - CHKLAVER: \textit{Recueil de textes de Droit international public}, deuxième édition, Paris 1934, pp.68-69.

\textsuperscript{35} Taking into account vattelian language of which Abbé Grégoire was strongly inspired, this seems to be adequate translation of original wording: "Les peuples sont entre eux dans l'état de nature; ils ont pour lien la morale universelle". The rest of this text does not raise difficulties.
own respect; the duties which a man owes to other men in the same way a people owes to other peoples.

4. Peoples must do one to another in time of peace as much as good, and in war the least possible evil.

5. Particular interest of one people is subordinated to general interest of the mankind.

6. Every people have right to organize and to change the forms of his own government.

7. A people has no right to interfere in the government of others.

8. Only those governments are consonant to rights of peoples, which are based on equality, and freedom of their respective citizens.

9. That what is inexhaustible and innocent in use, as is the sea, belongs to all peoples and cannot be taken into possession by anyone of them.

10. Every people is master of his own territory.

11. The immemorial possession constitutes the right of prescription between peoples.

12. A people have right to forbid the entrance of foreigners into its territory or to send them back, when its safety so requires.

13. Foreigners are subject to the laws of the country and may be punished accordingly.

14. The expulsion for crime is an indirect violation of foreign territory.

15. Ventures against the freedom of one people are the outrages against all others.

16. The leagues whose aim is an offensive war, treaties and alliances that can be hurtful to a people's interest, are outrages against the mankind.

17. A people can undertake a war in defense of its sovereignty, its freedom and its property.

18. Peoples involved in a war must not obstruct the free course of negotiations appropriate for bringing peace.

19. Public agents whom peoples send one to another are independent in regard to laws of the country into which they are sent in everything which relates to the object of their mission.

20. There is no priority between public agents of peoples.
21. Treaties between peoples are sacred and inviolable."

Almost all these draft articles concern peoples that are organized in States. Only principles from above paragraphs 6 and 8 relate to rights of a people within his own State. However, the rest of these draft articles consist in genuine principles of international law, governing relations between sovereign States. But all of them as provided in this text are of very diverse nature.

The principles from paragraphs 1 and 5 are of pure natural law, which takes for granted the existence of a firmly integrated international community, which has never existed as such. Similar to them are principles from paragraphs 3 and 4, which are merely moral precepts. The principle provided in paragraph 15 consists of an allegation, but it has latter been built into the collective security system of the League of Nations. It is now the basis of alliances of collective self-defense.

Wordings from paragraphs 11, 17 and 21 consist in rules of positive law, which are common to all municipal legal systems as well. They are therefore true general principles of law, as recognized by civilized nations, one of three formal sources of international law according to Article 38(1c) of the Statute of the International Court of Justice.

Principles sets forth in paragraphs 12, 13 and 19 have never been contested as being rules proper to positive international law.

Hugo Grotius had already endorsed the principle from paragraph 9 in his writing *Mare liberum* of 1609. But near the end of the eighteenth century, therefore exactly in the time of drafting this Declaration, it has been transformed through practice of leading maritime States into a rule of positive international law. On the contrary, principle from paragraph 20 had not yet been positive legal rule in 1795, but it became embodied into the positive international law at the 1815 Vienna Congress. Finally, according to our knowledge, the principle provided in paragraph 14 has never been a rule of positive law, and it has therefore always been a lex

---

36 The Congress has adopted on 15 March 1815 a "Règlement sur le rang entre les agents diplomatiques". It’s Article 4 provided that the diplomatic envoys shall take precedence in their respective class in the order of the date of the formal notification of the arrival of each of them.
Five remaining principles in that Draft Declaration seem to be of utmost importance for
relations among sovereign States and for very existence of international community of any
kind. They all imply restrictions of freedom of States to use force in accomplishing their
political objectives. The matter is of the principle of independence and equality of all States
(i.e. "peoples") (paragraph 2); the principle of non-intervention in internal affairs of another
State (paragraph 7); the principle of territorial inviolability of all States (paragraph 10); an idea
of prohibition of aggressive wars (paragraph 16); and the principle of peaceful settlement of
international armed conflicts (paragraph 18).

These five principles were in 1795 not more than a utopia, exactly as were moral
precepts in that Draft Declaration. After repulsion of foreign invasions, France itself had waged
numerous aggressive wars abroad. Napoleon sought event to impose his hegemony over entire
Europe.

And even after the final defeat of the Empire, the Vienna Congress of 1814-1815 had
reestablished the system of equilibrium which implied in order to be maintained: offensive
alliances and aggressive wars. The Holy Alliance discharged in its practice the three principles
of absolutism, legitimacy and intervention, which were contrary not only to the principles
proposed by Abbé Grégoire, but to the Declaration of the Rights of Man and of the Citizen as
well.

Hence, during more than a century the five above principles from the Declaration by
Abbé Grégoire were nothing else than a *lex ferenda*, exercising almost no influence on actual
legal relations of States. In that very period the wolffian concept of universal solidarity was
pushed aside in favor of vattelian teaching, based on individualism and egoism of sovereign
States. All States were by no means entitled to equal fundamental rights. The so-called non-
civilized States were deprived of them in law and in practice. The territories inhabited by "non-
civilized" peoples were considered as *res nullius*, open to colonial conquests and acquisition.
Their inhabitants were merely treated as accessory to the territory in which they lived.

And that reality of international relations, especially among European Powers, was the
cause of success of Vattel's book throughout the nineteenth century. It advocated subjective rights of States and their duty to self-preservation on detriment of *Civitas maxima*, which in actual circumstances virtually did not exist.

*  

6. VOLUNTARISM IN INTERNATIONAL LAW AND ITS IMPLICATIONS

6.1. Distinctive features of voluntarism in law-creating

The nineteenth century has radically discarded all relics of the teachings of the law of nature. The growing commercial and political relations between States could not anymore be based upon highly subjective and speculative rules of natural law created by each scholar for himself, following his own "dictates of right reason" or his perceptions of social nature of man. New international relations had necessarily to be based on infinitely more precise rules of positive law. The movement of codification of civil law in the Continent of Europe was a part of this process. However, it did not inherit in its beginning the latter shortcomings of voluntarism in law-creating.

Positive law of the nineteenth century was the product of virtually unlimited sovereign will of "civilized" States. Its observance was enforced by State's sanction. That sanction became the mark of distinction of any law. The State thus became the sole lawmaker, and it was in that subject to no superior legal rules, even to rules of positive international law to which it did not itself previously agreed.

Municipal law thus resulted from the will of one State and international law resulted from the wills of several or of majority of States.\(^{37}\) State was, in addition, the sole subject of international law of that time.

\(^{37}\) Following voluntaristic premises, rules of general international law are virtually impossible. But due to actual inequality of States, the situation was during the nineteenth century much different. Legal rules agreed in treaties by leading European Powers at the 1815 Vienna Congress, at the 1856 Paris Peace Conference, and the 1885 Berlin Conference, were universally respected as the generally accepted rules of international law. Weaker States did not venture to oppose this kind of law making. That was only since the 1899 Hague Peace Conference that started a movement of codification of legal rules with the participation of most or of all sovereign States.
Hence, no State could be legally obliged by any rule of international law to which it did not give its consent. As a consequence, only two sources of positive international law were then logically possible: treaties consented expressly by their parties; and customary rules consented tacitly by respective States. The stress was on subjective rights of individual States. Any concept of objective international law and especially implicit legal obligations of all States necessary for maintenance of a world legal order, were disdained and rejected altogether.

This insistence of consented legal rules had nevertheless some net advantages in comparison with previous conceptions of the law of nature. Its first merit was the precision of rights and obligations of States in their mutual relations. That reduced potential disputes on existence and scope of their mutual obligations, which should certainly arise if their basis were provided by a kind of natural law. General and multilateral conventions, universally adhered and providing normative legal rules were practically non-existent prior to the 1899 Hague Peace Conference.

Thus, J.L. Brierly has rightly stated that: "The real contribution of positivist theory of international law has been its insistence that the rules of the system are to be ascertained from observation of the practice of States and not from a priori deduction." And Charles De Visscher stressed that the indisputable merit of the positivist theory was of offering a clear and generally true picture of international relations in the period of relative stabilization that characterized the nineteenth century. The "ditch" which separated the normative picture from actual relations, which exists in all times, was in that period probably the narrowest.

The voluntarism - according to which no legal norm can be binding upon a State unless assented by it, was predominant in the doctrine of international law of that period. It was still


40 This voluntaristic approach was explained the best by the Permanent Court of International Justice in Lotus case of 7 September 1927, Series A, No.10, p.18: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with
the leading teaching in the period between two world wars, but then appeared a number of doctrines contesting it. After 1945 it became a mark of distinction of Soviet doctrine of international law with its leading representative Grigory Tunkin.41

However, even in the post-war times this approach was not confined by ideological boundaries. It is still widespread among scholars who dispute the existence of fundamental rights and duties of States, who challenge generating rules of general international law in customary process by a mere majority of States, and who discard the existence of jus cogens altogether.42

One of modern protagonists of vattelian concept of the Law of Nations was Prosper Weil from France. In his shrewdly done critical review of what he calls pathology of international normative system, many of his remarks and critical arguments seem to be well founded.

a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." Following this reasoning the Court held that Turkey was right arresting and prosecuting a French officer for collision of his ship with a Turkish vessel on the high seas.

Although the foregoing statement is nowadays cited as the authoritative, all subsequent general conventions on that subject matter rejected the Court's finding in the merits of that case. Hence, Article 97(1) of the 1982 UN Law of the Sea Convention states that: "In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of State of which such person is national."

41 It is likely however that after the demise of the Soviet Union the attitude of most Russian authors will join the prevailing universalist trend. That was in fact the tradition of the Russian doctrine of international law prior to the Revolution of 1917.

42 This last view is the mark of the so-called "moderate" positivists like Ch. ROUSSEAU, supra, op.cit., n.2, tome I, pp.150-151, and of some other scholars especially from the Anglo-Saxon World. Most of them fall into another trap. They do not recognize binding force of a legal norm on a State, which did not accept it either expressly or tacitly, on one hand. At the same time they all refer to judicial decisions as the proof of existence of actual legal rules, the same as in Common Law. That was in spite of the fact that most States have never recognized the jurisdiction of The Hague Court as obligatory on them.

This inconsistency only proves the trustworthiness of allegation of J.L. BRIERLY, op.cit., supra, n.6, p.56: "The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live."
He has, however, consistently advocated voluntaristic approach in its purest form, alleging that in all times of history the international law bore the stamp of an end, namely "to ensure the coexistence - in peace if possible, in war, if necessary - and the cooperation of basically pluralistic society". In his view the international society has always been, and it will be in future, ideologically pluralistic. He has thus implicitly or expressly denied common moral values of the humanity, and a fortiori the existence of rules of natural law. Therefore, the legal rules between heterogeneous and equal States emerge in order to temper this condition of anarchy and to enable them to live side by side, and "to cater to the common interests that did not take long to surface over and above the diversity of states."\(^{43}\)

According to Weil, "(i)nternational law will be unable to carry out its function of coordination unless it is neutral"\(^{44}\). That means religious, as well as ideological neutrality. Thus in a way, a mere absence of any objective rules of law, together with the voluntarism and "positivity" of legal norms (lex lata), seem to be a condition sine qua non that the international normative system can serve its purpose in an international society made up of juxtaposed egoisms.\(^{45}\)

Most legal advisors of governments equally esteem the voluntaristic approach to international legal order but on a highly selective basis. All depends in fact whether in question are duties or rights, burdens or advantages of their respective State. On the basis of voluntaristic arguments they will refute without much hesitation, specific obligations of their State that might arise from alleged rules of general international law. But they will never deprive their country for the sake of the same arguments of new rights, which might arise from that very set of rules of general international law.

Hence, since the time of signature of the respective 1958 Geneva Convention, all


\(^{44}\) Ibid., p.420.

\(^{45}\) Ibid., pp.422-423.
coastal States have claimed to be entitled to their own continental shelf. Its Article 2(3) provides that the rights over it "do not depend on occupation, effective or notional, or on any express proclamation". For the possession of these new areas of seabed and subsoil thereof by all coastal States, was required neither the formal entry into force of the 1958 Convention, nor the quality of being its party. That "instant custom" appeared by the mere adoption of its text at the 1958 Geneva UN Conference on the Law of the Sea.

But quite different was for instance the fate of the "equidistance and special circumstances principle" in matter of delimitation of continental shelf, provided in Article 6 of the same Convention. The Federal Republic of Germany has repudiated this rule on the ground inter alia, that it did not ratify the Convention, although it has previously signed it. It became obvious since then that third States to codification conventions can pick and choose in them what they want, while only incautious governments become their parties. This is a problem apart. But it proves the fact that voluntarism is not a panacea that might offer the best solutions to all legal problems in relations between States. And these relations should necessarily be based on good faith.

* 

6.2. Inhumane Laws

Law serves in many States as an instrument of oppression by totalitarian régimes, either of some particular groups, or of their entire population. Positivistic voluntarism and other modern doctrines like normative, did not propose a ground for denial of legal force of such laws that may refuse even the right to life to entire groups, or are based on discrimination of

---

46 Prior to that Convention a coastal State, which did not expressly proclaim it, was considered not to possess its continental shelf, just as is now the case with contiguous zone, exclusive economic zone, or archipelagic waters of archipelagic States.

47 Exactly this dissent from effectiveness and from the effective occupation as being necessary for the acquisition of new maritime areas is the deepest cause for a storm in the legal order of the seas, which happened after 1958. The 1982 UN Law of the Sea Convention has multiplied new legal regimes on the sea, seabed and its subsoil, adding to the existing ones: archipelagic waters, exclusive economic zone and the Area. That is a source of legal instability in itself. By this trend were reduced zones under the regime of the high seas, and those, which should become parts of the Area. This was in fact an example of world-wide law-creating against some legal precepts based on reason.
human beings on the so-called racial or similar bases. The carrying out of such laws has
tremendous inhuman consequences, but they are still "laws" according to voluntaristic and
similar teachings.

Likewise, in States, which until quite recently pretended to build “socialism”, law was
the instrument of the so-called "class struggle". The constitutional acts and legislation in these
States gave preference to some proclaimed economic, social and cultural rights over a genuine
respect of civil and political rights of all individuals as defined in the French Declaration of
1789. That situation ultimately produced poor results in accomplishing proclaimed "socialist"
objectives. Economic, social and moral crisis could not there be prevented. In these States
without separation of powers, the so-called "socialist law" virtually became an instrument of
oppression of the entire population by ruling bureaucratcic elites, and in some cases even by
dictatorial dynasties, which factiously exercised their unlimited power in the name of the
"working class".

It is in that respect not better in most Third World countries, and especially in some
Central and South American States, where their constitutional and legal system produced poor
results.

Crimes on massive scale and sufferings of innocent people thus cannot be prevented
when the law imposed by a State's will despises and contempt that what Grotius has imprecise-
ly defined as man's social nature.

The issue of World War II has already proved the inadequacy of voluntaristic doctrine
in practice. The judges of the Nuremberg and Tokyo Tribunals were unable to base their
verdicts on the rules of international law that were previously consented either by Germany or
by Japan. That was especially the case with rules providing responsibility of individuals for
crimes against peace and against humanity. But still these two Judgments were not acts of
arbitrariness and of revenge against defeated enemies.

More than the texts of these two Judgments, the inadequacy of voluntarism was proved
in the well-known Advisory Opinion of the International Court of Justice of 28 May 1951,
concerning the Reservations to the Genocide Convention of 1948:
"...The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations... The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention)..."48

The infamous atrocities committed during World War II, which the new Genocide Convention of 1948 has to prevent and suppress, have therefore proved the simple fact that beyond and above a set of legal rules which were consented by States, there still exist at least some superior principles of that what the Court called - moral law. These principles are recognized by civilized nations as binding on States, as it was stressed, without any conventional obligation. Hence, the crime of genocide is a crime in itself, and not because specific legal rules, consented by States, prohibited it or not.

Inhuman municipal laws and their large-scale consequences produced after 1945 an unprecedented development in positive international law, on which there will be latter more words.

*

6.3. Unreasonable Legal Rules

A second ill-fated phenomenon of the unlimited law-creating power of sovereign states is even more widespread than inhuman laws. The matter is of various legal norms devoid of precise legal contents, which cannot produce the expected legal effect by the lawmaker. They exceed the limits of that what Grotius loosely described as "reason".

Such "legal rules" form only a part of that what modern writers often call "soft law".49

There is no place to enter here into a detailed discussion with this doctrine in all its aspects. However, if this writer understands it correctly, there are some misconceptions in its core. Its

48 I.C.J. Reports 1951, p.23.

partisans seem to confuse the contents of rules with the form in which they find their expression. With regard to the aspect of form, the most important fact seems to be to them: whether a "norm" is provided in a formal treaty, or in a non-conventional instrument like a UN General Assembly resolution, or the 1975 Helsinki Final Act, or the matter is perhaps of a so-called gentlemen's agreements which allegedly bind their parties only politically, but not legally. From the very form of the act in question they draw the intention of its parties or authors on the legal scope of all norms provided in it. They, thus, roughly underestimate the will of parties as might be expressed in the very text of these provisions.\(^{50}\)

Thus, Prosper Weil obviously overestimates the form when asserting: "Whether a rule is "hard" or "soft" does not, of course, affect its normative character. A rule of treaty or customary law may be vague, "soft", but... it does not thereby cease to be a legal norm."\(^{51}\) He, however, deplored the phenomenon of the "soft law" in general, describing it among structural weaknesses of present normative system.

But the real problem is in contents, not in form. Formal treaties, which are indisputably governed by principles of the law of treaties as codified inter alia by the 1969 Vienna Convention, happen to provide in some of their provisions political objectives or postulates, or programs of co-operation of their parties expecting future specific agreements or decisions, or are simply more or less accurate statements of certain facts or allegations. They, thus, do not provide specific rights and specific obligations to any of addressees. Such "hortatory" or

\(^{50}\) It is thus not a pure accident that Grotius made a stress on promise, and not on pactum, when searching the ground of binding force of human engagements. In rich current international practice it is thus not always easy to divide formal treaties from the so-called gentlemen's or political agreements. And finally, in some international instruments in regard to which the obvious intention of their parties was not to conclude a formal treaty, there still may be expressed their firm intention to assume very specific obligations. This entire practice warrants the conclusion of the International Court of Justice in the Nuclear Tests case of 20 December, 1974, that: "With regard to the question of form... this is not a domain in which international law imposes any specific or strict requirements." I.C.J. Reports 1974, p.267, para.45. The Institute of International Law has dealt with the topic of "International texts of legal import in the mutual relations of their authors and texts devoid of such import", on the basis of reports of Michel Virally. Cf., Annuaire de l'Institut de Droit international 1983, Session de Cambridge, vol.60, tome I, pp.307-327. However, the Institute was not able to agree on a resolution on this issue. Cf., Annuaire... 1984, vol.60, tome II, pp.116-154, 285-291.

"programmatory" rules cannot produce expected legal effects by their parties, regardless the form in which they were agreed.

Certain examples can be explained from treaties of considerable political importance for the maintenance of international peace and security.

That was almost the entire text of the Hague Convention for the Pacific Settlement of International Disputes of 1899, and its enlarged new text of 1907. The latter is still in force among its parties. Its first article provides as follows:

"With a view to obviating as far as possible recourse to force in the relations between States, the contracting powers agree to use their best efforts to ensure the pacific settlement of international differences."

Then follow provisions on good offices and mediation, on international commissions of inquiry, on the Permanent Court of Arbitration and on arbitral procedure. The parties to this Convention did not assume however any obligation to submit their disputes to any of these methods of settlement. For the recourse to any of these procedures necessary is the existence of an agreement between disputing parties. Hence, the only genuine legal obligations for its parties relate to nomination of four persons in the list of potential arbitrators, to support the expenses of the International Bureau of the Permanent Court of Arbitration, and to take part once a year in deliberations of its Permanent Administrative Council.\(^52\)

Exactly of the same scope was Article 8 of the Covenant of the League of Nations of 1919, concerning plans for reduction of armaments of its Members. It was provided at the time as one of cornerstones of that system for maintenance of international peace and security.\(^53\)

Not much better is with the Chapter VII of the UN Charter of 1945. It is to the Security Council to determine in each particular case the existence of threat to the peace, breach of the

\(^{52}\) Thus within the Permanent Court of Arbitration permanent is only its International Bureau.

\(^{53}\) Article 8 of the Covenant reads as follows: "1. The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations. -- 2. The Council, taking account of geographic situation and circumstances of each State, shall, formulate plans for such reduction for the consideration and action of several Governments. -- 3. Such plans shall be subject to reconsideration and revision at least every ten years..." These plans have never been agreed.
peace, or an act of aggression in order to put collective measures of member States into operation. If because of negative vote of a single permanent member of the Security Council such a decision is not reached, the collective action fails. The same is when there is no political will at the majority of member States for such an action.

According to Article 45 of the Charter, all UN members are bound to hold national air-force contingents for combined international enforcement action on the call of the Security Council. To this end was provided conclusion of agreements of member States and the Security Council. But because the Security Council was unable to reach these agreements, all specific legal obligations in taking part in collective measures remained a dead letter.

The Charter hence provides itself that the entire system from the Chapter VII, which is based on definite legal obligations of all member States -- may be blocked by any permanent member or by majority of members in the Security Council. And when doing so, these members do not violate any of their legal obligations as provided in the Charter. For that very reason very few ordinary members of the United Nations have until now violated their obligations assumed by the Charter, but the entire system simply did not work in practice.

Such "rules" being empty nutshells, are even more widespread in non-conventional instruments like in the part of the Helsinki Final Act of 1975, which consists of the program of cooperation, or in some declarations of the UN General Assembly.54 "Programatory rules" became recently present also in constitutions and municipal legislation of many States.

* *

Even the International Court of Justice did not resist in its recent practice to the temptation of setting up some normative rules of this character. The matter was of notorious "equitable principles" in delimitation of continental shelf and of other maritime areas, claimed by the Court as being "principles and rules of international law".

In its Judgment of 20 February 1969 on the *North Sea Continental Shelf* the Court did

54 With provisions of this kind especially rich is the text of the Charter of Economic Rights and Duties of States (res. 3281 (XXIX)), adopted by the General Assembly on 12 December 1974.
not want to resort to the principle of equidistance and special circumstances, as provided in Article 6 of the respective 1958 Geneva Convention. It asserted that besides that principle there are -- "still rules and principles of law to be applied".\textsuperscript{55} And it then set forth a number of "equitable principles" which it was unable itself consistently to apply as legal principles in its subsequent practice on the same subject matter. Here is the Court's own restatement of these "principles and rules" in its 1985 Judgment on the Continental Shelf (Libya v. Malta):

"...That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensation for the inequality of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coast to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality"... nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice..."\textsuperscript{56}

Only the above-mentioned principle of non-encroachment has some resemblance of a legal norm.\textsuperscript{57} To this should be \textit{a fortiori} added the principle according to which: "the land dominates the sea". Although it was not expressed as such in codification conventions, all rules concerning maritime areas are based on it. It was also confirmed without exception literally in all judicial decisions concerning maritime delimitations.

For their rest the matter was perhaps of equitable considerations by the Court of a more general character, or of equitable criteria and practical methods for the purpose of reaching an

\textsuperscript{55} \textit{I.C.J. Reports} 1969, p.46, para.83.

\textsuperscript{56} \textit{I.C.J. Reports} 1985, pp.39-40, para.46.

\textsuperscript{57} In its 1969 Judgment the Court deduced this rule from - "the most important of all rules of law relating to the continental shelf..." enshrined in Article 2 of the 1958 Convention, "...namely that the rights of coastal State in prolongation of its land territory into and under the sea exist \textit{ipsa facto} and \textit{ab initio}, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources...", \textit{I.C.J. Reports} 1969, p.22, para.19. In its subsequent practice the Court was not able to apply it. Cf. \textit{I.C.J. Reports} 1982, p.92, para. 133, A(2). And finally, in the said Judgment of 1985, the Court recognized that at least inside a distance of 200 miles from the coast, the principle of natural prolongation in the physical sense cannot offer any criteria of delimitation of the shelf areas, \textit{I.C.J. Reports} 1985, p.33, para.33; and p.57, para.79 A(2).
equitable result in delimitations, or simply statements of some facts. But the Court obviously did not define here any "principles and rules" which can function as legal norms. None of them has a sufficiently specific content that its application should display any degree of predictability in maritime delimitations.

Besides the discarded equidistance and special circumstances principle and the general statement that in delimitations the land dominates the sea, authentic principles and rules of international law in the domain of maritime delimitations seem to be logically impossible. That was, after all, the accurate conclusion of the Chamber of the International Court in the 1984 Judgment on the *Gulf of Maine* case. The Chamber has stressed that:

"...each specific case (of delimitation) is, in final analysis, different from all others, that is monotypic... This precludes the possibility of those conditions arising which are necessary for the formulation of principles and rules of customary international law giving specific provisions for subjects..."58

* 

There are therefore some domains, which resist human regulations by pre-established rules of more general scope of application. In the foregoing cases it was the Court, not sovereign States, which pretended the existence of legal "principles and rules". But it would not be different if the same or other "equitable principles" were stipulated in a formal treaty, or in a law of a State.

This situation, as well as the above mentioned examples of "soft law", contradict voluntaristic claim that anything what is prescribed in a due legal form by sovereign will of States has the nature of a legal norm. It is not different even when such a "rule" is protected by a State's sanction. The sovereign law-creating will has therefore some limits which are imposed by the reason itself. Reason is in this sense the measure of all law. It is however not understood here as a call for free deducing of rules of natural law by scholars, but as an objective limit in law-creating by a legislator.

From a strictly doctrinal point of view, voluntarism in international law has been an unsound theory since its beginnings. Implied consent, for instance, cannot be an adequate explanation for existence of customary law. Brierly asserted that - "A customary rule is observed, not because it has been consented to, but because it is believed to be binding..." And this is a right conclusion for *opinio juris* at least of customary rules of general international law. He asserted furthermore that the theory of implied consent is nothing else but a fiction invented by the theorists.\(^5^9\) That fiction bestows voluntarists to acknowledge the existence of a few rules of general international law that even they do not venture to deny. And if the basis for creation of new legal rules is reduced to the will of States only, it becomes extremely impoverished. According to Charles De Visscher, international law is then "impressed by marked static character."\(^6^0\)

Hence, from a wider position, one can notice a negative development in law creating since St.Thomas Aquinas. Unlike St.Thomas, Grotius and his successors infinitely believed in human reason that, according to them, is able to discern all secrets of nature and all distinct rules of "Eternal Law" in St.Thomas's mind. Therefrom their subjectivism and even arbitrariness in deducing ostensibly immutable rules of natural law from human reason. And unlike Grotius and other naturalists, modern lawmakers sometimes believe that all what they enact in the form of municipal laws, or agree in treaties, are of undeniably legal nature. The some proved with "principles and rules of international law" provided in some judicial decisions. Hence reason and man's social nature, are the most often not of decisive importance to these lawmakers.

\(^{59}\) Cf., J.L. BRIERLY, *op.cit.*, *supra*, n.6, pp.51-52.

\(^{60}\) Cf., Ch. DE VISSCHER, *op.cit.*, *supra*, n.39, p.54.
70

Part Two

SOME OBJECTIVE FEATURES IN POSITIVE INTERNATIONAL LAW

7. INTRODUCTION

All previous remarks should not lead to a conclusion that exist an international legal order, based on natural law, operating beyond and above sovereign will of States. States remain to be at once the main creators and addressees of international law.

All modern legal doctrines that have underestimated sovereign will of States, or which even sought to deny the existence of States and of juridical persons in municipal law, failed in their aims.\textsuperscript{61} These theories were contradicted by the reality of international relations, and they were all forgotten.

Not contesting at all the sovereign will of States as the main factor in creation and in cessation of rules of positive law - municipal and international - some examples will be done in which this will is dependent of some objective norms. Some situations will also be explained where objective norms restrain or determine law-creating power of sovereign States. The question is of the nature of these objective legal norms and of their relationship with positive law.

It must be stressed above all that all concepts of natural law like all other doctrinal postulates, must ultimately be proved or rejected by that what becomes positive law. Notwithstanding the ingenuity of authors of some legal concepts, they have almost no value if not embodied into positive law, and first of all into rules of positive general international law. The measure of their "positivity" is therefore the test of their trustworthiness.

But the first question is: are there at least some legal principles whose very existence and functioning does not depend on specific agreement of States?

\textsuperscript{61} That was in particular the mark of solidarists and of the objectivist school of law by Leon Duguit and Georges Scelle between two world wars in France.
8. GENERAL PRINCIPLES OF LAW

As was said, modern teaching implies that all law is the product of sovereign will of States. And because this will is subject to no superior law, there are no legal rules that States could not modify or abrogate by their sovereign will. Voluntarists hence refuse the existence of unchangeable and eternal legal rules or principles of any kind in toto.

On this ground most authors deny the obligatory character for States of such general principles of law, which are not embodied either in treaties or in customary law. And vice versa, if for a legal norm can be proved either its conventional or customary basis yet when the matter is of an obvious fiction, such a norm ceases to be according to this teaching a "general principle of law, recognized by civilized nations".

On such a reduced basis one cannot ascertain the real nature and scope of this recognized source of positive international law. There are today in fact very few of these principles if any, which have not already been embodied in the general corpus of customary international law.

To this misapprehension contributes in addition the confusing use in doctrine and in practice of the term "principles". Under this expression sometimes are meant some uncompelling legal maxims allowing many exceptions, which are a part of legal reasoning, as for instance the principle lex specialis derogat legi generali. On the contrary, sometimes this term is related to imperative norms of general international law or jus cogens, as are to "principles of the United Nations". Thus, under this term may be confused uncompelling maxims of legal reasoning, jus cogens, and sometimes other "principles" of normative character belonging to positive international law, but not of peremptory character (jus dispositivum).

The arbitral practice of the nineteenth century has already revealed the fact that treaties and customary rules, which were agreed by disputing parties, were at that time incomplete bases for rendering justice. They could not as such constitute a sufficient basis for a judicial decision, which had to be based on application of law in force between disputing parties.

The arbitrators resorted in these situations to municipal law analogies under various
denominations, such as: "common law only applicable" in the case;\textsuperscript{62} or the principles of "universal jurisprudence"; \textsuperscript{63} or the "general principles of the law of nations"\textsuperscript{64}, or even the "general principles of law common to modern nations"\textsuperscript{65}. The last expression is the closest to the formula of "general principles of law, recognized by civilized nations" as being provided in Article 38 of the 1920 Statute of the Permanent Court of International Justice.

It seems nevertheless that municipal law analogies in actual practice did not consist in application of legal rule only in force for the case. The choice of these principles seems rather to be a part of judicial discretion. It is thus the most likely that the arbitrator decided the case following the contradictory arguments of parties during the procedure, and conformably with his sentiment of what is just in the affair. Only after that, in order to motivate his decision or his dissenting opinion, he was looking after the nearest general principle of law.

In the course of the twentieth century positive international law has become a much more comprehensive and integrated legal order. However the existence of many alleged customary rules of general application is still based on a fiction of general practice by States and of their communis opinio juris, which in reality do not exist. Therefore, the two Hague Courts have based their decision very seldom and inconsistently on the source of international law as provided in Article 38(1c) of the Statute. They almost never directly refer to that provision. Hence, the resort to municipal law analogies remained only a part of free reasoning and of the discretion of the Court. They are however sometimes a subsidiary argument for a decision based on other sources.


\textsuperscript{63} Cestus case, Great Britain v. Argentina, Arbitral award by President of Chile of 1 August, 1870; \textit{ibid.}, p.67.

\textsuperscript{64} Fabiani case, France v. Venezuela, Arbitral award rendered by the President of the Swiss Confederation on 30 December, 1896; \textit{ibid.}, p.356.

\textsuperscript{65} Lourenzo Marques Rail Road in Mozambique case, Great Britain and United States v. Portugal, award by the arbitral tribunal of 29 March, 1900; \textit{ibid.}, p.399.
A review of international arbitral and judicial practice is for this reason not revealing of
the nature and scope of this source of positive international law. Hence, one should resort once
again to some doctrinal views.

As was said, Vattel distinguished the so-called voluntary law, which is based on
presumed consent of Nations, from customary law properly called, which is based on their tacit
consent.

A famous Italian positivist of last century Dionisio Anzilotti was almost of the same
view. He asserted with good reason that a treaty does not consist of its written provisions only.
Logical implications and necessary logical consequences of its written stipulations form its
parts also. The will of parties to comply with a written norm or with a complexity of such
norms, suggests also their will to comply with logically implied norms. In their absence written
provisions in a treaty remain senseless. Anzilotti has called those implied norms as "constructive rules", which are according to him essential for any legal order.66

Lord McNair was of the same view in regard at least to the basic norm of *pacta sunt
servanda*:

"In every uncodified legal system there are certain elements and universally agreed
principles for which it is almost impossible to find specific authority. In the Common Law of
England and the United States of America, where can you find specific authority for the principle
that a man must perform his contracts? Yet almost every decision on a contract presupposes
the existence of that principle. The same is true of international law. No Government would
decline to accept the principle *pacta sunt servanda*, and the very fact that Governments find it
necessary to spend so much effort in explaining in a particular case that the pactum has ceased
to exist, or that the act complained of is not in breach of it, either by reason or of an implied
term of some other reason, is the best acknowledgment of that principle..." 67

There exist other "constructive rules" or precisely speaking, general principles of law,
which apply to agreements and contracts of any kind, whether being governed by municipal
law of a State, or in question are "transnational contracts", or genuine treaties. They are such as:

Nevertheless, this author has distinguished these "constructive rules" from general principles of law.
They are for him parts of a treaty as a formal source of international law. He interpreted on the contrary
Article 38(1c) of the Statute as a permission given to the Court to resort to analogy. *Ibid.*, pp.106-109.

pacta tertiis nec nocent nec prosunt, or inadimplendi non est adimplendum. They are, in addition, some well-known vices of consent of parties that may invalidate the agreement like: error, fraud, corruption and coercion.

There exist general principles of law, which do not apply to agreements only, but to other legal situations as well. That is the principle of good faith, or prescription, or that nemo plus juris in alium transferre potest quam ipse habet, or circumstances precluding wrongfulness of an act like force majeure, distress, necessity and self-defense.

All these general principles of law operate in international law regardless the specific will of States. They are genuine rules of positive law, not dependent of the consent granted on them by sovereign States. In fact, any legal relations of States or of any other kind of juridical persons, who are equal in rights, are impossible if these principles do not function as rules of positive law. They are necessary prerequisite of any legal relations.

One can see in these principles, not "immutable" legal norms, but specific provisions of acts in which they are consecrated, such as the 1969 Vienna Convention on the Law of Treaties, or a municipal civil code. But no lawmaker can avoid them when codifying a branch of law, neither can he subsequently abrogate them in their general scope of application, because such a venture would simply lead to a legal chaos.

That means that conventions on codification of a part of international law do not consist entirely of provisions of declaratory, crystallizing or generating effect of customary rules only. In addition, they largely codify (or "declare") existing general principles of law. These codified principles are not merely a lex ferenda, but are necessary rules, which have never lost their force in positive law.

This phenomenon can be discerned in commentaries of draft article on the law of treaties, done by the ILC. The Commission resorted to all kinds of evidence in order to prove at least previous practice of States, as one of elements of presumed existence of a general customary rule in question. When lacking practice, it referred to relevant judicial decisions. But there were some draft articles in support of which no evidence of customary law in force existed of any kind.
With regard to fraud invalidating the treaty, the Commission has said in its Comment: "Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means that there is little guidance to be found either in practice or in jurisprudence of international tribunals as to the scope to be given to the concept..." It was similar with corruption, which the Commission distinguished from fraud. In its respect the Commission did not find any evidence for existence of a general customary rule which might satisfy rigorous voluntaristic criteria. The matter was of course of well-known general principles of law in force, whose obligatory character nobody could deny on whatever ground.

It would be however excessive to pretend that these objective rules of positive law restrain the sovereign will of States. A State may abstain to conclude a treaty, and the principle *pacta sunt servanda* will not restrain its freedom of action in the domain of its regulation. Besides, all parties to a treaty already in force, can by unanimous decision modify or abrogate it at any time. Then the principle *pacta sunt servanda* will cease to operate. And the general principle of law - *clausula rebus sic stantibus* -- as an exception to it, may in rare circumstances result to the abrogation of a treaty.

The principle *pacta tertiis nec nocent nec prosunt* has many important exceptions which are recognized and codified as positive law. And most vices affecting the authenticity of expressed will of parties (error, fraud and corruption, but not coercion), do not automatically nullify the treaty or a unilateral act. The party concerned must deliberately invoke them in order to make the treaty void. And this is almost the same in all legal systems.

Of alike nature are general principles of arbitral and judicial procedure, governed either by municipal, or transnational, or international law. These principles are unchangeable. They are absolutely obligatory but only for judicial organs. They cannot bind sovereign States,

---

68 Cf., *Reports of the International Law Commission*, on the second part of its seventeenth session 3-28 January 1966 and on its eighteenth session 4 May - 19 July 1966, p.73. (No.9(A)/6309/Rev.1).

69 Cf., *ibid.*, p.74.
because on the basis of general international law arbitration and judicial settlement are not obligatory means of settlement of all their disputes.

Among these universal and everlasting procedural principles, which are embodied in the rules of procedure of all permanent judicial bodies, are inter alia: the principle of equality of disputing parties in all phases of the procedure; their equal right to produce all kinds of arguments, documents and testimony; the duty of judicial body to be impartial; the principle res judicata; the principle precluding litispendence; etc.

A grave and deliberate violation of these principles by an arbitrator or judge may make his decision void. On the other hand, a deliberate exclusion or substantial modification of these principles by the compromise of disputing parties, the terms of which are obligatory for arbitrator, deprive the procedure of its judicial character.

The universal nature of aforementioned general principles of law is confirmed in arbitral practice concerning transnational contracts. For these contracts international law in force does not provide substantive rules, and the municipal law of one or of both contracting parties is sometimes insufficient. Nevertheless, these agreements between a subject of international law and a foreign natural or juridical person legally bind their parties like all other treaties or contracts. They are not legally non-binding "gentlemen's agreements". Lacking other applicable rules the arbitrator when deciding a dispute on these contracts often has no choice but to resort to general principles of law, as to the only applicable law.

And even the supranational law among member States of the European Union (former Community), which is a highly developed and integrated system of written legal rules, is not exempt from similar practices by the Court of Luxembourg. Some of treaty provisions directly refer to "the general principles common to the law of the Member States". However, even beyond express authorization, the Court of Luxembourg sometimes applies principles common to municipal law of its Member States in order to fill in the gaps of written provisions in the

\[\text{70} \text{ Cf. former Article 215(2) of the Treaty establishing the European Economic Community; and Article 188(2) of the Treaty establishing the European Atomic Energy Community. Both provisions concern non-contractual liability of the Communities.}\]
Community law.\textsuperscript{71}

When discussing the eternal character of some general principles of law, it is not the same as to pretend that they actually operate as legal norms in all times the history and in all possible situations. A prerequisite of their operation in practice is the existence of legal relations between States or other persons. In pre-Colombian epoch for instance, they could not be applied between Americas and European States. Neither had they operated in the periods of ruthless wars of conquests and annihilation. But once treaties were agreed between belligerents, they became immediately effective as rules of positive law.

And finally, in face of certain physical laws which proved to be valid in the entire universe, in face of principles of formal logic and of mathematical operations, there is no conclusive evidence that legal rules of such a character are not existent in relations of equal and autonomous subjects of any kind, as are today sovereign States.

There is however always a risk of going too far in their deduction, and of abandoning the limits of positivity and realness in human relations. Exactly that was the fault of naturalists since Grotius, who in identification of rules of objective law based their research only on the deduction. Necessary standards of legal "positivity" must therefore always control such an intellectual operation.\textsuperscript{72}

*  

9. FUNDAMENTAL RIGHTS AND DUTIES OF STATES  

9.1. Development of rules of positive international law on fundamental rights of States  

This set of legal rules is of entirely different character than the general principles of law. They do not operate above and beyond the sovereign will of States. Quite on the contrary, if


\textsuperscript{72} It is to be noted that in Roman law prior to Justinian codification (529-535 A.D.), as well as in present Common law, the main source of law have been judicial precedents, following the doctrine of \textit{stare decisis}. The net advantage of these legal rules, created by judge when deciding actual cases, is that they do not exceed the limits of reason.
most of States did not receive them on their free will as rules of positive international law, they remain at the level of lex ferenda and have no significant importance as legal rules in international relations. They are, however, a necessary minimum for existence of a world political order and for the maintenance of international peace and security. Of their very respect by States as jus cogens, directly depend the preservations of these supreme values of the mankind.

One must now return to the Draft Declaration of the Law of Nations of 1795. Following the teachings of his naturalist predecessors, Abbé Grégoire assimilated States with individuals in the society. Just as physical persons, according to the naturalist teaching, are entitled to some inherent and absolute rights due to their birth, States being members of the international community possess on the same ground some inalienable, indivisible and unassignable rights, simply because of their existence. This is the core of all teachings on fundamental rights and duties of States. These rights are therefore based on solidarity and on mutual respect by all members in a community of the existence, equality and independence of each of them individually.

It has been explained that during the nineteenth century these teachings did not exert an influence of legal relations of States. If there was any impact, the spirit of that doctrine was distorted and abused. Thus, on the basis of the fundamental right to self-preservation (in vattelian sense) was claimed the right of States to wage wars for territorial aggrandizement, or even for subjugation of others, and especially of "non-civilized" States and peoples. The policy of equilibrium, which implied territorial compensations in order to avoid wars, maintained relative stability in relations of European powers.

In international relations the stress was at that time on subjective rights of those countries that were recognized as members of the community of "civilized" States. No legal duties of States should be presumed from the necessity of maintenance of the international community. And the rejection of legal duties of this kind remained as mark of distinction of voluntaristic teachings until the present days. The logic of voluntarism is therefore hostile to any concept of fundamental rights and duties of all States.

But just because the policy of equilibrium could not preserve the mankind from
disasters of World War I, which hurt above all Europe and its population, the leading Powers wished to replace it at the Versailles Peace Conference of 1919, with a collective security system. To this aim the text of the Covenant of the League of Nations was incorporated in all Peace Treaties.

The first aim of that Covenant was the prevention of all future wars, and to this end, planning of collective sanctions against any member States when violating their legal obligations assumed by it. And hence this new objective which was the maintenance of international peace and security, required new far-reaching legal obligations of States, restraining their freedom of action when accomplishing their particular national interests.

Article 10 of the Covenant of the League of Nations, which was designed to be one of cornerstones of the new collective security system, provided as follows:

"The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League..."

This was not yet a far-reaching obligation. It was confined to the relations of Members of the League, i.e. between parties to the Covenant. But this provision revealed the fact that worldwide maintenance of peace and security requires the recognition and preservation of two basic States' rights: to their territorial integrity and to their independence.

Since that time the teachings on fundamental rights and duties of States gathered momentum. Declarations on this subject matter by various non-governmental bodies did not cease to multiply even since 1916. Their proclaimed principles were however not yet been accepted by States as rules of positive international law. At the time of their adoption they were not more than a lex ferenda. But nothing could prevent the transformation of these principles, first into certain treaty provisions of regional character before being transformed into rules of

general international law.

That development started within the Pan-American Union. Because one State in that region is stronger than the rest of others, the conditions have never been met there for a genuine policy of equilibrium, which has been performed in Europe prior to World War I. The biggest power abused its strength and influence, especially in the period of the Big Stick Policy in some of central-american countries under three presidents.

In order to preserve their independence, Latin American States had little choice but to seek refuge in the doctrine on fundamental rights. The Good Neighborhood Policy, introduced by new President Franklin Delano Roosevelt, followed the period of the Big Stick Policy since 1933. In the same year in Montevideo was signed the Convention on Rights and Duties of States. It was followed latter on by the Protocol on Non-Intervention, signed in 1936 in Buenos Aires.

Some principles of that kind were reaffirmed in the Act of Chapultepec of 8 March 1945. The original text of the Charter of the Organization of American States or "Charter of Bogotá" of 1948 contained in its Chapter II "Principles", while its Chapter III relates to "Fundamental rights and duties of States". However, these parts of the Charter were shortened by the amendments of the Protocol of Cartagena de Indias of 1985. The earlier very detailed elaboration of the principle of non-intervention is in the new text reduced to the account, which more or less corresponds to the level of obligations according to general international law.

Among acts of regional character in this regard one must not forget the Declaration on Principles Guiding Relations between Participating States, from the Helsinki Final Act of 1975. The matter is here of a non-conventional instrument. But it is in fact a restatement and creative interpretation of the principles of the United Nations, in European context. It however formulates and endorses three principles as separate: (III) Inviolability of frontiers; (IV) Territorial integrity of States; and (VII) Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.

As being originally based on natural law, the doctrine of fundamental rights of States must necessarily have universal validity. Their transformation into positive rules of general
international law may take place first by means of some general conventions, which in latter phases generate into customary rules through a general practice of States and a *communis opinio juris*.

The doctrinal views disagree in enumeration of these fundamental rights and corresponding correlative duties, but the most acceptable seems to be the division into five: (i) right of all States to existence, i.e. preservation; (ii) their right to independence or sovereignty; (iii) their rights to equality in law; (iv) their right to respect; and (v) their right to international communications. The full enjoyment of all these rights comprises the legal obligation of all members of the international community strictly to respect all these rights in regard to all other States. And from these five fundamental rights and duties a larger number of more specific rights may derive, depending on the stage of development of positive international law in a given time.

That development of general international law begun, in fact, with the Briand-Kellogg Pact of 1928. Its parties renounced the recourse of war as an instrument of their respective national policy, and they agreed that the settlement of all their future disputes or conflicts of whatever nature should never be sought except by peaceful means. The Judgment of the Nuremberg Tribunal of 1946 applied these provisions as imperative norms of general international law under the heading of Crimes against Peace.

Then the Atlantic Charter of 1941 defined certain aims in form of political principles and ideals, which made a strong impact on the post-war development of legal rules. These principles, set forth in the Atlantic Charter -- including that of self-determination -- were addressed not only to States, but to all peoples as well, including peoples under colonial rule.

And finally the United Nations Charter of 1945 proclaimed in its Article 2 certain principles of the United Nations. They were however formulated in that text in form of specific obligations of member States and of the Organization itself, and still not as universally binding

---

74 This enumeration was followed by Juraj ANDRASSY: *Međunarodno pravo* (International Law), 6th ed., Zagreb 1976, pp.80-91, and by most other authors from ex-Yugoslavia.
principles of international law.

That lacuna was filled by the "Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". It was approved in the General Assembly by consensus on 24 October 1970. It announced and elaborated the following seven principles: (i) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (ii) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (iii) The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (iv) The duty of States to co-operate with one another in accordance with the Charter; (v) The principle of equal rights and self-determination of peoples; (vi) The principle of sovereign equality of States; and (vii) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

And in spite of the fact that the UN Charter itself does not confer on General Assembly the power to enact rules binding on States, some of its declarations adopted unanimously or without negative vote, may be declaratory of existing rules of international law, or they can contribute to the creation of new general customary rules.

The International Court of Justice in its Judgment of 27 June, 1986 on Nicaragua case ascribed an important role to some of these declarations, as being a proof of opinio juris of existing general customary rules:

---

75 Because the violation of this duty does not produce international responsibility, it is formulated as an aim rather than a precise legal obligation. States are for instance not legally obliged to establish and maintain diplomatic and consular relations one with another. Their economic, social, cultural, technical and other co-operation depend of their mutual agreements, which they are not bound to conclude.

...This *opinio juris* may, though with all due caution, be deduced from *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves..."77

"...As already observed, the adoption by States of this text (the said Declaration of 1970) affords an indication of their *opinio juris* as to customary international law on the question..."78

The Court largely quoted in that Judgment the said Declaration of 1970 as a proof of existence of principles prohibiting use of force and intervention.79 For the same purpose it quoted the Declaration of the Inadmissibility of Intervention;80 Definition of Aggression;81 and even the Helsinki Final Act of 1975.82

There is today no slightest doubt that even according to the most orthodox and restrictive voluntaristic criteria, all above mentioned rights and duties of States have transformed into general customary international law. There is at present virtually no State which did not assume obligation to respect these rights either by the UN Charter or by some other treaty, or declaration having law-declaring effect.

But perhaps no other rules of general international law do limit to such an extent the freedom of action of all States, whatever their power and influence can be. Most of these fundamental rights and duties thus consist in far-reaching limitations of arbitrary use of force. And it is not surprising that the difference between normative picture and the reality of international relations is here greater than in other domains of international law.

The correlation of fundamental rights and duties of States and of the maintenance of

77 *I.C.J. Reports 1986*, pp.99-100, para.188.
international peace and security taken as an objective, seem to be of importance for the present topic. The problem arose in regard to the legal effect of the Helsinki Final Act of 1975 which, as is known, was not adopted in form of a treaty. Many authors contested the obligatory character of that international instrument in international law. Discussing this problem, J.E.S. Fawcett has made a comparison of the principles set forth in the UN Charter and those that were laid down in the Declaration of Principles, which is a part of the Helsinki Act. He came to some interesting conclusions:

"...The members of the community of nations have political objectives, analogous to the moral and social obligations of individuals. They take broadly two forms, as axioms on which the order of the international community rests, and as political commitments, serving a common interest and so engaging reciprocally. The UN Charter and the Helsinki Act both enunciate as axioms of international order the pacific settlement of disputes, the renunciation of the use of force, the territorial integrity and political independence of States and self-determination of peoples. The obligations implied for international relations do not depend on any rule of law; the rule of law itself depends on their observance as political obligations. Their formal conversion into legal obligations in the UN Charter -- an "International agreement", which is " binding on the parties to it" and "governed by international law" -- does not change their nature though it may strengthen their enforceability. The Helsinki Act is in part a restatement or implied interpretation, in the European context, of the UN Charter, corresponding to General Assembly Resolution 2625-XXV. It sets out in effect the political obligations necessary to "peace, justice and security" in Europe and elaborates them into a number of specific particular undertakings. Those who refer to the Act as the Helsinki Agreement are legally inexact but politically correct."

The common objective, which is the maintenance of international peace and security, thus requires very precise legal, and at the same time political obligations of far reaching importance. These fundamental principles are therefore axioms on which rest the entire international political order. Like all other legal rules, they can be respected or ignored. But the stability of international relations depends on their lasting observance as political commitments. In this sense they are axioms of international order.

It is worth mentioning that more than a century ago, Abbé Grégoire deduced essentially the same axioms dreaming a harmonious family of human beings.

*  

9.2. "Principles of international law" in practice of The Hague Court

At least a part of this reasoning can be revealed in the deductive approach of The Hague

Court to the so-called "fundamental principles of international law". Of course, the Court has never resorted to the concept of natural law in order to prove the existence of these fundamental principles. But it nevertheless occasionally applied them as precepts of objective law, implicitly recognizing them as being a part of international legal order.

In its usual practice the Court has inductive approach to legal rules of a broad application. It endeavors to prove their customary origin, namely the practice of States as much as possible and if possible, *communis opinio juris*. This second psychological element of customary rules consists in the conviction of participants of a practice that they fulfill a legal duty, or at least in their acceptance of such a practice as legally obligatory. Following the same criteria the Court in its practice even more often denies the existence of an alleged general customary rule. But the most often it corroborates the existence or lack of existence of customary rules on the basis of its own former practice that what is not fully in agreement with its inductive approach.

However, already Max Sørensen in his remarkable book on sources in international law of 1946 noticed an important phenomenon in the practice of the former Permanent Court of International Justice. Certain principles are so firmly enshrined in international law and have such a persuasive force, that the international judge does not feel obliged to search for their origin and foundation. These axiomatic principles are therefore inherent in international legal order and they are, as he wrote, the spinal column (*épine dorsale*) of the *corpus juris gentium* of our times.  

This author was of opinion that this set of "principles of international law" is even different from the customary law itself. That in our view runs the risk of legal subjectivism by judge when deciding particular cases.

Nevertheless, it is evident that throughout their practice, the two Hague Courts have had

---

84 As was stated, these principles should not be confused with the general principles of law recognized by civilized nations, which are a source of general international law apart.

a deductive, rather than inductive approach in regard to some legal rules. From the wished aim, which is the maintenance of international peace and security, or the existence of a world legal order, they deduced some peremptory norms of conduct, obligatory on all subjects of international law, regardless the acceptance, disapproval or indifference towards them by a particular State.86

In the *Lotus* case of 7 September, 1927, the Permanent Court upheld,

"...that the word 'principles of international law', as ordinarily used can only mean international law as it is applied between all nations belonging to the community of States..."87

In its actual practice the Court has the most often deduced some rules of conduct from the principle of sovereignty of all States, or from juxtaposed sovereignties in relations of several States. Here are some examples, first of all in the practice of the Permanent Court of International Justice.

In the *Eastern Carelia* case of 23 July 1923, the Court refused to render its advisory opinion because the legal question requested by the Council of the League of Nations related to matters which formed the subject of a pending dispute between Finland and Soviet Russia. Russia refused to accept the obligations of membership in the League for the purposes of that dispute. The Court added:

"...This rule, moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement..."88

In the *Mavrommatis Palestine Concessions* case the Court in its Judgment of 30 August 1924, stressed:

"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial pro-

86  Unfortunate outcome of the deduction by the Court of "equitable principles" as allegedly being "principles and rules of international law" in maritime delimitations was already discussed.


88  *Series B, No.5*, p.27.
ceedings on his behalf, a State is in reality asserting its own rights -- its right to ensure, in the person of its subject, respect for the rules of international law."89

In the *Brasilian Loans* case of 12 July 1929, the question arose whether the applicable law on bonds contracted by Brazilian Government was that of the State borrower or of their bearers. The Court decided the issue on the following ground:

"...Only the identity of the borrower is fixed; in this case it is a sovereign State, which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own."90

And in the Advisory Opinion on the *Greco-Bulgarian "Communities"* of 31 July 1930, the Court upheld:

"...it is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."91

In its first Judgment of 9 April 1949, in the *Corfu Channel* case on Merits, the new International Court of Justice found that the attitude of both disputing parties was contrary to some wider concepts of international law.

On the one hand, it established out the breach of obligation by Albanian authorities to notify the existence of a minefield in Albanian territorial waters, and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based "on certain general and well recognized principles", such as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States",92 namely the right of innocent passage.

On the other hand, the Court found that the British minesweeping operation after the incident happened, violated Albanian sovereignty, because it had been carried out against the will of the Albanian Government. It added a well-known passage:

---

89 *Series A, No.2*, p.12.

90 *Series A, Nos 20/21*, p.121.

91 *Series B, No.17*, p.32.

92 *I.C.J. Reports 1949*, p.22.
"...The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." 93

Therefore, the intervention carried out in this particular form violated both concepts of sovereignty and of equality of the State in question.

The passage from the Advisory Opinion of 28 May 1951, on the Reservations to the Genocide Convention is of particular importance. The Court stressed there inter alia that principles underlying that Convention, especially because of extremely cruel consequences in cases of its violation, "are principles which are recognized by civilized nations as binding on States, even without any contractual obligation". 94

Of even more significant effect is the statement of the Court given obiter dicta in its Judgment on Barcelona Traction Ltd., case of 5 February 1970, with regard to obligations of States erga omnes:

"...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of corresponding rights of protection have entered into the body of international law... others are conferred by international instruments of a universal or quasi-universal character." 95

Being obligations erga omnes, they are binding on all States regardless their conventional character, and even regardless the participation of an individual State in customary process. International instruments can nevertheless be useful in determining their contents and scope. 96

---

93 Ibid., p.35.
95 I.C.J. Reports 1970, p.32, para. 33, and 34.
96 Cf., critics of this attitude of the Court - P. WEIL, op.cit., supra, n.4, pp.431-433. See on this kind of State obligations in general – V.D. DEGAN: "The Scope and Patterns of Erga Omnes Obligations in
In the Judgment of 24 May 1980, on *U.S. Diplomatic and Consular Staff in Tehran*, after establishing that Iran by holding hostages has violated its obligations under Vienna Conventions of 1961, 1963 and 1973, the Court has stressed the following:

"...The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted through the world by nations of all creeds, cultures and political complexions..."\(^97\)

With that supplementary argument the Court has condemned in advance as unlawful a possible act of seizure and holding hostages among foreign diplomatic or consular staff, even by a State that is not a party to Vienna Conventions.

Iran refused to take part in this procedure, and it ignored the Judgment rendered in favor of the application by the United States. But in the following case it was the turn of the United States to refuse its participation in proceedings on merits, and to comply with the Judgments.

The matter was of the case concerning *Military and Para-military Activities in and against Nicaragua*. The applicant was Nicaragua and the defendant was the United States. The United States claimed on various grounds that the pleas set forth in Nicaragua's application are not within the jurisdiction of the Court, and are inadmissible. One of issues that are of interest for our topic was the relationship between multilateral treaties and general customary law.

The declaration of acceptance of the jurisdiction of the Court by the United States, given in 1946, literally referred to "all legal disputes" set forth in Article 36(2) of the Statute of the Court, including - "(b) any question of international law". But it specifically provided that this declaration shall not apply *inter alia* to - "(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction..."

In the proceedings on jurisdiction of the Court, one of complaints by the United States was that - "the Court cannot determine the merits of Nicaragua's claims formulated under

(continued)


\(^{97}\) *I.C.J. Reports 1980*, p.24, para.45.
customary and general international law without interpreting and applying of the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua's claims.\(^98\)

This objection seems not to be very convincing. If the United States has recognized jurisdiction of the Court in regard to "any question of international law", under specifically multilateral treaty reservation, it seems obvious that the Court had, on condition of reciprocity, the jurisdiction to hear all disputes arising under bilateral treaties, or customary rules of international law, or even general principles of law. Here thus cannot apply otherwise obsolete principle of interpretation: *expressio unius exclusio alterius est*.

By its Judgment of 26 November 1984, the Court gave effect to the multilateral treaty reservation by the United States, but it found that it had jurisdiction in that case. In regard to the above objection, it declared:

"...The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of non-use of force, non-intervention, respect for independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated..."\(^99\)

It is not accidental that the Court here insisted on some well-known fundamental principles of international law, although stressing at the same time their customary character.

The United States subsequently declared that the Judgment of 1984 has been "clearly and manifestly erroneous". It refused to comply with it and it did not take part in proceedings on merits. It also reserved its rights in respect to any decision by the Court regarding the Nicaragua's claims.

In proceedings on merits, which ensued in the absence of the United States, the main

\(^98\) *I.C.J. Reports 1984*, p.423, para.69.

concern of the Court was how to extract general customary rules applicable in that case from provisions set forth in the UN Charter. In the text of its Judgment of 27 June 1986, it generally adopted inductive approach to rules of general application. It put as its task to consider whether a customary rule exists in the opinio juris of States, and satisfies itself that it is confirmed by State practice.¹⁰⁰

But dealing with some legal principles the Court did not renounce to corroborate its statements by deductive considerations as well. At stake was especially the application of principles of non-use of force and of non-intervention. With regard to the first, it stated inter alia the following:

"...The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations...."¹⁰¹

It proceeds therefore, that this "fundamental principle" deserves its existence in a way apart from the UN Charter as conventional instrument, and even apart from customary law.

With regard to the principle of non-intervention, it quoted its own passage from the Corfu Channel case of 1949, and then concluded:

"...though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law..."¹⁰²

Important is another passage of this Judgment:

"...in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones..."¹⁰³

In that Judgment was also emphasized the following:

¹⁰¹ Ibid., p.97, para.181.
¹⁰³ Ibid., p.108, para.205.
"206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State... It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention."\(^{104}\)

A Dutch writer P.P. Rijpkema comments this statement of the Court, in our view correctly: "This passage shows that, in the Court's view, State practice can certainly influence the content of the principle, but that it cannot have an influence of whether it exists. Admittedly, State practice deviating from the principle can "modify" the principle, but the principle still continues to exist in its modified form."\(^{105}\)

The above mentioned examples prove the fact that the Court cannot completely give up from deductive approach to the most important legal rules for maintenance of international peace and security. It seems however paradoxical that with increasing importance of a legal rule for maintenance of world political order, diminishes the Court's sense of duty to prove its customary character. It would certainly not take the risk simply to deduce a less important rule of general customary law -- other than \textit{jus cogens} -- affecting by that subjective rights of one of parties in dispute.

It must nevertheless be acknowledged that even the authentic inductive method in ascertaining general customary rules which bind all sovereign States, has never satisfied all voluntaristic criteria for their existence. General practice has scarcely been equivalent to universal practice of all States. \textit{Communis opinio juris} has been more often than not a legal fiction. It has furthermore never been proved in actual practice that existing rules of this kind do not legally bind new States, which virtually did not participate in previous law-creating practice. And the references by the Court to its own precedents as a proof of law in force have


nothing common with the genuine will of all States to accept universal validity of a legal rule.

In the light of the above conclusions it must nevertheless be stressed that the deductive approach by the Court -- which is not a lawmaker in the same sense as are sovereign States -- should always be kept under strict control. A rule in respect of which the Court itself finds to be a prerequisite for maintenance of international peace and security, or for achievement of some other supreme values of the humanity, is not for that reason only a *lex lata*. However, if a predominant practice of States confirm the respect of such a rule, if a number of codification conventions and of the UN General Assembly resolutions prove *opinio juris* by a large number of States, such an acceptance can overwhelm the indifference or opposition of a few remaining States. Inductive and deductive operations then usefully complement one another.

That exactly seems to be the attitude of the Court throughout its practice. But it seems likely that the Court, in its own cautious way, has confirmed the validity of fundamental rights and duties of all States that were set forth by Abbé Grégoire in 1795.

* 

**10. FUNDAMENTAL RIGHTS OF INDIVIDUALS**

**10.1. Introduction**

As was indicated, all legal concepts of Eternal, Divine and natural law by St. Thomas Aquinas and Hugo Grotius were penetrated by a deep and sincere humanism. Man had a very important place according to these teachings, between God, creator of nature and nature itself. Nevertheless, these concepts did not necessarily mean equality and freedom of all human beings. Although inhuman positive laws were considered in these writings as unnatural and sinful, these teachings could not alter the harsh reality of slavery and serfdom of that time, and even annihilation of indigenous populations, especially in both Americas.106

In accordance with his time, Vattel has, however, based his doctrine on a "healthy

---

egoism" of free States and individuals. The French Declaration of 1789 was, as was stressed a sublimation of natural, inalienable and sacred rights of all individuals without discrimination but it had no important immediate effects on positive law in its time.

On the other hand, voluntarism of the nineteenth century, exalting sovereign States as the unique lawmaker, had certain contempt for individual and his rights in respect to his State. In spite of a certain progress in positive international law, the protection of human rights was not then an end in itself. Inhuman laws were not considered to be lesser or weaker or inferior law, nor less "legitimate", than any other laws issued by a States' sovereign will.

The development of positive international law prior to World War II has nevertheless made important steps in suppression of slavery, slave trade, servitude, and forced labor. There was also a progress in the protection of minorities in certain States but on the basis of strictly conventional obligations.

Besides these limits, no State bore international responsibility for unjust treatment of its own citizens. Rights of individuals within a State, if any, depended on its own constitutional and statutory guarantees. Any superior law in that time did not protect individual. If, for instance, a foreign government has undertaken some steps in the eve of World War II at German Government in favor of German nationals of Jewish birth, it was politely answered that the treatment by a State of its own subjects belongs essentially to its domestic jurisdiction. And such an answer reflected the level of development of general international law of that epoch.

It is true also that the rules of warfare have since mid of 19th century undergone an influence of elementary humanitarian considerations, but to the extent only as military requirements permitted. Thus, soon after the Swiss citizen Henri Dunant published his pamphlet "Un souvenir de Solferino", on the battle which happened in 1859 in Northern Italy, in Brussels was concluded in 1864 the Convention for the Amelioration of the Condition of Soldiers wounded in Armies on the Field. Since then expanded conventional regulations on the conduct of hostilities on land and at sea, and for protection of prisoners of war. The common aim of these conventions was diminishing unnecessary human sufferings.
But only the large-scale crimes committed during World War II, in the first place against civilian population, shocked the conscience of mankind. These crimes were perpetrated in particular in implementing Nazi laws and decisions of German administrative and military bodies.

As a result, the UN Charter of 1945 *inter alia* stressed the faith in and respect of fundamental human rights, the worth of the human person, and human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

After that War came the reaction of the Institute of International Law (*l'Institut de droit international*). On the basis the report of its prominent member Charles De Visscher from Belgium the Institute adopted on 9 August 1947, at its first after-war session in Lausanne, the prophetic resolution entitled: "*Les droits fondamentaux de l'homme, base d'une restauration du droit international*".107

That resolution, entirely penetrated by naturalist teachings on unassailable human rights and on values of human person as ultimate goal of any government, has perfectly predicted the post-war normative development in this domain.

* The post-war development of positive international law has therefore had, as its end, the

---

107 Here are some of its parts:

"L'Institut de Droit international,
Considérant qu'au lendemain d'événements qui ont ébranlé jusque dans ses bases une civilisation traditionnellement fondée sur le respect des valeurs humaines, il importe avant tout d'affirmer à nouveau certains principes qui répondent plus particulièrement aux exigences actuelles de la conscience juridique des peuples civilisés...

I. La reconnaissance et le respect des droits inhérents à la personne humaine, qui doit servir et non asservir l'Etat, sont immédiatement liés au progrès du Droit des Gens.

II. Cette reconnaissance et ce respect sont à la base de toute conception fonctionnelle du Pouvoir -- Pouvoir qui puisse son titre dans son aptitude à réaliser les fins individuelles et sociales de la personne humaine...

III. Un ordre juridique efficace entre Etats est inséparable du respect de la personne humaine dans l'ordre interne de chaque Etat...

IV. Affirmer le respect des droits de la personne humaine sans en assurer l'efficacité par des mesures effectives de garantie et de contrôle est insuffisant aussi bien dans l'ordre international que dans l'ordre interne..." *Cf.*, Institut de Droit international, *Tableau général des Résolution (1873-1956)*, Bâle 1957, pp.1-2.
same objectives as did natural law prior to the nineteenth century. That is the achievement of
natural, inalienable and sacred rights of all human persons without discrimination. Hence, the
term "inhuman" in present international law has almost the same sense as "illegal" in naturalist
teaching.

The Universal Declaration of Human Rights, adopted by the UN General Assembly on
10 December 1948, assimilated in fact the substance and standards of the 1789 French
Declaration of the Rights of Man and of the Citizen. But, in defining particular civil and
political rights its drafters had in mind circumstances of modern times. They adjoined to them a
number of economic, social and cultural rights which mostly remained long term aims rather
than precise legal obligations for all States.

In their practice, the UN organs relevant for human rights, including the General
Assembly itself, when deciding on allegations of breaches of human rights by a State, regularly
apply the provisions of the Charter and of the Universal declaration of 1948, irrespective of
whether or not the State concerned has ratified relevant treaties in this domain.\footnote{That fact was explained in a letter of Director of Human Rights in the UN Office at Geneva. \textit{Cf.}, \textit{Annuaire de l'Institut de Droit international 1989}, Session de Saint-Jacques-de-Compostelle, vol.63-I, p.326.} For the
United Nations is therefore the 1948 Universal Declaration in a sense superior to all treaties of
the same subject matter.

Useless is today to enumerate the titles of a plenty of other declarations, and of general
as well as regional conventions on human rights. More important seems to be to summarize
here the achieved level of general international law, most of all in regard to the protection of
civil and political rights of individuals.

It is doubtless that all governments are restrained at present by some rules of general
international law in the treatment of their own citizens, as well as of foreigners and stateless
persons. These obligations are based not only on natural law concepts. Their respect does not
depend therefore on States’ conscience only. At stake are rules of positive international law as
well.
10.2. Human Rights v. intervention in the internal affairs of States

The Institute of International Law has prescribed in Article 1(1) of its Resolution of 1989, on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States" -- the following:

"Human rights are a direct expression of the dignity of human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights." 109

The aforesaid obligation of all States does not therefore arise from a volitional, i.e. consensual basis only. Following the afore-cited position of the International Court of Justice in Barcelona Traction Ltd. case of 1970, the Institute stressed in Article 1(2) of that Resolution the following:

"The international obligation, as expressed by the International Court of Justice, is erga omnes; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world."

There can certainly be disputed whether such a far-reaching obligation reflects the present level of development of positive international law, or it is perhaps a little before our time. But it seems to be certain that the future normative development is oriented to this end.

Nonetheless, in the light of numerous conventional obligations assumed by all States, including the UN Charter, the conclusion in its Article 2(1) of that Resolution seems not to raise doubts:

"A State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction."

In post-war international practice that was not only the UN General Assembly which condemned grave violations of human rights committed by particular governments. The practice of apartheid by the former South-African régime was opposed by various individual

and collective measures of economic and political boycott in which only a small number of States did not take part. The flagrant violations of civil and political rights of individuals by governments in East Europe, in Americas, etc, were occasionally met with similar measures. From such practices a right to intervene had developed within certain legal limits, although its exercise has not always been devoid of opportunism and of egoistic interests of particular States.

The Institute defined the right of humanitarian intervention in paragraphs 2 and 3 of Article 2 of its Resolution:

"Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered as unlawful intervention in the internal affairs of that State.

Violations justifying recourse to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances."

Article 4(2) provides inter alia that:

"...measures taken shall be proportionate to the gravity of the violation...".

And Article 6 states that,

"The provisions of this Resolution apply without prejudice to the procedures prescribes in matters of human rights by the terms of or pursuant to the constitutive instruments and the conventions of the United Nations and of specialized agencies or regional organizations."

Hence, the above quoted articles indicate that violation of whatever human rights that might be guaranteed in international instruments does not justify the same measures of intervention. This Resolution makes in this respect a distinction, though rather exempli causa,

---

110 Measures "permitted under international law" should not in particular exceed strict requirements limiting the exercise of the right to countermeasures, i.e. reprisals. As a guidance may serve the resolution of the Institute on "Régime des représailles en temps de paix", adopted on 19 October, 1934, at its Paris Session. Cf., Résolutions de l'Institut de Droit international 1873-1956, Bâle 1957, pp.167-170.
of rights that cannot be derogated from in any circumstances, and other human rights. Large-scale and systematic violations seek in any event stronger and more urgent measures than incidental and isolated cases of such illegal actions by a State.

Nevertheless, it is important to emphasize that the entire post-war development of positive international law led with some reverts in progress of some new legal concepts. Thus, the International Law Commission, when codifying the rules governing State responsibility, made a subtle distinction between "international crimes" and other internationally wrongful acts or ordinary international delicts. However, in respect to State responsibility this division was later on abandoned.

Here is proposed a hierarchy of human rights, which are all parts of positive international law of present time. The suggested hierarchy will take into account the gravity of consequences of their violations, the degree of the international responsibility of the wrongdoer, and accordingly, the choice and degree of individual or collective legitimate measures of intervention by thirds against the offenders.

*  

10.3. **International crimes: common elements**

On the top of this list are without doubt international crimes. Apart from numerous misdeeds committed practically by all the belligerents in two world wars the concept of international crimes with its particular legal consequences is the result of transformation of entire Law of Nations into a naturalist direction. The rigid voluntaristic beliefs that virtually denied the possibility of existence of rules of general international law with objective nature were overcome with the provision of Article 53 of the 1969 Vienna Convention on the Law of Treaties. That article provides the invalidity of agreements conflicting with a peremptory norm of general international law (*jus cogens*).112

However, it is far from true that wording of this provision is the same as definition of international crimes, or that legal rules prohibiting these crimes can replace it. All international crimes belong by definition to *jus cogens* with regard to all States members of the international community, but all the rules of this character are not recognized by that community as international crimes.

Description of this kind of legal norms is more complex than one could expect. There are many dilemmas in theory and in practice on which there are no clear answers. For that reason our explanation here must be more exhaustive than usual.

International crimes were originally defined in paragraph 2 of article 19 of the Draft Articles on State Responsibility by the International Law Commission (ILC) as a distinct category from any ordinary international delict. Later on the Commission radically changed its position what will raise many problems.

The original definition reads as follows:

"An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime".

Paragraph 4 of that article provided a negative criterion:

"Any internationally wrongful act which is not an international crime (in accordance with the above definition) constitutes an international delict".

With that distinction these two categories of unlawful acts were introduced, having quite dissimilar consequences in law.

As stressed in the commentary of the ILC, the specific criterion of international crimes had two aspects: "one is the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community; the other, which completes the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the

112 Article 53 reads as follows: "A treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized of the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The Vienna convention is now unanimously agreed on and applied even by a few States, including France, which refused to become its formal parties.
obligation is essential and, accordingly, whether its breach is of a "criminal" nature."\textsuperscript{113}

Taking these criteria into account the list of international crimes having been adopted as such in the body of general international law is impressive today. They are: piracy on the high seas, slavery and slave trade, aggression, genocide and \textit{apartheid}. In \textit{statu nascendi} are perhaps the crime of torture, that of international terrorism and that of drug trafficking.

Statutes of international criminal courts and tribunals have added to this lengthy list some crimes that can be committed in connection with armed conflicts: crimes against humanity; violations of laws or customs of war; serious violations of Article 3 common to the 1949 Geneva Conventions and of Protocol II of 1977 (that can be committed in non-international armed conflicts); and grave breaches of the 1949 Geneva Conventions (that can be committed only in international armed conflicts). The Rome Statute of the International Criminal Court of 1998 encompasses the last three groups of crimes into its large text of Article 8 as "war crimes".

Finally, it seems important to emphasize another distinction relating to perpetrators of these offenses. Crimes of piracy, slavery and drug trafficking are usually committed by individuals or groups acting for their own interests. Although anything in life is possible, it is difficult to impute these acts to one or more States.

Some of the most atrocious crimes such as genocide, \textit{apartheid}, or transnational terrorism, or crimes against humanity, can also be committed by groups of individuals acting in their own capacity; but individuals can be inspired by or act as agents of a State.

However, crimes against peace (i.e. the crime of aggression) can by definition be committed by individuals only if acting in the capacity of State organs. State responsibility cannot be dissociated from them, while in other cases it should be proved.

* 

Common legal features of all international crimes can in our view be defined as follows:

(1) They involve personal responsibility of their perpetrators, but some of them can involve State responsibility as well.\(^{114}\)

(2) International crimes affecting human rights are absolutely forbidden as measures of reprisals against internationally wrongful acts by other States, in time of peace or in time of armed conflicts. As such, they are prohibited even as countermeasures against international crimes which were first committed by the wrongdoing State.

(3) They all have "imprescriptible" character, in the sense that no statutory limitations applies to them, irrespective of the date of their commission.

(4) Obligations not to breach fundamental norms prohibiting international crimes are all obligations \textit{erga omnes}.\(^{115}\)

(5) In respect of their transformation from codification conventions into customary rules of general international law all of them elude strict positivistic requirements.\(^{116}\) Unlike most other international crimes that are defined in conventions having this character, the crime of aggression was defined by the UN General Assembly resolution 3314 (XXIX) of 14 December 1974.

(6) The fifth important feature of all international crimes is their delicate link to \textit{jus cogens} as described in Article 53 of the 1969 Vienna Convention on the Law of Treaties. It was already a word on it.\(^{117}\)


\(^{116}\) Hence, written provisions qualifying these crimes from the general conventions on slavery, genocide, \textit{apartheid}, etc, usually transform in a short period of time into new customary rules of general international law. As customary rules, these qualifications are binding on third States that are not parties to respective conventions. These conventional definitions most often serve their purposes when a State's responsibility is at issue. But they are sometimes too scanty and insufficient in case of criminal responsibility of individuals before a criminal tribunal. On customary process in respect to all these norms see -- V.D. DEGAN: \textit{Sources of International Law}, The Hague 1997, pp.83-89, 220-236, 520-524.

\(^{117}\) See on that subject matter -- François RIGAUX: "Le crime d'Etat. Réflexions sur l'article 19 du
All aspects of relationship between State responsibility for any internationally wrongful acts, including international crimes, and the personal criminal responsibility of individuals acting as State organs, are not as yet clear. Nevertheless, the perpetration of international crimes such as that of aggression involves both responsibilities of the wrongdoing State and of individuals acting in its name. On the contrary, the commission of an ordinary international delict by a State, like unlawful use of force short of aggression, seems not to involve in practice personal responsibility of individuals who are its organs, but only the responsibility of the intervening State.

Because all international crimes constitute violations of norms of *jus cogens*, circumstances precluding wrongfulness of an "act of the State" such as consent, state of necessity, legitimate countermeasures, *force majeure* and fortuitous event, do not apply if the obligation arises out of a peremptory norm.\(^{118}\) They do not *a fortiori* apply in case of international crimes.

Nevertheless, even in the domain of international protection of human rights there are some non-derogable rules of *jus cogens* which have not been recognized so far as international crimes by the international community of States. Examples of such peremptory norms are: freedom from *ex post facto* laws; prohibition of imprisonment for debt; right to equal protection of the law; right to personal liberty; right to a fair trial; freedom of thought and expression; etc.

In order to make this specific relationship more clear several possible situations of international responsibility may arise in practice:

(i) A breach by a State of any of its international obligations, regardless of its origin (whether customary, conventional or other), constitutes its internationally wrongful act and entails international responsibility of that State.

(ii) Every State is subject to the possibility of being held to have committed an ordinary international delict by action or omission of its organs in breach of its obligations from a treaty,

\(^{118}\) *Cf.*, Articles 26 and 50(1d) of the *Draft Articles on State Responsibility* of 2001.
from a particular customary rule of law, from a judgment binding on it, etc. "Injured State" in such situations is only the State whose rights are infringed by that wrongful act. These relations belong to the field of diplomatic protection and they are not a matter of concern of third States.

(iii) A State can also commit an ordinary international delict in breach of its obligation from a peremptory norm of general international law (jus cogens), the violation of which has not been generally recognized as an international crime yet. This is a breach of an obligation erga omnes, and any other State can, as a matter of principle, consider itself an "injured State". But still, the personal responsibility of individuals acting as State organs does not arise because no international crime was committed.

There is, nevertheless, a strong tendency in the further development of general international law that large scale and widespread violations of norms of jus cogens, especially in the field of protection of human rights, transform into new international crimes.120

(iv) There is, however, a further far reaching limitation. Together with the responsibility of the wrongdoing State itself, only the commission of international crimes generally recognized as such by the international community of States involves personal responsibility of individuals acting as State organs. This relates indeed to any other individual perpetrator of such crimes, whether encouraged in this by a State or not.

But an international criminal court or tribunal can prosecute individuals only for crimes that are specifically conferred by its statute into its competence. Punishment of individuals for crimes that are not within the jurisdiction of a tribunal of that kind is violation of the principle nullum crimen sine lege.

119 This follows from a famous dictum by the International Court of Justice in its 1970 Judgment on Barcelona Traction, I.C.J. Reports 1970, p.33, para. 33. See its citation, supra, p.88.

120 In a remarkable book by -- Lauri HANNIKAINEN: Peremptory Norms (jus cogens) in International Law, Helsinki 1988, pp.716-723, the author has undertaken a careful research in order to ascertain norms of jus cogens which are now in force. The results of his analysis indicate that the difference between these peremptory norms and international crimes is thin. It sometimes depends more on the degree and harmful consequences than of the nature of the unlawful attitude. For instance, even if torture and other forms of brutal or cruel treatment or punishment are not as yet recognized as a specific international crime, a widespread practice of torture under some particular circumstances is already incorporated into other crimes.
10.4. Legal consequences of State responsibility for international crimes

In its initial Draft articles the ILC was not able to ascertain and provide criminal responsibility of States for international crimes analogous or alike to that of individuals. Although such tendency was present at the time of drafting of what became Article 19 of the Draft Articles on State Responsibility, it was later abandoned altogether.  

Hence, it is true that State responsibility for international crimes is essentially "a form of civil responsibility". This means that when a State commits an internationally wrongful act consisting of an international crime, it bears the responsibility to make reparation, just as in case of an ordinary international delict.

However, this flaw in positive international law should not be filled in by easily attributing criminal responsibility to individuals in international trial proceedings who have no personal guilt for the crime in question, and that can even be committed by a third State.

On the other hand, as was already stressed, there is no doubt that conduct of any State...

---

121 In a succinct review of the former doctrine, Professor Roberto Ago has described the views of supporters of the so-called theory of penal responsibility of the State, which experienced certain success in the period between the two world wars: "...reference must be made to the school which includes V.V. Pella, Q. Saldaña, H. Donnedieu de Vabres and others, who urged the adoption of a code listing the most serious breaches of international law and specifying the penalties attaching to them. These range from punitive damages to the occupation of territory, and, as a last resort, the loss of independence. All the authors in question make the implementation of their principles dependent upon the establishment of an international criminal court responsible for applying the penalties in question." Cf., Yearbook of the International Law Commission 1976, Volume II, Part Two, p.113, para.141. Such proposed court, if adopted under present circumstances, would perhaps assume a part of the responsibilities of the UN Security Council. However, if not for other reasons, it is hard to believe that any of its five permanent members would agree to such a far reaching revision of the UN Charter.


123 These shortcomings in positive international law were reflected in Chapter IV of Part Two of the First reading of Draft Articles on State responsibility of 1996, containing only three provisions. According to its article 51, "An international crime entails all the legal consequences of any other internationally wrongful act...", and in addition such further consequences as are set out in following two articles. Article 52 provides specific consequences for injured State, and article 53 relates to obligations for all States. See critical notes on provisions concerning ordinary international delicts v. international crimes -- Alain PELLET: "Remarques sur une révolution inachevée, le projet d'articles de la CDI sur la responsabilité des Etats", Annuaire français de droit international 1996, pp.22-25.
organs, being of executive, military, legislative or even judiciary branches, consisting either in actions or omission, which constitute an international crime recognized as such by the international community of States, is considered an act of that respective State and entails its international responsibility.

On the same footing, a State can be responsible for some indirect acts of aggression. Article 3 of the Definition of Aggression qualifies as aggression: "(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating of an act of aggression against a third States"; and "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such a gravity as to amount to the acts listed above, or its substantial involvement therein." The spectrum of indirect acts of unlawful intervention short of war is even much larger.

Virtually, wherever there is omission of State organs to prevent internationally wrongful acts on its territory affecting another State, a difficult problem can arise of attribution of these acts to its particular organs.

It must be, however, acknowledged that an injured State or person is entitled to reparation from a wrongdoing State. But it happens mostly as a consequence of its ordinary international delicts committed in time of peace, and then only if both respective parties have strong interest in continuing their peaceful cooperation and trade.

On the contrary, for the commission of the most serious crimes like that of aggression, State responsibility can remain in its consequences platonic. It depends on the power relations whether a State victim of aggression can be successful in its recourse to self-defence against a more powerful aggressor. Actions by the UN Security Council under Chapter VII of the UN Charter cannot be successful if the aggressor is one of its permanent members, or another State acting under its protection.

*
10.5. *Some features of personal responsibility of individuals*

Unlike national courts which are usually entrusted with prosecution of a large scale of international crimes, but for the reasons of political expediency do not properly fulfill their judicial function, international criminal courts and tribunals have, in this respect, very limited competencies. Their statutes confer to them the jurisdiction to prosecute only a few specific international crimes. In order not to grossly violate the principle *nullum crimen sine lege*, they cannot transgress their competencies, nor the qualifications of crimes as provided in their statutes.

Beside these far-reaching restrictions, the respect for some general principles of criminal law may shed particular light on responsibility of individuals, as compared to the State responsibility for the same crimes. The rules on State responsibility do not know limits which will now be discussed. As pointed out previously, the responsibility of States for the acts of their organs is more direct, yet in practice it can remain platonic.

Before that, the scope of States’ obligations in general in respect to existence of judicial bodies competent to decide on their violations must be clarified here. In its Judgment of 2006 on *Genocide Convention* (Bosnia-Herzegovina v. Serbia) the I.C.J. has emphasized the following:

“148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them...” 124

* 

It is not contested, at least in theory that every accused person, even for international crimes, has the right to a fair trial which includes the respect of all fundamental rules that can be called "general principles of criminal law". These principles are inherent to any judicial process. Their aim is neither to exculpate perpetrators from their personal responsibility, nor to

attenuate it, but to prevent injustice against these who are innocent. The breaches of these general principles, or their manifest violations, would affect the judicial character of criminal proceedings and easily lead to a mockery of justice.

Most of these general principles are embodied in statutes and rules of procedure and evidence of criminal tribunals. Some of them can only be mentioned here as examples: the ban of analogy, the principles *nullum crimen* and *nulla poena sine lege*, that of non-retroactivity of criminal law, and *res judicata*.125

* 

This author has especially learned statutory provisions and practice of the International Criminal Tribunal for the former Yugoslavia (ICTY). He was surprised by the extent of cases of disrespect of several rules of the said general principles of criminal law, especially in the beginning of its activity.126

On the one hand, the procedural rules were in its Statute poorly and insufficiently coached. In such a situation the task of a judicial body should be to define in advance all these principles in its Rules of Procedure and Evidence and respect them in the proceedings as much as possible. A plenty of other legal texts on criminal procedure could serve it as precedents.

Instead of that this Tribunal filled up these flaws by so-called “customary law” serving itself with precedents from allied military tribunals in occupied Germany after World War II. Even in that it was inconsistent, neglecting or underestimating important precedents conflicting with its predetermined positions. In any case such precedents do not constitute customary rules of positive international law. After the Rome Statute of 1998 has successfully codified general principles of criminal law in its Articles 22 to 33, the ICTY should adopt the spirit of these

125 One can reproach us that with this view we make preference of perpetrators of international crimes over their victims who expect justice. However, the previous practice has reviled that genuine perpetrators and their superiors in important official positions were very often protected from arrest and prosecution either by their State, or by the Prosecutor who finds numerous reasons not to raise acts of accusation against them. When at stake is a pacific solution of an internal conflict diplomacy overwhelms justice.

principles and adjust its practice with them. Instead of that, the Tribunal created its own “judge made law” for each particular case and it had to amend its Rules of Procedure and Evidence many times.

In addition, because the crimes and other rules applicable in non-international armed conflicts are insufficiently drafted in the Geneva law of 1949 and 1977, the duty of the Tribunal should be carefully to estimate the nature of each conflict at the time of perpetration of a crime. Instead of that, it wanted to have applicable all the rules of humanitarian law and it easily qualified these hostilities as international armed conflicts in their totality.

Such a “judge made law” consists in legislative function and is inappropriate to any judicial body. Hence, the Tribunal started from the postulate that the international criminal proceedings are essentially different from trials before national courts. It seems hard to support this position. The greater the gravity of a crime imputed to an accused, the higher the risk of miscarriage of justice.

Especially in the early phase of its activities, the Tribunal overburdened itself with other self-appointed duties which are not appropriate to any criminal court: establishing "historical truth" and involvement in the problems of responsibility of States in the conflicts in the former Yugoslavia. If it is not about some facts established by a judgment, historical truth in general terms belongs to historians, not to judges.

Nevertheless, the Tribunal has in its later phase adjusted its practice to the function of an impartial body. In this respect that practice constitutes a contribution to case law of international criminal courts and tribunals. However, in its earlier phase of activity its practice proves the effects of serious decline from fundamental principles already laid down in the 1789 French Declaration and first Ten Amendments to the Constitution of the U.S.A. that entered into force in the same year. All these fundamental principles are based on reason and man's social nature. They cannot be replaced by simple wish of some judges to create an entirely new criminal law, allegedly applicable in international proceedings.

*

Since 1956 nobody in the doctrine has seriously challenged the distinction between proper international crimes and ordinary international delicts, especially in light of rapid expansion of international criminal judiciary and the adoption of the Rome Statute of the International Criminal Court in 1998. Thus even in the Draft Articles on State responsibility the ILC adopted in 1996, the text of the Article 19 remained untouched.\(^\text{127}\)

The final and the most authoritative text on the Responsibility of States for Internationally Wrongful Acts, as adopted by the ILC on 9 August 2001, turned these things upside down. The former Draft Article 19 was suppressed altogether and the adjective "criminal" was omitted throughout the newly adopted text. Rules providing rights of "injured States" and obligations for all other States in case of commission of international crimes were replaced with new provisions concerning "serious breaches of obligations under peremptory norms of general international law" (Articles 40-41).

This happened after a quarter of a century of existence of that essential provision concerning international crimes that was generally understood as reflecting a customary rule of positive international law.

That radical change was a concession to representatives of a number of States in the Sixth Committee of the UN General Assembly. They vigorously argued that the responsibility of States is not of a criminal nature. This allegation seems at first glance correct. However, in the Commission's comment, among the examples of these "serious breaches" (every breach of \textit{jus cogens} is serious in itself), the following are quoted: prohibition of aggression, prohibition of slavery and slave trade, genocide, racial discrimination, \textit{apartheid}, torture, some basic rules of humanitarian law, and the right of peoples to self-determination. This list is, of course, not all-exhaustive.\(^\text{128}\)

It appears from the above cited examples that the changes in the attitude of the ILC were formal only in order to avoid some political objections.\(^\text{129}\) That is because even by the

\(^\text{127}\) It is true that throughout its work, since 1976, the Commission had been unable to ascertain specific legal consequences for States committing international crimes in relation to their commission of ordinary international delicts. It became obvious to everybody that, unlike individuals in their personal capacity, sovereign States cannot be criminally responsible.


\(^\text{129}\) These important modifications do not seem entirely justified especially in light of another decision
application of the former draft Article 19(2) almost all of the above acts constitute proper "international crimes". However, if only formal changes were the real intention of the ILC, their practical consequences seem to be more serious.

As mentioned above, according to the former Article 19(2), it was understood that the international community was as a whole responsible for judging whether some internationally wrongful acts were so essential to the protection of fundamental interests of this community that they constitute international crimes. After this change it could be implied that a very powerful State can judge for itself that another State committed a serious breach of obligations under peremptory norms of general international law on its detriment, and react unilaterally. In other words a very strong State can accuse all other countries for commission of some international crimes, but it can elude its own responsibility for similar acts by its unilateral qualifications. Reciprocity in relations of big and small States was by that diminished in favour of implied unilateralism.

The new situation also results in the confusion of terminology, but before that another explanation seems to be of importance. Before the Rome Statute of 1998, all international crimes were qualified as such in humanitarian and other codification conventions with a broad participation of States. All these conventions provide or imply primarily the responsibility of their States parties in case of their violation. Personal responsibility of individuals for these crimes was aggregated. This personal responsibility cannot, of course, eliminate the respons-

(continued)

by the Commission not to prepare draft articles of a codification convention on this subject-matter for a future diplomatic conference. Instead, the Commission adopted a restatement of provisions having primarily doctrinal importance.

130 Nevertheless, the problem of the right of peoples to self-determination faced with the principle of territorial integrity of States is of a more complex character. See the view of this author on it -- "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", Recueil des Cours, (Académie de droit international de La Haye), tome 279 (1999), Chapitre VIII: Droit à l'autodétermination, protection des minorités et respect de l'intégrité territoriale des Etats nouveaux, pp.330-367.

131 An exception to that were crimes against humanity, first provided in the 1945 London Statute on the Nurnberg Tribunal.

132 The matter was in particular of the 1948 Genocide Convention, or of "serious breaches" set forth in the four 1949 Geneva Conventions on humanitarian law.

133 It is true that their States parties undertook also to sanction the same crimes in their national legislations and to provide effective penalties for the persons found guilty. These obligations are but one aspect of these treaty commitments but in practice they are not very efficient.
sibility of States in case of violation of their conventional obligations. But that simple fact was not universally agreed on.\textsuperscript{134}

Now we come to a bizarre situation. On the basis of its jurisdiction under Article IX of the 1948 Genocide Convention, the ICJ can be competent in a dispute to establish the responsibility of a State party to it for its violation. That can be done in respect to any other State party of this Convention. Its Article I expressly states that genocide is a crime under international law which the contracting parties "undertake to prevent and to punish". Acts enumerated in its Articles II and III mean that the responsible State committed the crime of genocide on its own. However Articles IV to VIII relate to persons charged with genocide.

According to the new logic introduced by the ILC, this crime in this case was not committed as such in spite of the very title of that Convention. What was committed was a "serious breach of (the) obligation under the peremptory norm of general international law" which prohibits genocide. That is because of the fact that the responsibility of States is not criminal. The genuine crime of genocide can be committed, according to this logic, only by individuals for which the International Criminal Court (ICC) is competent, not the ICJ.

In spite of that in both situations it is a matter of the same internationally wrongful act. Even its qualification in Article II of the 1948 Genocide Convention and in Article 6 of the 1998 Rome Statute is the same.\textsuperscript{135} This means that The Hague Court and criminal courts and tribunals apply the same material rules and that violations of the prohibited acts have the same heinous consequences for their victims. For these reasons it does not seem possible to ignore the concept of international crimes in respect of State responsibility as well.

Besides that, in spite of the negative attitude in the ILC's Articles on State Responsibility, we cannot neglect altogether the important difference between proper international crimes on the one hand, and on the other, the violation of some other norms of \textit{jus cogens} which the international community of States has not as yet recognized as such. Other peremptory norms are for instance: the general legal rule of prohibiting discrimination of human beings; or violations of certain fundamental human rights not resulting in international crimes; or even the

\textsuperscript{134} In its 2007 Judgment the ICJ dismissed the allegation by Serbia that the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The Court relied in its denial on Preamble and Articles I to III and IX of the Convention. \textit{Cf.}, \textit{I.C.J. Reports 2007}, paras. 155-179.

\textsuperscript{135} The same is also with Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and Article 2 of the Statute of the Tribunal for Rwanda.
most of fundamental principles of international law (or "the principles of the UN") which include important derogations if provided by other legal rules.

Unlike these other peremptory norms, international crimes are, in principle, of absolute character. As such they are forbidden even as acts of countermeasures or of reprisals in armed conflicts.

All the above leads to the conclusion that the former Draft Article 19(2) with all its comments cannot be seriously replaced by the simple formula of: "serious breaches of obligations under peremptory norms of general international law".

* 

10.7. **The crimes of genocide and aggression**

Last issue relating to the nature of international crimes is a significant comparison between two most disgusting offences in international law: the crime of genocide and that of aggression.

First about genocide. All criminal tribunals, as well as the permanent International Criminal Court, have been so far entrusted to punish individuals for commission of this crime.\(^{136}\) In difference to other “core crimes”, definition and elements of this crime remained unchanged in all statutory provisions of these tribunals since the 1948 Genocide Convention.

In addition to this, Article IX of the Genocide Convention provides the right of its parties to submit applications to the International Court of Justice in The Hague against its other parties in case of disputes about the interpretation, application or fulfillment of it, including differences relating to the responsibility of a State for this crime.

However, the serious problem is that genocide is a crime which is very difficult to prove in a judicial procedure. Article II of the Convention, as well as other respective provisions in statutes of criminal courts and tribunals, impose as the strict condition for it, the so called “*dolus specialis*”. Criminal acts provided must be committed “*with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group*”. In case that the applicant is not able to prove this subjective element, acts forbidden in Articles II and III of the Convention constitute either crimes against humanity or war crimes. However, these international crimes do not fall under Article IX of the Genocide Convention and the ICJ has no jurisdiction to decide

\(^{136}\) Because the Convention on genocide was adopted in 1948, this offence was embraced in statutory provisions of military tribunals in Nuremberg and Tokyo in the larger concept of crimes against humanity.
As a consequence, although States parties to the 1948 Convention have the right to bring their case to that Court by unilateral application against its other parties, they have practically no means to prove the existence of the said subjective element. They have no free access to archives and documents of the respondent State that could be relevant for judicial findings. Hence, both Bosnia-Herzegovina and Croatia raised applications against Serbia on the basis of Article IX. However, the Court could rely only on evidences about *dolus specialis* from previous criminal proceedings before the ICTY against some political and military leaders of the Republika Srpska. As a result, only the massacre committed at Srebrenica in July 1995 was recognized as the crime of genocide, first by the ICTY and later on by the ICJ.

*  

It is quite different with the crime of aggression. In respect of State responsibility the most important act from the aspect of general international law remains the General Assembly resolution 3314 (XXIX) of 1974 on Definition of Aggression. But in respect of this crime there is no legal basis of alleged victims for unilateral applications to judicial bodies against a would-be aggressor State. Besides, it is hard to suppose that a State that was accused for this crime will voluntarily agree on jurisdiction of the ICJ or of an arbitral tribunal in order to attain justice. That is in respect of settlements of disputes concerning responsibility of States for this crime.

On the other hand, unlike with genocide, all international criminal tribunals were not entrusted to punish individual perpetrators of the crime of aggression.138

The military tribunals in Nuremberg and Tokyo, which solely prosecuted the losers in World War II, were bestowed with the jurisdiction of prosecuting “crimes against peace”. They were in fact equivalent to aggression. However, since 1948 no criminal tribunal was conferred with that jurisdiction in respect to individual persons.

---

137 As a consequence, many States brought to the ICJ under the heading of genocide the cases concerning aggression, war reparations or “ethnic cleansing” in occupied territory. But in all these instances the Court interpreted its jurisdiction very restrictively.

138 State responsibility was the subject matter of the UN Special Committee on definition of aggression. Its effort was successful by adopting the said resolution in General Assembly 3314 (XXIX) in 1974 by consensus. Parallel with drafting Articles on State responsibility in general, the International Law Commission was also preoccupied with discussing of a Draft Code of Crimes against Peace and Security of Nations. The ILC adopted its last text in 1996.
In this light it is important to know how the provisions of the Rome Statute of 1998 dealt with individual responsibility for crime of aggression. Among the “core crimes” provided in its text (genocide, crimes against humanity, war crimes), Article 6 has stipulated prosecution of individuals also for the crime of aggression. However, because of the disagreement on its definition the jurisdiction of the International Criminal Court (ICC) was regulated only at the Review Conference in Kampala (Uganda) in 2010. But amendments then adopted are not yet in force.

The definition of this crime in the amended text of the Rome statute incorporates in a condensed form all rules of general international law applicable in these situations. There were no substantial innovations in this respect in comparison to the said UN General Assembly resolution 3314 (XXIX).

Article 8 bis defines the individual crime of aggression as "the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Hence, this crime cannot be committed by low-ranking officers or private soldiers who take part in an aggressive war.

An act of aggression is further defined as the use of armed force by one State against the sovereignty, territorial integrity or political independence of another State without the justification of self-defense or authorization by the Security Council.

The definition of the acts of aggression, as well as the actions qualifying these acts as such, literally repeat acts described in Article 3 of the Definition of Aggression of 1974. They can be: (a) the invasion or attack by the armed forces of a State of the territory of another State; (b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) the blockade of the ports or coasts of a State by the armed forces of another State; (d) an attack by the armed forces of a State on the land, sea or air forces, or marine or air fleets of another State; (e) the use of armed forces of one State which are within the territory of another State with its agreement but in contravention of the conditions provided for in it; (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used for perpetrating aggression against a third State; and (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of
such gravity as to amount to the acts listed above.

Important difference in these two instruments is that the 1974 Definition of Aggression provides in its Article 4 that the UN Security Council may determine that acts others than provided above constitute aggression. Conformably to the principle *nullum crimen sine lege* in amended Statute of the ICC the above list is all-inclusive. On the other hand, according to Article 15 ter, paragraph 4, a determination of an act of aggression by an organ outside the ICC (including the UN Security Council), shall be without prejudice to the Court’s own findings. Yet the Security Council has too much influence in the proceedings.

* 

According to the Rome Statute three organs can initiate an investigation in respect of all crimes in the jurisdiction of the Court:

(i) Any State party can refer to the Prosecutor a situation in which such a crime appear to have been committed, requesting him to investigate the situation in case that the suspect is its national or national of another State party. However the Court has no jurisdiction in case that the crime was committed in the territory of a third State.

(ii) The Prosecutor may initiate inquiry either *proprio motu*, or by initiative of a State party, or on the request of the Security Council. He shall analyze the seriousness of all information received from various sources. If he concludes that there is a reasonable basis to proceed with an investigation, he shall submit a request for authorization of an investigation to the Pre-Trial Chamber of the Court. The Pre-Trial Chamber can authorize the Prosecutor to undertake the investigation or can refuse it,

(iii) The Security Council, acting under Chapter VII of the UN Charter can refer a "situation” to the Prosecutor in which one or more of such crimes appears to have been committed. In such an event there are no restrictions *ratione loci* and *ratione personae*. It is understood that the Security Council may request the investigation in case that criminal act was committed on the territory of any State, including non parties of the Rome Statute. However, no investigation or prosecution may be commenced or proceeded with under the Rome Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter has requested the Court to that effect. That request may be renewed by the Council under the same conditions without restriction. This organ can by that prevent any proceedings in the future.

Hence, in contrast to other crimes the amended text of the Rome Statute establishes a
unique jurisdictional regime when the Prosecutor can initiate an investigation into a crime of aggression.

Where a ‘situation’ is referred to the Prosecutor by the UN Security Council, article 15 *ter* of the Statute provides that the Court’s jurisdiction is started in the same manner as with the other crimes in the Statute. Hence, the Prosecutor may proceed with an investigation into the crime of aggression as well.

In contrast to Security Council referrals, under article 15 *bis*, the Prosecutor may only proceed *proprio motu* investigation or an investigation based on a State referral of a situation after first ascertaining whether the Security Council has made a determination of the existence of an act of aggression (under article 39 of the UN Charter) and waiting for a period of 6 months; where that situation concerns an act of aggression committed between States Parties; and after the Pre-Trial Division of the Court has authorized the commencement of the investigation.

In addition, Article 15 *bis* provides that States Parties may opt-out of the Court’s jurisdiction by lodging a declaration of non-acceptance of jurisdiction with the Court’s Registrar. Such a declaration can be made at any time (including before the amendments enter into force) and shall be reviewed by the State Party within three years.

Non-State Parties have been explicitly excluded from the Court’s jurisdiction into a crime of aggression under this article when committed by that State’s nationals or on its territory. This refer also to permanent members of the Security Council which refuse to become parties of the Rome Statute.

The provisions of both article 15 *bis* and article 15 *ter* provide that the Court will not be able to exercise its jurisdiction over the crime of aggression until at least 30 States Parties have ratified or accepted the amendments; and a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017.

*In view of this author there is little chance that the ICC will ever be efficient enough to prosecute individual perpetrators of this crime of aggression. In the words of the Nuremberg Judgment of 1946 it is "the supreme international crime... that contains within itself the accumulated evil of the whole."*\(^{139}\) Here are the reasons for this inefficiency:

\(^{139}\) *Cf., American Journal of International Law* 1947, p.186.
First, sovereign States are free to become parties to the Rome Statute in its present form or not. In difference to statutes of the ICTY and ICTR which were impose to UN members by resolutions under Chapter VII of the Charter, the Rome Statute is an optional international instrument. The freedom of choice relates to UN member States, as well as to others. Three permanent members of the Security Council out of five namely, the United States, Russia and China, refuse to ratify or accede to the Rome Statute as such. Nearly a half of other States did the same, among them Japan, India and Pakistan, Some of former parties like the United States, Israel and Sudan renounced the Statute later on. Its actual parties can *a fortiori* accede to its amended text or not.

Second, as was said, actual States parties to the Rome Statute when acceding to the amended text are free to lodge a special declaration on not to adopt the jurisdiction of the ICC concerning the crime of aggression for themselves.

Third, as was just described, the amended Statute provides numerous restrictions *ratione loci* and *ratione personae* that are further obstacles for a normal exercising of the jurisdiction of a judicial body specifically for the crime of aggression.

Fourth, within the above restrictions all proceedings before the ICC are, as was said, virtually under strong control of the UN Security Council. It is hard to imagine an actual procedure in which a permanent member State, or its ally, is suspect of the crime of aggression. By its right of veto it can prevent any proceedings. By contrast, its permanent members that refuse to assume obligations under this system have the power to supervise and control the actions of its States parties that adopted *bona fide* all those restrictions of their sovereignty. To our knowledge, not taking account of former treaties of peace, it was the first time that occurred in the treaty practice since the Peace of Westphalia of 1648.

In consequence, the above diplomatic arrangement between States enemies of international criminal justice and its fervent partisans is not promising in respect to prosecution of criminals. That is because its rational basis is very slim.

* 

10.8. The principle of non-discrimination

After proper international crimes to our second category fall all other measures of discrimination of human beings which do not consist in these crimes. Such measures can be of whatever basis, either in accomplishment of municipal laws in force, or committed by an
unlawful practice within a State.\textsuperscript{140}

There is no doubt that the principle of non-discrimination has become a peremptory norm of general international law (\textit{jus cogens}). It has been already declared in the Preamble and Articles 1(3), 13(1) and 55(c) of the UN Charter. Later on, it has been reinforced in Articles 1 and 2 of the 1948 Universal Declaration of Human Rights and virtually in all subsequent general and regional conventions on human rights. It is furthermore the main object of regulation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and of such special agreements as is the I.L.O. Convention No.111 concerning Discrimination in respect of Employment of 1960, and the UNESCO Convention of 1969 against Discrimination in Education. There is virtually no State in the world which did not give its consent on this principle in form of one or more conventional obligations.

Discrimination of human beings on whatever basis always produces far-reaching and harmful consequences. Its effect is always large-scale and systematic violations of human rights.

Violations of whatever rights of men, when committed as a measure of discrimination against an ethnic or social group bear the risk that the entire group in question becomes compelled, as its last resort, "to rebellion against tyranny and oppression" as it was stated in a somewhat different context in the Preamble of the 1948 Universal Declaration.

There will be more discussion of this legal principle when dealing with the right to equality of different ethnic groups, living together within a State.

* 

10.9. \textit{Peremptory norms on civil and political rights (jus cogens)}

Into our third category fall breaches of these civil and political rights of individuals that are couched in respective multilateral conventions in terms of \textit{jus cogens}, allowing no exceptions or attenuation in their implementation.

To this class belong first of all human rights that cannot be derogated in any circum-

\textsuperscript{140} See however about special measures of protection of unprivileged groups, \textit{infra} para.11.3.
stances such as war, public danger or other emergency. Different conventions provide somewhat different lists of these non-derogable rights, though they are essentially the same.

Hence, Article 4 of the 1966 International Covenant on Civil and Political Rights provides in this respect its following provisions as being non-derogable: Article 6 (right to life); Article 7 (right to human treatment); Article 8, paragraphs 1 and 2 (freedom from slavery and servitude); Article 11 (freedom from imprisonment for debt); Article 15 (freedom from \textit{ex post facto} laws); Article 16 (right to juridical personality); and Article 18 (freedom of thought, conscience and religion).\textsuperscript{141}

To this list should be added certain other fundamental rights of individuals that perhaps may be derogated in public emergency for a very short time. However, their violations justify strong measures of foreign intervention if committed in a longer period of time and on a large scale and systematic basis. According to the text of the aforesaid 1966 International Covenant these are rights as provided in its Article 9 (right to personal liberty); Article 10 (right to human treatment of imprisoned persons); and Article 14 (right to a fair trial).

States parties to conventions providing these rights and freedoms cannot deny their nature of \textit{jus cogens} in their own respect. But if this process has not been already accomplished it seems the most likely that all above mentioned rights will in a foreseeable future transform into rules of general customary law.

\* \* \*

\textbf{10.10. Other mandatory rules}

To our fourth category belong infringements of certain other civil and especially political rights of individuals which, strictly speaking, do not constitute \textit{jus cogens}. In question are nevertheless firm legal obligations of States, whose violations cause international respon-

\textsuperscript{141} Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is in that respect more restrictive providing as non-derogable the following rights: rights to life, to human treatment, freedom from slavery or servitude, and freedom from \textit{ex post facto} laws. The most extensive is, however, Article 27 of the American Convention of 1969. In addition to all the foregoing it provides as non-derogable: right of the family, right to name, rights of the child, right to nationality, right to participate in government, as well as juridical guarantees essential for the protection of these rights.
sibility. Respective conventional provisions allow to States parties a large choice of measures in their implementation or even considerable restrictions in application in order to ensure such loose objectives as "national security", "public order", "morality", etc.142

According to the aforementioned 1966 International Covenant on Civil and Political Rights, the question is of its Article 12 (freedom of movement and residence); Article 17 (right to privacy); Article 19 (right of expression); Article 22 and Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights (freedom of association in trade unions); Article 23 (right of the family); Article 24 (special rights of child); and Article 25 (right to participate in government).

Large-scale and flagrant violations of these rights may also justify measures of foreign intervention. But it is perhaps more essential that in States in which the full respect of these rights is evaded by restrictive municipal legislation or practice that leads in the long run to the disintegration of political and economic order. That has dangerous consequences for all citizens. All East-European States offered a plenty of negative examples in the past.

*  

10.11. Economic, social and cultural rights of individuals

To our last category belong faults in implementation of the so-called economic, social and cultural rights. In the respective 1966 International Covenant they are defined rather as long-term objectives than as firm legal obligations. Their disrespect does not give raise in all circumstances the international responsibility. The implementation of these rights depends on economic capacity and welfare of respective States parties of it. That means that in wealthier societies these objectives become source of stronger and more definite legal obligations than in very poor and backward countries.

Hence the 1966 International Covenant on Economic, Social and Cultural Rights, binds its parties in Article 2(1) to achieve: "progressively the full realization of these rights".

According to the text of this Covenant they are: right to work (Article 6); right to just and favorable conditions of work (Article 7); right to social security including social insurance (Article 9); protection and assistance to the family, special protection of mother and children (Article 10); right of everyone to an adequate standard of living (Article 11); right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12); right to education (Articles 13 and 14); and right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and of the rights of author (Article 15).

Although the matter is here not of *jus cogens* in regard to all States, Article 2(2) of the said Covenant strictly forbids the discrimination of their citizens in enjoyment of these objectives on whatever basis as to race, color, sex, social origin, property, birth or other status. This means that if one State is not capable to assure all the above mentioned rights to all its citizens, its discriminatory measures in enjoyment of any of them against some particular groups do not differ from discrimination in regard to any other human rights or freedoms. This specific obligation proves furthermore that the principle of non-discrimination is a *jus cogens*, and that it is as such of universal application.

* 

10.12. Conclusion

The proliferation of conventional legal obligations in this subject matter after World War II evidences a curious merging of natural and positive law in the domain of human rights. This branch of international law has developed under the impact of that what Grotius loosely called rational and social nature of man. Hence, almost all provisions from the French Declaration of 1789, which were themselves based on reason and social nature of man, have already been absorbed into rules of positive international law of universal scope of application. The most important among them have even transformed into *jus cogens*.

This however does not mean that the natural person has become itself an international person, possessing the same international rights and duties as States or intergovernmental organizations. An individual is nowadays not bestowed of the capacity to maintain his rights
bringing international claims in its own capacity. Those are sovereign States which agree on all internationally protected rights that an individual can enjoy.

However, a State may by treaties or unilateral acts entitle individuals under its jurisdiction who claim to be victims of violation of their protected human rights directly to address their petitions to impartial international bodies. When doing so, the respective State agrees that its obligations of this kind have in fact priority over its constitutional and statutory provisions in this domain. In order to avoid useless and expensive litigations such a State is sometimes compelled to adjust its domestic laws with international standards on human rights.

And it has been proved in practice that exactly these countries that scrupulously respect their obligations in protection of human rights are more fitted to economic and technological progress than States in which fundamental rights of individuals and groups are disregarded and despised.

It has also been proved that especially in multiethnic and multi-confessional countries the contempt of human rights is the first cause of disorder, riots, civil strives and of total chaos. The situations in ex-Yugoslavia, Lebanon, Somalia, and now especially in Syria and Yemen are the best confirmation of this truth.

There exists in fact a delicate link in the present world between the observance of natural rights of individuals such as defined in the French declaration of 1789, and economic stability, progress and social justice.

*  

Hence, the progress in normative development of legal rules on protection of human rights has been since 1945, tremendous. The right to humanitarian intervention in case of large scale and systematic violations of human rights in a State is less and less disputed in doctrine, as well as in practice.

But on the other side of the medal, there is a harsh reality of human sufferings because of the lack of will of international community, including the United Nations, to intervene in order to stop international crimes. In situations like these in Bosnia-Herzegovina, Somalia or Angola, the normative affirmation of the right to humanitarian intervention does not suffice.
That what is needed is a duty to intervene according to some impartial criteria. Such measures should be devoid of egoism of intervening States. The early prevention of further atrocities is for actual and potential victims of these crimes more important than the prosecution of their perpetrators by the recently established International Criminal Tribunal. The international community thus needs new and more advanced forms of its organization.

* 

11. A LEX FERENDA: FUNDAMENTAL RIGHTS AND DUTIES OF ETHNIC GROUPS WITHIN A STATE

11.1. Introduction

Under this heading there will be no room anymore for a comparison of natural and positive law. Just on the contrary, in tradition of naturalist thinking we shall try to formulate some fundamental principles, based on reason and on social nature of man, that are still largely lex ferenda. It is not certain whether the totality of these principles will ever transform into new positive law, whether they will be respected by States as such, and transform existing relations between ethnic groups in a positive sense.

As was said, Vattel discussed on rights of "nations". Abbé Grégoire defined fundamental rights of "peoples". However in both instances these terms were used more or less as synonymous of States. They both meant nations or peoples organized in a national, and in principle in an ethnically uniform State.

Here will be discussed some natural rights and duties of various national, ethnic, linguistic, or tribal groups living together within a State, or within a part of a State's territory such as a commune, district, administrative or autonomous region, component unit of a federation, etc. For the sake of convenience they will all be called "ethnic groups". When appropriate, confessional and linguistic groups will be considered as well. There shall be not the word only of ethnic or other "minorities". In some ethnically mixed States like Belgium, Switzerland, the former Yugoslavia, or former Czechoslovakia, etc, all ethnic problems cannot
be envisaged in the majority-minority relations.\textsuperscript{143}

As was just stressed multiethnic and multi-confessional States have become in recent times more and more vulnerable as it has happened in some other past periods of history. They are more than other countries exposed to ethnic conflicts and strive, especially if fundamental rights of all their citizens were not scrupulously respected. Even some States with stable democratic institutions and relatively independent judiciary are not totally spared of these calamities. Multiethnic relations are for them too a pressing problem which must find its just and lasting solutions.

It is believed that it was the French Revolution, which created a unified French nation absorbing all regional and linguistic differences and radically eradicating all kinds of particularism on French soil, allegedly suppressing these obsolete remnants of feudalism. However, although many governments in the world have pursued the Jacobin policy of centralization and assimilation, a similar development has barely been achieved in another European State or elsewhere. The policy makers in these States were willing to create new nations from different groups, or they just wanted to absorb existing minorities with their majority population. Recent developments in Corsica proved the fact that even in France this policy did not produce everlasting results. But in most other countries such a policy of enforced assimilation had only excited potential differences and created new ethnic problems and conflicts.

Some States in Europe like Switzerland, Belgium, ex-Czeco-Slovakia or actual Bosnia-Herzegovina, have traditionally been multiethnic and no policy could change this reality. The policy of subjugation, oppression and even annihilation to various extents of some groups was one of causes of dissolution of former large empires, like Imperial Russia, Ottoman Empire,

\textsuperscript{143} The text which follows was first published in Croat language in the beginning of 1989, just when Serbia was suppressing the autonomy of its Provinces of Kosovo and Voyvodina, but before democratic processes in Eastern Europe and dissolution of Yugoslavia itself. At that time it had some echo only at a small fraction of intellectuals but it could not have impact on tragic political developments that followed. \textit{Cf.}, V.D. DEGAN: "Prirodnopravni temelji prava i dužnosti čovjeka, države i etničkih zajednica" (Rights and Duties of Individuals, of States and of Ethnic Communities: their Basis in Natural Law), \textit{Naše teme} 1989 (Zagreb), No.1-2, pp.3-22.
and Austria-Hungary, and in recent times of the Soviet Union and Yugoslavia.

Some other States with substantial majority of homogenous population have more or less large ethnic or religious minorities on their soil which have never been assimilated. They are among others: Germany, Italy, Spain, modern Austria, Greece, Bulgaria, Scandinavian countries, France, etc.

The present time is a new epoch of great migrations of populations coming from underdeveloped countries and settling themselves in prosperous parts of the world. Thus, even these States in Europe which had until quite recently a more homogenous population than others, became more and more inhabited with migrant workers accompanied with their large families and offspring. These recent immigrants bring with them different customs, habits and religion. It is vain to expect that one morning all of them will leave the countries of their actual residence forever. Some of these groups are more resistant to natural processes of assimilation than others, but these processes will perhaps last for centuries.

That is therefore the fate of the most States in the world, rich as well as poor, to be or to become multinational, multi-confessional and multi-cultural.

*  

Positive international law has affirmed in favor of peoples which do not possess their national States their right to self-determination, including the right of secession and of creation of their own State. However, the accomplishment of this right by all ethnic groups in the world could produce a total disorder and chaos. Territorial integrity of most existing sovereign States could not keep its existence forever. A huge number of new and tinny independent States would appear without economic, communicational and other conditions for survival. Even more than that, the population of different origins is in many regions so mixed, even in villages, that the secession of one group is impossible without creating new minorities in seceded territories. Hence, the justice for one group would inevitably result in the injustice for others.

*  

The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations tries to
reconcile the principle of equal rights and self-determination of peoples with the respect of territorial integrity of existing States. It proclaims in one of its key-provisions the following:

"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into another political status freely determined by a people constitutes modes of implementing the right of self-determination by that people."

However, another provision from that same section in this Declaration provides a far-reaching exception to that principle:

"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."

This reservation restricts in practice the choice of means for implementing the right of self-determination considerably. According to the first cited paragraph these modes are inter alia the establishment of a new sovereign and independent State, or the free association or integration with an independent State. For the sake of maintenance of its territorial integrity or political unity, an existing State conducts itself in compliance with the principle of self-determination if it possesses a government representing the whole people belonging to its territory "without distinction" as to race, creed or color. Hence, minorities can be represented in the legislature but they can still be deprived of their national rights if permanently outnumbered by representatives of larger groups. In these situations it is still assumed that such a State conducts itself in the compliance with the said principle of equal rights and self-determination of peoples, what is simply not true.

This reservation opens the door in fact to grave abuses. There is today slightly a State in the world, which does not pretend that its government represents the whole population within its territory without any distinction as to race, creed or color. Almost no State admits that it discriminates its own citizens on whatever basis. And most foreign States give them easily credence in constant fear that the exercise of the right of self-determination by some peoples would challenge the existing territorial status quo with unpredictable consequences for international peace and security, as well as for their own integrity. In addition, in case that they
recognize their very existence almost all States pretend that various ethnic groups on their soil, have already "consumed" their right to self-determination "freely" associating themselves in some former time into the respective State.

Therefore, instead of strict and consistent implementation of the right of self-determination by all ethnic groups in the world, including their likely secession, it seems more appropriate to establish and maintain conditions necessary for peaceful and harmonious living and amicable co-operation between such groups within the same territory.

The rights to secession should however remain as a part of natural right to resistance against oppression in circumstances of necessity and as ultima ratio when all peaceful means for deterring injustice, unequal treatment and crimes prove futile.

*  
The solution of ethnic problems is sometimes sought in special protection of national or other minorities. As was explained, in States like Belgium or the former Yugoslavia, it is not a panacea that can resolve all their ethnic problems.

For the rest, except Article 27 of the International Covenant on Civil and Political Rights of 1966, there are scarcely other provisions of wider scope suitable for their transformation into general customary international law. All other general customary rules on human rights relate to non-discrimination of individuals but they do not ensure for them any suitable means for the preservation of their national identity such as schools or other institutions.

It is true that the system of minority protection that was introduced after World War I was in that respect much more advanced. But Western Allied and Associated Powers have imposed that system on discriminatory basis to defeated States in that war; to their own allies

---

144 The said Article 27 reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." This wording allows States parties of the Covenant simply to deny the existence of such minorities on their territory. More ambitious is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (GA resolution 47/135 of 18 December 1992 (hereafter "the 1992 Declaration on Minority Rights"). Cf., International Legal Materials 1993, No.3, pp.913-916. Its text has however not the same impacts on customary process as Article 27.
from Central and Eastern Europe; and to some new States candidates for membership to the League of Nations. They themselves refused to assume any such obligations in favor of minorities on their soil. As a consequence this system caused itself new injustices and discriminatory treatment, and was soon frustrated or abolished by its States parties.\footnote{Thus, on behalf of the Treaty on Minority Protection of 1919 Yugoslavia was bound to assent to creation of private institutions and schools to national minorities on its soil, and to finance elementary education in national languages to substantial minorities in communes which they inhabit. By this protection was encompassed \textit{inter alia} the tinny Italian minority on the Adriatic coast. Much larger groups of Albanians, Macedonians and Turks were deprived of these special rights because this obligation related only to territories acquired by Serbia or by the Kingdom of Serbs, Croats and Slovenes, after 1 January 1913. On the other hand, Italy itself refused to assume any similar obligation. As a result large Austrian, Croatian, Slovenian and Albanian minorities on its acquired territories in 1919 were submitted to ruthless assimilation, especially during the Fascist regime under Benito Mussolini. Even names of their ancestors on graves were "italianized".}

Faced with widespread intercommunal conflicts in recent times both the Council of Europe and the Conference on Security and Cooperation in Europe started to issue instruments on special protection of minority rights, on conventional or regional basis.

* 

The solution of ethnic problem is sometimes sought in federal structure of multiethnic States. Thus, according to the Constitution of the former Soviet Union of 1977, fifteen nations had their national soviet socialist republics which were component parts of the Soviet federation. Some large nations whose territory did not reach external frontiers of the Union had their autonomous republics integrated either in the Russian Federation or in other federal republics. Less numerous nations had their autonomous regions, and these the smallest had their national territories.

There were therefore established more than fifty national and territorial entities on various levels of statehood in the Soviet Union, but this large State had not less than 110 national and linguistic groups. Thus, more than half of them had neither their national territories. That what further complicated the problem is the fact that almost in every entity of the former Soviet Union on whatever level, lived several ethnic groups mixed, which could not be divided by borderlines without creating new minorities. Some of them have considered
themselves to be autochthonous on the territory they lived, and others were more recent immigrants. Russians and Ukrainians, and maybe Jews before their mass emigration to Israel, still live almost everywhere.

The demise of the Soviet Union has not improved this situation. All new States have succeeded all these problems. They are the cause of armed conflicts in Moldova, Azerbaijan, Armenia and Georgia. Creation of new States has incited the desire for autonomy or even for secession of regions inhabited by minorities in new States. To this must be added recent Russian annexation of the peninsula of Crimea in 2014 from Ukraine.

Yugoslav federal structure, according to its last Federal Constitution of 1974, and constitutions of republics and autonomous provinces, in former times seemed to be based on the reason and on justice for all. It was an attempt to eradicate differences between "nations" which were all of South Slavic origin (Serbs, Croats, Slovenes, Slav Moslems, Montenegrins and Macedonians), and national minorities. There were two very large non-Slavic ethnic groups: Albanians and Hungarians. Albanians live mainly in the Serbian Autonomous Province of Kosovo and in Macedonia, and Hungarians in the Serbian Autonomous Province of Voyvodina. Recognizing to all minorities, regardless their number, the position of so-called quasi-nationalities ("narodnosti"), the intention was to make all citizens of whatever origin active political subjects responsible for the maintenance of the Yugoslav Federation and for preservation of their national rights as well.

This system could not rescue the Yugoslav Federation first of all because of lack of civil and political liberties of individuals under the rule of the Communist Party, and because of deep economic crisis and high foreign debt.

After the death of the Yugoslav President Tito that system started to erode. The *coup de grâce* to Yugoslavia has caused great Serbian nationalism and the wish to create a territorially enlarged Serbia. Serbian leadership managed in March 1989 to suppress the autonomy of its two Provinces of Kosovo and Voyvodina, depriving Albanian, Hungarian and other minority groups of their political and cultural rights. That was the cause of increasing separatism in all other republics, which did not want to experience the fate of Kosovo.
Democratic elections after the fall of Berlin Wall were possible only in Republics and not on Federal level. New non-communist régimes in Slovenia and Croatia were tried to be overthrown by intervention of the Federal Army. It was coordinated by the rebellion of local Serbian population in Croatia and latter on in Bosnia-Herzegovina. At that time only Macedonia had been preserved of this armed conflict.

Former Yugoslav Republics have got their independence in a bloody war. During that armed conflict large parts of Croatia and Bosnia-Herzegovina were cleansed of non-Serbian population and were temporarily under the rule of local Serbs. But after the military debacle in 1995 large parts of Serbs left Croatia and settled themselves elsewhere. Their fate was similar to that of Germans in 1945.

Although the foregoing examples of the former Soviet Union, Yugoslavia and even of Czecho-Slovakia indicate that federation is not a perfect solution to all problems of multiethnic States, it is nevertheless a step in right direction. Decentralization of power and of decision-making on various levels is by all means preferable to centralized government in a strong and totalitarian State.

However, if within new sovereign States, or members of a confederation, the political leaders of the prevailing population reduce other ethnic groups living with them into the status of lawless "minorities", nothing substantial will be changed. Present intercommunal conflicts will continue, and only their actors will change their rôles.

* 

Notwithstanding institutional and legal patterns the deepest cause of all communal conflicts in multiethnic States rests in mutual distrust or in fear of assimilation or expulsion, or even of physical annihilation of one group by another. Even when less numerous groups enjoy all appropriate minority rights their condition of being minorities is itself a cause of their anxiety.

Groups which feel themselves weaker are always anxious, with or without reason, that their existing rights might be reduced or even abrogated by majority decisions of the dominant group. For this reason they sometimes resist to democratic processes. In any case they resist to
the secession of the State in which they are settled from a federation in which their fellow tribesmen had formerly dominant position. On the other hand, as was stressed, systematic discrimination of members of one or more ethnic groups by laws can always cause their rebellion. The discrimination of entire groups is the most serious threat to stability and integrity of any State.

Some States in the Balkans try to settle this problem by the cruelest solution of all: by ethnic cleansing of captured territories. Hence, their leaders try to constitute ethnically homogenous States in which they want to embrace all territories in which their tribesmen have earlier lived mixed with other groups. Such a "solution", like the "final solution" in Nazi Germany should be confronted by similar measures.

* 

On the basis of precepts of natural law we shall now try to formulate a number of fundamental and inalienable rights and duties of all ethnic communities of citizens living together within a State, or in a component State of a federation, or in an administrative subdivision of a State, or even in a commune.

These fundamental rights and duties will be explained respecting certain hierarchy. Their sum relates to all ethnic groups of citizens regardless their origin, extent or proportion in the total number of population. Nevertheless, an ethnic group in this sense is not a very small population of the same origin living dispersed and mixed with other citizens over a vast territory and not communicating with one another. But that population can still be a potential ethnic group in statu nascendi because it can organize itself in the future.

* 

11.2. **Right to existence**

All ethnic or religious groups have equal and inalienable right to exist. No group, on the basis of its alleged historic or other rights, its greatness, importance, or for any other reason, shall under any circumstances deny this fundamental right to existence to any other group living mixed with it on the same territory. There shall be no "constitutive nations" and "minorities", no "dominant" and "second-rate" groups on any other grounds.
Any propaganda threatening the right to existence of any group must be severely punished according to the law.

The deepest cause of most communal conflicts throughout the world lays in the fear of members of various groups for their very survival. For different reasons, whether justified or not, they sometimes feel that their physical existence is becoming endangered by another group with which they live together on the same territory.

This is then the cause of many ensuing misfortunes. The instinct of survival and of self-defense conduces the members of this group to threaten the existence of the “hostile” group as a whole. Then social and even family relations between relatives and former friendships rapidly deteriorate and the paranoia on a massive scale is taking place. Such tensions make it impossible to distinguish between the causes of the actual conflict and their consequences. A potential social conflict can gradually degenerate into an armed struggle in which the right to existence of all individuals becomes threatened regardless of their origin or affiliation. Just and rational solutions to such conflicts are very difficult to find. It is even more difficult to literally implement them.

In this connection it must be stressed that the relations between ethnic and other groups do not entirely depend on their mutual sentiments. The existing proportions in the population of these groups on a territory cannot be petrified by the will of legislator or otherwise. Like individuals, even like States, ethnic groups are living bodies, which are not eternal or immutable. Due to the natural processes of assimilation, migrations, diseases and varying birth-rates, proportions between various ethnic groups on a territory are subject to continuous changes. But the birth-rate is a factor, which is neither constant nor foreseeable, because it can unexpectedly change.

It is, however, of utmost importance that the State with its policy and legislation does not deliberately intervene in this process with the aim of changing these proportions. Above all, it must by no means threaten this fundamental right to existence of any ethnic or religious group of its citizens.¹⁴⁶

¹⁴⁶ In this spirit the 1995 Council of Europe Framework Convention states in its Article 16: “The
Members of certain groups have a deeply rooted feeling that they constitute the only autochthonous element in the territory, which they believe belongs to them alone, and that they alone have the so-called "historic rights" to it. Individuals belonging to other groups are in their eyes nothing but "intruders".

In some successor States of the former Yugoslavia that is the basis of the said division between "constitutive nations" and simple "minorities" with some differences in their civil and political rights. In multiethnic States or territories this is a typical cause of distrust of other groups and their fear that they may be deprived of their political rights, forcibly assimilated, expelled or even physically exterminated.

The alleged "intruders" in their turn start to fabricate arguments about their own even older title of "historic rights" over the same territory. These arguments soon lose any rationale and themselves become the cause of mutual distrust and conflicts. Each group becomes convinced that its "title" is stronger and older than that of other groups. Finally, the question arises not of "titles" but of bare survival.

"Historic rights" of one population over a territory is a highly relative argument. It is in itself an obstacle to co-existence and friendly relations among more groups which have to live together. Even if ancestors of an ethnic group settled in that territory in ancient times, they must have met some other known or unknown tribes living there before it. Who can really trace one's lineage only five or six centuries backward?

The difference of a few centuries of settlement of several groups should never be a reason for discrimination of their descendants, or even for the denial of the right to existence of members of one group by another. Even the most recent immigrants, once they have acquired citizenship and after their children were born as citizens, must have the right to exist in the respective State or region like all others.

Political parties or unstable individuals sometimes easily deny the fundamental right to

(continued)

Parties shall restrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention."
existence of other groups, including especially that of migrant workers. These arguments are quite frequently defended as the exercise of the so-called freedoms of association, expression and press. But because of their ill-fated and far-reaching evil consequences, especially in multiethnic States lacking stable democratic institutions, they should not remain "freedoms". They should be forbidden as crimes and heavily penalized.

Intercommunal conflicts today have become more dangerous for the maintenance of international peace and security than the disputes and contests between States and their military alliances. At any case, it is much more difficult to terminate an internal conflict and to find a just and lasting solution to it than to reach a peace treaty between belligerent States.

*  

Now the question is how to redress the situation after the large-scale ethnic cleansing has already taken place. If it is accepted as a fait accompli in regard to a future political solution and as a justification for altering frontiers between the new States, a lasting peace will never be restored.147

As a consequence any peace settlement should be based on the right of all refugees and displaced persons of whatever origin to return to their homes in safety and dignity. All contracts or laws on disappropriation or confiscation of their property should be cancelled. All owners of the destroyed property should be compensated as much as possible on an equitable basis. All persons accused of international crimes should be brought to the international justice.148

The peace on any other basis would encourage the aggressor to attempt to gain new territories in the future, which he would then ethnically cleanse again. On the other hand, in

147 In the light of these circumstances what becomes quite convincing are recent interpretations of the origin of all conflicts in the Balkans since the beginning of the nineteenth century. According to these interpretations, these conflicts stem from a disorderly destruction and disappearance of the former Ottoman Empire. That would mean that the Balkan peoples are not able to live peacefully in their States, that a foreign Empire should again rule them. It seems unacceptable to this author.

148 In past there was a risk that the International Criminal Tribunal for the Former Yugoslavia at The Hague becomes a bargaining tool of diplomats in search of a quick peace plan.
these circumstances nobody could deny the victims of the aggression the right to re-conquer their lost land. The expected consequence would then be the same as the fate of the German population in Eastern Europe after the fall of the Nazi Germany.

* The fundamental right to existence of all ethnic and confessional groups is not yet firmly established in all its aspects in general international law as such.

The broadest basis for responsibility of instigators, i.e. intellectual offenders, who did not personally commit the crime nor did they order it to their subordinates, lies in Articles II and III of the 1948 Genocide Convention and in the same text in all statutes of international criminal courts and tribunals. On that basis, any person who has by writing or speech directly and publicly incited the committal of genocide against members of one or more ethnic groups can be accused and prosecuted by the tribunal as a criminal.

This basis of international criminal responsibility has proved to be too narrow. On one hand, any propaganda threatening the right of existence of any settled group on a territory should be punishable as an international crime, even if it does not consist of a direct and public incitement to commit genocide or of a complicity in genocide in the narrowest sense of this term.

On the other hand, provisions provided in other general and regional conventions on human rights do not precisely proscribe forcible expatriation of individuals from their country on the basis of domestic laws or in violation of them. And these provisions neither prevent nor provide punishment for forcible measures of assimilation of ethnic groups by a State which can be very refined and perfidious.

* It seems to be important that the fundamental right to existence of all groups should as such be endorsed in all international instruments on human rights, the same as is now the case with the right of non-discrimination. Only in these clear and unequivocal terms is it capable to be transformed into a new peremptory norm of general international law.

And for a lasting peaceful co-existence and amicable co-operation of all groups in a
territory as even more important than formal legal rules, it is maintaining their mutual confidence in order that no collectivity feels menaced in its existence, in its equality and in its respect by other groups.

*  

11.3. Right to equality

All citizens of whatever ethnic or other origin are free and equal in rights. On the same ground all ethnic groups of citizens and all confessional denominations are free and equal before the law.

All individuals shall be equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talent.

The right to equality is displayed in the legal principle of non-discrimination but is not tantamount to it. Its full respect in all its aspects should lead to conscious renunciation of "historic" or similar exclusive rights of members of one group over a territory that it inhabits with other groups. With even better reason, it should result in refutation of division between "constitutive nations" and "minorities" in respect to their rights, which has no basis in the positive international law. This seems to be a distant objective today, which in this intolerant world sounds rather like a dream.

Paradoxically, in an atmosphere of genuine equality, in which members of no group feel to be discriminated in any respect, the processes of spontaneous and natural assimilation of diverse populations are the speediest and the most efficient. And conversely, nothing helps the consolidation and homogeneity of an ethnic or confessional group so much as its deliberate discrimination and oppression either by a State's official policy, or by hostile attitude against it on the part of the rest of the population.

Although the principle of non-discrimination is not synominous to the principle of perfect equality of all groups, it is the most essential part of it. The non-discrimination of individuals on whatever basis, has transformed since the UN Charter of 1945 into a jus cogens binding all States and all other international persons without exception. Needless is to quote in
support of this conclusion numerous provisions from general and regional conventions on human rights which all embody this principle. Needless is also to quote respective provisions from the international instruments relating to minority rights.

The largest description of this peremptory norm of general international law is done in Article 1, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. It reads as follows:

"1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Paragraph 4 of Article 1 specifies conditions, objectives and duration of special measures taken for the purpose of securing advancement of non-privileged groups or individuals:

"4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to insure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

The requirements in both paragraphs 1 and 4 of Article 1 are limits of margin of legislative action and practical policies of a Government in respect to persons belonging to different groups, and in respect to groups as well. If a national minority already possesses some institutions for the preservation of its identity, there are no reasons to prohibit the same institutions for the majority population or other minority groups.

Most of all, persons belonging to one group must not be restricted in or deprived of fundamental civil, political and other rights, in order to ensure "adequate advancement" of members of a numerically smaller group with a lower birth rate. If such measures against a group were undertaken "for the purpose of establishing and maintaining domination" by one group over another, then it is the matter of the international crime of apartheid.\textsuperscript{149}

All temporary measures in the period of public emergency derogating certain civil, political or other rights in an ethnically mixed region must in no circumstances involve discrimination of individuals, as well as entire groups.\textsuperscript{150}

The precondition for strict implementation of fundamental right to equality is a firm legal order, based on the rule of law and with functioning independent judiciary.

It is, in addition, highly desirable that especially States with mixed population adhere to human rights conventions and to protocols according to which individuals and groups within their jurisdiction may bring their cases to impartial international bodies. These bodies are provided \textit{inter alia} in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("the European Court in Strasbourg"), in the 1969 American Convention on Human Rights ("the American Court in San José, Costa-Rica"), in Article 14 of the aforesaid 1963 Convention on Racial Discrimination (the Committee on Elimination of Racial Discrimination), and in the first Optional Protocol to the 1966 International Covenant on Civil and Political Rights.

Although there is nothing to add to the existing legal instruments in respect of non-discrimination of individuals, it remains to advance the idea of suppression of any distinction in enjoyment of collective rights of majority and of minority groups. This should result in the abandonment of any degrading or humiliating meaning of the notion of ethnic, national or religious "minorities" in municipal legislation. That is a long-term objective that could be fostered by the integration of Europe with transparent frontiers.

Nevertheless, the right to equality and the right to political representation which will be discussed must be clearly distinguished from public positions and occupations, or civil service. Every citizen must have, without discrimination, equal opportunity to accede to all public positions. These functions, which require special abilities, talent or competence, should not be

\textsuperscript{150} \textit{Cf.}, Article 4(1) of the 1966 International Covenant on Civil and Political Rights. Article 4 (1) of the 1993 Declaration on Minority Rights provides in this respect that: "States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law."
distributed according to ethnic, regional, tribal, confessional or other proportions of the population. This is because such practice harms the entire society within a State and usually opens the door to grave abuses.

*  

11.4. **Right to proportionate sharing in decision-making**

Persons belonging to all ethnic or other groups, regardless of their number or percentage in population, are political subjects in their respective State. They shall vote and be eligible to election for representation in all political bodies by secret ballot and without unreasonable limits imposed by law. They shall have the right to represent and to defend the interests of their constituency.

In ethnically mixed territories, the rights of no group shall be derogated or reduced without approval of its representatives and without their participation in the decision-making. The fundamental rights of all groups -- especially the rights to existence, to equality, to proportionate sharing in decision-making, to the use of national language and to institutions -- ought to be guaranteed by the constitution. They shall not be subject to modifications or abrogation by the majority decision in the parliament, in a popular referendum or otherwise.

In ethnically mixed areas on different levels of self-government or administration, the principle of "one man, one vote" can be a rule but is not sufficient for all purposes. The structure of power there must be organized on such basis as to prevent the domination and absolute legislative power of the most numerous population and its representatives. Especially, the restrictions of existing rights, or even adoption of discriminatory measures against smaller groups by means of legislative and other acts adopted by the majority vote, must be prevented.

Therefore, on questions that are essential to the respect of the fundamental rights of specific groups, the simple majority vote must be excluded. On the other hand, questions to be decided either by consensus or by a qualified majority, must be restricted to the essential rights of particular groups, in order to prevent the obstructions of the decision-making in all other domains. And in order to prevent discrimination, any special rights which were already granted

151 In this respect it is worthy to cite a part of Article 6 of the 1789 French Declaration of the Rights of Man and of the Citizen: "...All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."
to one group should be recognized to other groups as well. There should be practiced in this respect a kind of the "most-favoured-nation clause".

For such a structure of power in a centralized State or in a Federation or in a component State of a Federation or in a province or commune, there are no universally recognized precepts. Probably no legal principles of universal application can be formulated for such situations. General international law is silent in this respect.

But even if the enactment of precise legal norms seems to be impossible, the most important goal to be achieved is to assure that no group, even the least numerous, feel marginalized, isolated and deprived of their rights. At the same time must be assured a certain proportion in political representation, according to the number of each group.

Here is in this respect enactment from an international instrument on minority rights. Article 2 (3) of the 1993 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is rather restrictive:

"Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the region in which they live, in a manner not incompatible with national legislation."152

*  

11.5. Right to free use of national languages

All linguistic groups have the right to use their language and alphabet in family, in private communications, in administrative and judicial procedure, as well as for other official purposes. The ignorance of the official language shall in no way impair the enjoyment of anybody's rights.

Languages of proportionally substantial group or groups in a territory shall be in official use on equal footing, even if they do not have the status of the official language on the level of the respective State.

There were in past regrettable experiences of the policy of forcible assimilation where even the use of native language in family was strongly suppressed and severely punished.

152 More elaborated is, however, the provision from the 1990 CSCE Copenhagen Document of the Conference on the Human Dimension of the CSCE. It is, however, of a "programmatory" character set up in a regional instrument.
These assaults in privacy are at the present time not widespread, but they are still not abolished everywhere.

Much more difficult is with the use of minority languages in judicial and administrative procedure, at post-offices and other public agencies. Very few States provide precise regulations in this regard. Translation in penal procedure is generally provided, but it is not the same with petitions of individuals when claiming their rights.

It is similar with rules of positive international law in this respect. Article 27 of the 1966 International Covenant on Civil and Political Rights is not quite precise. It admits first of all the attitude of some States to deny the very existence of ethnic, religious or linguistic minorities on their soil. In respect to States in which such minorities "exist", Article 27 provides that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy..." inter alia "to use their own language". Hence, it still results from its context that at stake is the freedom of the use of the language with other members of the same group, and hence not for any official purposes.

Such discrimination marginalizes members of linguistic minority groups, and can be harmful for enjoyment of the rest of their rights. This situation seems to be untenable in positive law and requires substantial improvements.

In some territorial entities within a State the concentration of linguistic groups is very high. Somewhere they constitute practically the totality of population. Somewhere they are in net majority or in substantial proportion. It is then just and fair that their respective language is in official use for all purposes on footing of equality with the State official language. That includes bilingual or even multilingual inscriptions of places, of streets, of public institutions, and at issuing public communications and official gazette if any. This is also a goal to be

\[153\] For its entire text, cf., supra, n.144.

\[154\] Article 2 (1) of the 1993 Declaration has extended the scope of the rule from Article 27 by following words: "Persons belonging to national or ethnic, religious and linguistic minorities... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference of any form of discrimination."
achieved, because general international law is still silent on this subject matter.

* 

11.6. **Right to institutions**

Linguistic groups are entitled to kindergartens and schools in their own language.

All ethnic groups have the right to their cultural institutions, such as theaters, press, and an equitable share in programs of the State-owned radio and television network.

To these ends ethnic groups shall be ensured an equitable share in the sums that may be provided out of public funds under the State, municipal or other budgets for these purposes.

For the survival of linguistic groups the most important is their enjoyment of the right to kindergartens and schools in their own language. It has been proved that kindergartens in national language are even more essential for the preservation of ethnic identity than secondary schools or the highest education level. When a child with both his and her parents employed in modern times forgets its language in its infancy, it is then lost to education even in the elementary school.

It is understood that in minority schools the teaching of State official language should be obligatory. On the other hand, in ethnically mixed regions it is equally understood that the languages of the largest minorities are taught as obligatory in other schools.

In any case, when they are deprived of education in their own language, linguistic groups have the feeling of being condemned to slow assimilation with the majority population, even if they fully enjoy all other abovementioned fundamental rights.

The struggle for institutions has its deep roots in history, although it has not been properly reflected so far in positive rules of general international law.

In times before World War I the main goal was the protection of religious, but not of ethnic groups. Therefrom is the achievement of some kinds of autonomy of their religious institutions from the intrusion of State authorities. Its traces can be found in early Capitulations
concluded by Western Powers with the Ottoman Empire. In the latter treaties certain obligations were imposed on the Ottoman Empire in favour of its Christian communities.

Within the system of minority protection instituted after World War I, the two provisions specifically dealt with this right to institutions. According to the first model provision, members of racial, religious or linguistic minorities enjoyed the same treatment and security in law and in fact as the other nationals of the respective State. In particular, they were entitled to charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

Another model provision imposed on respective State, that in public educational system in towns and districts in which a considerable proportion of members of a linguistic minority was resident, adequate facilities for ensuring that the instruction shall be given to their children through the medium of their own language. But the teaching of the State official language was obligatory.

The most important obligation of respective State was to ensure an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budgets, for educational, religious or charitable purposes in towns and districts where there was a considerable proportion of nationals of such minorities.

However, as it was stressed, being imposed on discriminatory basis only on certain States, this system created more injustices and unequal treatment of various ethnic groups than it redressed them. The most important fact is that there has never been a wish to transform these obligations into rules of general international law and to make them obligatory for all States in which several ethnic groups exist.¹⁵⁵

Due to Nazi manipulations with German minorities in other States, in the period after

¹⁵⁵ These provisions figure in treaties concluded in 1919 by the Principal Allied and Associated Powers with the Kingdom of Serbs, Croats and Slovenes, Poland, Czechoslovakia, Rumania and Greece. But as said above, these special rights were excluded in the territories that Serbia had acquired before 1 January 1913. These model provisions were also incorporated in the Peace Treaties of 1919 with Austria, Hungary and Bulgaria, and in the 1923 Peace Treaty of Lausanne with Turkey, but not in the 1919 Versailles Peace Treaty with Germany. They furthermore took place in unilateral declarations of some States as a condition for their admission to the League of Nations, such as Albania, Lithuania, Latvia, Estonia, Iraq, and of Finland with regard to its Aaland Islands.
1945 there was the least wish of Governments to assume obligations providing the right to institutions of their minorities. But in recent times there is a strong impetus to guarantee and regulate this right by multilateral international instruments, in Europe and elsewhere.

The 1993 UN Declaration is not very explicit in this respect. Paragraphs 3 and 4 of its Article 4 provide the following "obligations" for States:

"3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother language.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole."

The permissive language of these provisions does not recognize the right of minorities to schools in their languages. More ambitious are in this respect the instruments of European character.

* 

By assuming the legal obligation of ensuring the right of all ethnic groups to their institutions, and after carrying it out to the letter, respective States definitely renounce their declared or hidden policy of forcible assimilation of their ethnic minorities. As already said, the abandonment of such goal is the best means for natural and spontaneous processes of assimilation. It must ultimately depend on the free will of parents to use their language in family and to send their children to a minority kindergarten or school. And it depends again of the free choice of an adult to belong to whatever community he or she wishes. This is in fact natural right of a person.

The support and financing of schools and of other institutions of all ethnic groups from public funds in the territory, in which they live, must constitute a part of their fundamental right to institutions. Without their own institutions these groups will always feel unsatisfied.

Even if a deliberate long-term State policy attains its ultimate goal of assimilation and most members of a linguistic group forget their native language -- as has happened to the Irishmen, the Welsh, the Basques, or the Bretons in France -- their national sentiment or even
aggressiveness will not vanish for that reason.

*  

11.7 Summing up

Perhaps the above is not the complete catalogue of fundamental rights and duties necessary for sound relations of various ethnic and religious groups within a territory. But a careful respect of these five fundamental rights, done in good faith, would considerably diminish existing communal tensions and prevent new conflicts everywhere.

On the contrary, systematic and large-scale violation of any of the above rights of one or more ethnic groups will in the long run ruin every State with ethnically mixed population. As was already stressed, due to many historic and recent factors the majority of States of the present world fall into this category of multi-ethnic States.

This explanation of fundamental rights and duties of ethnic groups should however not be interpreted as an \textit{a priori} position against the existence of national States and of national sub-divisions in Federations of States. Such States are result of historic, cultural and economic emancipation and of former natural processes of integration of several groups into one nation. The existence of these States cannot, therefore, be contested. It is even more dangerous to contest actual frontiers and borders between these States and their sub-divisions, especially when they are a result of long historical processes.

In national States minority groups living together with homogenous majority population are expected to be loyal to the State and to its institutions, to be patriots, to have a feeling of being parts of it, and not to harm its vital interests. Such a loyalty can, however, reasonably be expected only if the majority population respects all the five fundamental rights of minorities mentioned above. These relations, therefore, work two ways, and the minority groups must also respect all these five fundamental rights of the majority group.

The ultimate goal of mutual relationship based on above rights and duties should be a genuine elimination of the status of dominant groups -- which usually form majority but can even consist of numeric minority -- and of the status of inferior groups which are reduced in or
deprived of their rights.

Finally, we cannot conceal the truth, that after the fratricidal war which consisted in ethnic cleansing of territories and in large-scale extermination of individuals only because belonging to distinctive groups, it will be extremely difficult to redress injustices inflicted and to re-establish the minimum of tolerance and mutual confidence.

The respect of all abovementioned five fundamental rights of all ethnic groups is a far more efficient precept for preventing intercommunal conflicts then for redressing all their evil consequences after they happened. Nevertheless, the full respect of these natural and inalienable rights consistent with the doctrine of natural law seems to be the only rational basis for the consolidation of new States in their recognized frontiers and for peaceful relations between these States in the future.
On the basis of a thorough research French scholar Louis Le Fur (1870-1943) has tried to determine the essence of natural law. According to his definition the matter is of a set of objective rules, superior to and imposed upon human will, determined but not created by reason.156 Hence, these objective rules are not entirely identical with the human reason. But in one way or another, rules of positive law that contradicts reason or social nature of man, contradict the precepts of natural law.

The abovementioned definition should certainly not satisfy everybody, and especially not these who do not believe in the existence of any kind of objective rules in law. And vice versa, those who identify natural law with a particular religious doctrine will not search for rational arguments in order to prove their existence. Because of differences in religious dogmas, any set of objective legal rules is thus equally unimaginable on that basis.

All what has been said above justifies a number of conclusions in regard to the relationship of objective rules of natural law and of human positive or volitional law. Natural legal rules cannot be valued by the logic of positive law. In the logic of positive law they are not superior to it, because unless absorbed in positive law, they are not supported by any temporal sanction. On the same account their own force neither imposes them on the will of the lawmaker.

It was explained that "unreasonable" rules of positive law cannot produce their effects


In his latter teachings this author has partly distanced himself from this definition. He has closely linked his idea of natural law with the sole idea of an abstract justice. That could be illustrated by his following conclusion: "...c'est le droit naturel ou objectif - quant à son principe fondamental, l'idée première de justice, le même dans tous les pays, - et avec lui, c'est le droit rationnel ou scientifique - quant au développement du précédent pour le mettre en harmonie avec les besoins d'un temps, - qui fournissent au droit positif à la fois son but et son fondement." Cf., "La théorie du droit naturel depuis le XVIIe siècle et la doctrine moderne", Recueil des Cours 1927, tom 18, p.398.
expected by the legislator. However, between such a sort of formalistic "legal rules" totally senseless and ineffective in practice, and rules properly deduced from natural law, there is a large margin in which a law-giver can carry out his legislative policy at his wish, doing good or evil to the society under his control. That is, as to say, the domain of "efficient voluntarism".

However, it seems very important to keep precepts of natural law apart from positive law in force of a given time. Even when it is in perfect harmony with reason and with man's social nature, a precept of natural law is not for that reason only a rule of positive law, binding international persons such as States or natural or juridical persons within a State.

Precepts of natural law can be an inspiration or correction to a wise lawmaker. They can indicate him what can be done by a legal regulation and where are limits of it. That has been largely neglected during the past two centuries. Precepts of natural law, if properly deduced, can advise a prudent lawmaker to issue new legal rules, or if necessary modify or abrogate existing ones, when the conflicts in human relations require so.

In the domain of application of positive international law of primary importance is not what the reason dictates. Important is what conventions, customary legal rules or general principles of law provide, or what kind of subjective rights a State has acquired, waived or recognized in respect to others either by treaties or by unilateral acts. A distinctive feature of a fine lawyer has in all times been his capability in distinguishing lex lata from lex ferenda.

When comparing positive law with natural law, which is, as was said, deprived of temporal sanction, it must nevertheless be stressed that natural law is neither synonymous to ethics. Because its respect is based on a certain utility and social necessity, it is superior to abstract principles of good and evil, or to ideas of abstract justice.

One of fundamental natural rights of all men and of all human groups is resistance to oppression. The preamble to the 1948 Universal Declaration of Human Rights states on that account that: "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...", meaning there the rule of positive law. The preamble to the 1789 French Declaration has in the same spirit proclaimed that: "...the ignorance, neglect or contempt of the rights of
man are the sole cause of public calamities and of corruption of governments..." Its Article 2 stated in addition the resistance to oppression as being one of four natural and imprescriptible rights of man.

Precepts of natural law whether embodied in positive law or not, should be observed simply in order to avoid a greater evil. The ill-fated consequences of their disrespect in the long run cannot be avoided, regardless the initial intention or wishes of their offender. Their flagrant violations always prove as counter-productive for the offender himself. In that relies their sanction and, so to say, their potential if not existing "legal force".

These principles, ascertained by reason and following the standards of rational and social nature of man, are statements of a broad character. It is not useful to elaborate, describe or divide them too much in detail, because their spirit can be by that easily lost. The proof of that are writings of Grotius and of his followers, as well as present-day too numerous and too detailed declarations and conventions on some specific rights of man, or on some specific rights and duties of States.

These principles should be couched in a clear and precise language, expressing both their generality and limits in scope of their application. Statements on them must be reasonable and self-convincing and must reliably reflect the spirit of the principle in question. Their reasonable and in good faith interpretation must emanate from their wording. Perhaps, better than in other great documents of our civilization, all these requirements were attained in the text of the 1789 French Declaration of the Rights of Man and of the Citizen.


GAIUS: *Institutiones*
GIDEL, Gilbert: "Droits et devoirs des nations. La théorie classique des droits fondamentaux des Etats", A.D.I., Recueil des Cours 1925, tome 10, pp.541-599.


VUKAS, Budislav: *Etničke manjine i međunarodni odnosi* (Ethnic Minorities and International Relations), Zagreb 1978.

