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History of Human Rights

I Human Rights and the Rise of the State in Europe

Whenever the student probes into the history of human communities, they will find certain mechanisms designed to protect individuals from violations of their rights. Systems of governance are generally based on reciprocity of protection and loyalty. Human beings, aware of the necessity to maintain and defend themselves in inimical surroundings, have invariably established structures of governance believing that those entrusted with a leadership role will protect individuals under their command. This has also been one of the constant themes of state philosophy. How can the function of a ruler be justified, and why is a ruler entitled to require compliance with his orders? Ethnological studies progressively reveal that humankind has created the most diverse systems of governance since it developed the capacity to organize large collective entities with a separation of functions

among its members. The language of human rights is of recent origin but their functional equivalents have, to a greater or lesser extent, always existed.¹

Unfortunately, the present study cannot go into such colourful—and often quite remarkable—details. To give an overview of the diversity of human efforts to create an architecture of well-ordered balance between the rulers and the ruled would exceed the limits of this book. It is undeniable that ideas and concepts about justice and equity in society have been developed in all parts of the world. On the other hand, it is also true that the paradigmatic intellectual instruments as they are in current use today—like the rule of law and the concept of human rights—have been conceived of in the Western world. Of necessity, although being aware of the dangers of eurocentrism,² we must confine ourselves essentially to those intellectual currents and factual developments which have helped shape the universe of human rights as it exists today. The starting point should therefore be the period in European history which paved the way for the emergence of the modern state. It is this entity which has also brought into being human rights in the sense described above. Claiming that it is the supreme power in a given territory, not being sub-

ordinate to any other human system of governance, the modern state has at the same time elicited a response. Unrestrained sovereignty may be acceptable as a legal instrument of defence against outside powers. But to apply the same philosophy of omnipotence internally vis-à-vis the ruled would have been a denial of a long history of constraints on the power of monarchs and princes.³ Thus, the challenge of human rights is inextricably bound up with the history of the modern state: on the one hand, the state has been accepted as an organization well-suited to promote the interests of its members in the never-ending fight for resources among different communities; on the other hand, it has also been identified as a lethal threat to the life and well-being of its members.⁴ Human rights have a dialectical function in overcoming that tension. They are designed to reconcile the effectiveness of state power with protection against that same state power. On the one hand, the state is the guarantor of human rights, the institutional framework tasked with safeguarding the existence, the freedom, and the property of the individual citizen; at the same time, however, historical experience tells the observer that time and again persons or author-

ities vested with sovereign powers have infringed the rights of the citizen.

International protection of human rights has two stages of development. In the first place, substantive standards must be present that contain the relevant provisos for proper conduct of the addressees of human rights, mostly state authorities. If these standards are to have some degree of autonomy and added value, they cannot be identical to the corresponding standards under domestic law. Secondly, effective international protection requires mechanisms entrusted with ensuring and enforcing those standards. Legal rules and principles lacking any enforcement machinery will easily be doomed. Yet, it is a truism to state that the different elements of the international legal order almost never attain the perfection of domestic systems. Whoever looks for the same level of swift performance in international law as in municipal law systems will be easily disappointed. Given that international society is still composed of sovereign states, the establishment of mechanisms without any loopholes and interstices is nearly impossible. In all fields where procedures for the protection of human rights have been put into place, a continual quest for the improvement of such procedures is

under way. In the following chapters we will show how, from modest beginnings, meaningful mechanisms have progressively emerged.

II International Protection of Human Rights: A Latecomer in History

International protection of human rights is a chapter of legal history that has begun at a relatively late stage in the history of humankind. This late-coming has reasons which can easily be explained.

In the world of sovereign states during the late nineteenth century, the fate of the populace was considered to be an exclusive domestic matter. No outside forces had a *droit de regard* concerning the relationship between the ruler and ruled. However, it was held to be self-evident that any ruler would take care in the most appropriate fashion of the fate of his/her subjects. In Europe, all the kings and other princes understood themselves as being committed to the values of the Christian faith. This foundational consensus did not, which need not be explained, prevent abuse of power in the most varied forms. In particular, the common value bases did not generate a climate of tolerance that would also have manifested itself vis-à-vis people

embracing a faith different from the prevailing state-authorized creed. In the religious wars of the sixteenth and seventeenth centuries, religious dissidents suffered brutal persecution. In the middle of the Thirty Years War (1630) Sweden sent a military expedition force to save the Protestant movement in Germany from being crushed by the Catholic counter-reaction (although it also pursued more self-interested goals). In a certain way, this early example of outside intervention repeated itself in the nineteenth century when Western powers undertook military actions in order to protect the Christian communities in certain parts of the Ottoman Empire. Such 'humanitarian interventions' occurred at random, without being guided by any predetermined criteria. More often than not, therefore, they smacked more of imperialism than of altruistic assistance to religious communities in an emergency situation.⁵ Otherwise, however, governments refrained from concerning themselves with the fate of human beings under foreign rule. Neighbours of a country where injustice and violence reigned knew perfectly well that they would have to face up to the overlapping consequences of such occurrences. But it was considered neither appropriate nor promis-

ing to make representations with a view to alleviating the fate of the victims. The revocation of the Edict of Nantes in 1685 was generally regarded in Europe as a blow to the idea of religious tolerance. But the other European powers saw this as a French policy decision that could not be challenged from outside. Instead, they offered their help to the Huguenots who fled France, providing them with hospitality in their countries. In Germany, Prussia benefited greatly from the arrival of the French refugees who brought with them all their knowledge and their craftsmanship.

Secondly, until the twentieth century, there were no international institutions capable of exercising a monitoring function. As long as the Holy Roman Empire of the Germanic Nation existed (it found its end in 1806), the German Emperor discharged a certain role as a guarantor of law and order within the territory of that Empire. But there was no authority over and above the heads of independent kingdoms like England, France, Russia, or Sweden. During the nineteenth century the so-called 'Holy Alliance', which emerged from the Vienna Peace Conference of 1815 (Austria, Prussia, Russia, and France (since 1818)), sought to exercise a function of arbitrator in the relations among European

states.⁶ But this loose alliance disintegrated with the rise of nationalism all over Europe. Furthermore, the Holy Alliance had felt that one of its main objectives was to shield monarchical legitimacy from any challenges by democratic forces. This was a far cry from conceiving its role as an institution entrusted with taking care of the concerns of the individual citizen. Its informal continuation as the Concert of Europe, including Great Britain, as a power-sharing instrument ('balance of power') was exposed to the vagaries of quickly changing circumstances. After Prussia and Austria had fought a war in 1866, the idea of establishing an overarching governing structure for Europe was definitively defunct.⁷ The second half of the nineteenth century saw a juxtaposition of sovereign nations, vying with each other for supremacy in Europe. In the circumstances, the idea of monitoring the conduct of other governments vis-à-vis their own citizens lacked any real basis.

Lastly, it is clear that international protection of human rights cannot be dissociated from national protection of human rights. Human rights evolved as countervailing forces against state power. It is only at a second stage that the idea emerged to establish mechanisms at the international level in

order to accommodate instances where a national system has broken down under the iron grip of a dictatorship or the assault of irrational forces of anarchy. First of all, human rights had to be accepted as an indispensable element of any constitutional order at the national level. In this regard, it may be noted that neither the German Empire under the Constitution of 1871 nor France's Third Republic of 1870 had in their constitutional instruments any section dealing with fundamental rights of the citizen. It was only after World War I, after 1918, that it was felt necessary to define the role of governments more accurately by assigning to them the task of respecting and ensuring certain basic rights of the individual. On that foundation, at a later stage, human rights could make their way to the international level.

III From the Sixteenth Century to 1776

In the early centuries of the development of the philosophical doctrines that have shaped our contemporary understanding of the state and its legitimate mandate, two main trends can be distinguished.

A. Protection of human beings by denial of human rights

The older doctrine seeks to bring about peace and thereby to protect the citizens—without employing modern human rights terminology—by denying them the benefit of any rights vis-à-vis the ruler, whose task was seen as preventing armed conflict between different societal groups. At first glance, the concept of protection of human rights by denial of human rights may seem fairly odd. But the logic of that approach can hardly be dismissed. It reflects the general conception of a well-ordered state of the *res publica* if everyone faithfully discharges his/her duties. However, that conception places great—and, one may safely say, excessive—trust in the nature of the ruler. The good king will always do the best for the well-being of his subjects. But if a morally corrupt person ascends to the throne, or if a group of criminals initially disguised as *Bieder Männer*⁸ gets hold of power, the construction collapses. The citizen finds no institutional support within the state apparatus. He/she can only claim a right of resistance against oppressive state power, as hinted in the preamble of the UDHR:

Whereas 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.

The first influential figure to defend that doctrinal position was the French author Jean Bodin (1530–96). Faced with a challenge to the power of the French kings by the Pope and by religious strife between Catholics and Protestants, he sought to confirm the royal authority. In his masterly work *Les Six Livres de la République* (1576) he posited that the prince, the King of France, enjoyed a right of sovereignty which no one was entitled to call into question. This could not be done by any religious community in the name of allegedly eternal truths, nor by any external power, be it a spiritual or a secular authority like the German Emperor. Individuals could not invoke any right of resistance.⁹ The sovereign was not even bound by his own laws. He was only obligated to respect God's commands, natural law, and general principles of law, the '*loix humaines communes à tous peuples*'.¹⁰

Whereas Bodin primarily emphasized the independence of the kings of France vis-à-vis any outside powers, the English author Thomas Hobbes (1588–1679) stressed the rights of the sovereign

power of the state over all the members of the common polity. Having been affected in his own life by the religious wars ravaging England, he aimed to free state power, which he called 'Leviathan', from any constraints which could possibly justify a right of resistance. His perception of society, which provides the basis of his doctrinal edifice, is a pessimistic one. As he explains in the 'Dedicatory Epistle' of his work *De cive* (1642) to the Earle of Devonshire, man, following his instincts, would attack his neighbours if not restrained by public authority. In an anarchic society, the guiding maxim would be: *homo homini lupus*.¹¹ Only the superior might of the Leviathan can establish peace and mutual tolerance. In order to effectively discharge his mandate, the Leviathan must be exempted from all kinds of legal ties. Although it is incumbent upon him to secure the life and the property of his subjects, he is not bound by law to do so. The only obligations to which he is subject are the commands of God and the laws of nature. These rules, however, cannot be invoked vis-à-vis the sovereign power of the state. Only if the state fails in providing protection as agreed upon in establishing the sovereign authority, do the rights of the citizens come back to life.

It goes without saying that this doctrine was born at a time when experiences with somewhat complex models of separation of powers within constitutional systems were still entirely lacking. At the heyday of absolutism in the world of European states, only fairly simple solutions could be imagined. Carried by the most noble intentions and wishing to put an end to any ideological justification of civil war, Hobbes saw no other way out than to plead for the right of authoritative decision of the sovereign power of the state. It needs no long explanation to demonstrate that his suggestions fitted well into a world dominated by monarchs and princes but could hardly be amalgamated with emerging democratic doctrines.

B. Protection of human beings by recognition of human rights

John Locke (1632–1704) is the author who took positions diametrically opposed to the recipes advocated by Thomas Hobbes. In his *Two Treatises of Civil Government* (1690), he proceeded from the premise that men were 'by nature all free, equal, and independent'.¹² Pursuing this proposition, he resolutely denied that a human being is able to divest himself of all natural rights, which he enjoys

as a gift of nature. Although he shared the basic idea that the polity is founded by consent among its members, he rejected the suggestion by Hobbes that in establishing a 'body politic' man forgoes all of his natural rights. In a central passage, he writes:

nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man . . . cannot subject himself to the arbitrary power of another . . .¹³

This amounts to saying that everyone retains their natural freedom even vis-à-vis the machinery of the state: the conclusion of the social compact founding the body politic is no unconditional surrender.¹⁴ Consequently, the way is open for fundamental rights which the individual can oppose to illegitimate requests of the state. In a famous passage, Eméric de Vattel follows this line of reasoning, postulating a right of resistance of citizens if a ruler commits 'clear and glaring wrongs', in particular by attempting to take away life without any justification.¹⁵ Many decades earlier, Hugo Grotius had also expressed similar ideas in a summary reflection on the limits of sovereign power, but without elabo-

rating a similarly impressive intellectual edifice as John Locke.¹⁶

It is interesting to note that Montesquieu (1689–1755), the author of the famous work *De l'esprit des lois* (1748), turned away totally from the somewhat artificial concept of a social compact concluded by the members of a given human community, developing instead a constitutional theory centring on the different functions that fall to be exercised within a polity. Although pursuing the same objective as John Locke, namely to secure the freedom of the citizen, he saw as the most appropriate means to reach this aim a strategy of strict separation of powers. In his view, the citizen will receive sufficient protection from the mechanisms of a well-ordered system of governance where the legislative function, the judicial function, and the executive function are clearly separated from one another.¹⁷ Within this conceptual framework, there is no room—and perhaps no need—for fundamental rights of the individual. Montesquieu concludes therefore:

la liberté politique ne consiste point à faire ce que l'on veut. Dans un Etat, c'est-à-dire dans une société où il y a des lois, la liberté ne peut consister qu'à pouvoir faire ce que l'on doit vouloir . . .¹⁸

Freedom according to the yardstick of the law, and not independently of the law, is a dangerous proposition, even in a democratic system of government.

Other authors who have exercised a determinative influence on the theory of human rights are Jean-Jacques Rousseau and Immanuel Kant. For Rousseau, the construction of the state does not start out from the (monarchical) ruler, but from the basis of all public power, the individual and the people formed by them. To him, the basic element is the freedom of the individual, as borne out by the introductory first sentence of his work 'Du contrat social':¹⁹

L'homme est né libre, et partout il est dans les fers.

His main concern is to devise mechanisms of how the popular sovereign may discipline itself. Rousseau is convinced that the '*volonté générale*' will ensure equality and fair treatment among all citizens.²⁰ Immanuel Kant (1724–1804), on the other hand, views the freedom of the individual as the centre-piece of any political philosophy,²¹ but he does not proceed to suggest an institutional framework designed to defend that freedom against the threats to which it is subject, an omission which may be due to his position as an aca-

demic officer in the service of the King of Prussia.
The concept of individual freedom can be said to be
the root cause of the human rights movement.

IV From 1776 to 1914

A. Human rights in national constitutional texts

At the end of the eighteenth century, the history of human rights acquires a new quality. While until that time philosophical discourse dominates, which has no direct repercussions on the status of the individual, now a new epoch commences where an attempt is made to lay down human rights as true entitlements invokable even by the ordinary citizen. In the Virginia Declaration of Rights of 12 June 1776, the first document of constitutional policy that came about on the North American continent, the ideas propagated by John Locke found an almost textual reflection. Section 1 of that instrument reads like an excerpt from the central passages of Locke's *Two Treatises of Civil Government*. It provides:

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact,

deprive or divest their posterity; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

It is this philosophy, having prevailed for more than two centuries since the adoption of that remarkable instrument, which a few days later, on 4 July 1776, also found a reflection in the American Declaration of Independence with the following words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.

Likewise, the French *Déclaration des Droits de l'Homme et du Citoyen* of 26 August 1789 contains no trace of Hobbesian thinking. It also emphasizes the rights of the human person as being natural and inalienable (Article 2: '*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme...*'). Being the product of a revolution against the absolutist power of the French monarchy, the Declaration of 1789 could not give back to the state what had just been conquered from it. Although it was submerged a few years later by the establishment of a French

Empire under Napoleon I, the French Declaration set the tone for Europe at large. After the fall of the Napoleonic Empire in 1815 a constitutional movement commenced in all of the neighbouring states. In Germany, which after 1815 remained a fairly loose confederation ('Deutscher Bund') until 1866, the first new constitutions in the component states of the Confederation set forth fundamental rights as a matter of necessity. In Prussia, the largest German state, it wasn't until 1850 that the Government agreed to accept a new Constitution with a lengthy section 'On the Rights of the Prussians' (Articles 3–42).

B. Abolition of the slave trade

All this needed to be consolidated at national level before a concept of international protection of human rights could emerge. Yet during the nineteenth century the first cautious steps towards an international regime can already be observed. One of the decisions of the European powers to which attention is invariably drawn is the 1815 Declaration on the Abolition of the Slave Trade, adopted during the Peace Conference in Vienna on 8 February 1815.²² It is true that a big question mark can be placed after that Declaration. First of

all, the reader will note that it was not slavery as such that was forbidden, but the slave trade. It is a matter of common knowledge that in the United States slavery continued until the Civil War of 1861 to 1865.²³ Secondly, it has been contended that, essentially, the ban served the economic interests of England. Wilhelm G Grewe wrote that to permit the continuation of the slave trade would have favoured the colonies of the enemy states of England.²⁴ However, measured in objective terms, the adoption of the Declaration was a decisive step forward. The Declaration constituted an international instrument prohibiting a practice which was profoundly at odds with the concept of human dignity. It may be viewed as the first stage of a long journey towards the development of a fully fledged principle of equality, coupled with the prohibition of discrimination on racial grounds.²⁵ Only in 1926 was slavery definitively banned through an agreement prohibiting not only the slave trade, but also slavery itself.²⁶

C. Humanitarian law

A further development with far-reaching consequences had its origins in the mid-nineteenth century. Notwithstanding its almost uninterrupted

history of wars, Europe, a continent that officially declared its attachment to Christian values, had not been able to establish a system designed to take care of the suffering in armed conflict.²⁷ Some rules had developed on the conduct of hostilities, although opinions differ largely as to their real impact on warring parties.²⁸ Grotius devoted large sections of his masterwork *De Jure Belli ac Pacis*²⁹ to the laws of war. But it had not been realized that some system had to be put into place to accommodate the vital needs of the victims on the battlefield. It was a citizen of Geneva, Jean Henri Dunant, who, having witnessed the battle of Solferino during the Italian War of National Unification, took the initiative of convening an international conference in Geneva in 1863. After the successful conclusion of the first conference, a second 'Congress' took place in Geneva in 1864, which adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.³⁰ From that time, it was generally recognized that it was advisable to codify the laws of war in international treaties.³¹

D. No general guarantees of human rights

Outside the sphere of humanitarian law, during the nineteenth century human rights do not yet

exist as a separate chapter of international law. In some treaties concluded after the liberation of the Balkans from Turkish domination, religious freedom and the principle of non-discrimination on religious grounds were explicitly guaranteed.³² But a look into the indexes of leading textbooks yields meagre, even totally negative, results. For Henry Wheaton international law is evidently the law governing relations among independent states.³³ Johann Caspar Bluntschli, one of the most famous authors of the second half of the nineteenth century, lists '*Menschenrechte*' (human rights) in the index of his ground-breaking treatise on international law³⁴ but relates that concept exclusively to the laws of war.³⁵ Other textbooks completely ignore the word³⁶—which is quite understandable, given the absence of any practice to substantiate the concept.

Summing up the situation as it existed until the outbreak of World War I, one may say that during the nineteenth century the first treaties came into being which directly took care of the individual. But none of those treaties addressed the relationship between a state and its citizens. The instruments setting forth norms of humanitarian law, in particular, dealt with situations which, by their very na-

ture, have a transnational character. Human rights in general were considered as falling within the domestic jurisdiction of states. Protective mechanisms were not lacking altogether. Vis-à-vis other states, governments safeguarded the rights and interests of their citizens through the traditional procedure of diplomatic protection, which entitles a state indirectly injured in the person of its citizens to make representations and, as a measure of last resort, to take reprisals to enforce the violated rights.³⁷ Internally, protection was progressively ensured by conferring on citizens fundamental rights by virtue of constitutional instruments and opening up access to judicial bodies. This construction, with its two windows of external and internal protection, seemed to add up to a consistent whole, not requiring any further complements. But the fact was that under the available international instruments individuals had no standing. They were unable to take steps towards the protection of the rights enshrined in those instruments on their own initiative. Internally, on the other hand, legal remedies frequently did not lie with regard to sovereign decisions having political overtones. Furthermore, no defence was available against legislative acts.

Even laws embodying grave injustices could not be attacked before a competent judicial body.

V Between the Two World Wars

After World War I the situation changed dramatically. The experience had been gained that even in an age which considered itself civilized and enlightened, states were able to abuse their powers. While during the nineteenth century Hegel had still concluded that the state embodied all the positive values of a nation, stating that it is 'the realized ethical idea',³⁸ this proposition now became untenable. It had to be acknowledged that, ineluctably, governments are made up of human beings with all their virtues, but also their defects. Notwithstanding this recognition, the first steps taken on the international level were timid and cautious.

A. Mandate system of the League of Nations

The League of Nations was established as the first organization entrusted with ensuring international peace and security and thereby preventing war—the greatest threat to human life and physical as well as spiritual integrity. The preamble of its Covenant explicitly enunciated this task. However,

the Covenant remained silent regarding human rights. Only in respect of mandated territories did it provide that 'freedom of conscience and religion' must be guaranteed and that 'abuses such as the slave trade, the arms traffic and the liquor traffic'—three entirely different items intimately coupled with one another!—had to be prohibited (Article 22(5)). In addition, Article 23(a) provided that the administering powers (mandatories) would 'endeavour to secure and maintain fair and humane conditions of labour for men, women, and children'. In fact, it was public knowledge that, in general, the colonial powers did not treat the inhabitants of their colonial territories fairly, according to the same standards as the inhabitants of the metropolitan areas. Since the development of the peoples to be placed under the new mandate regime, who had formerly been subject to the Ottoman Empire or the German Empire, was emphatically phrased a 'sacred trust of civilisation' (Article 22(1)), the international community could not leave those peoples entirely to the discretion of the administering states. Some minimum guarantees had to be established. It is noteworthy, though, that there was no mention of any political freedom. The Covenant confined itself to stating that the wishes

of the communities concerned must be a 'principal consideration' in the selection of the Mandatory (Article 22(4)).

However, there was an important novelty in that a mechanism of control evolved not on the basis of the Covenant, but under the pressure of events. Although neither the Covenant itself nor the terms of the mandates provided for petitions to be submitted to the League, petitions did arrive and hence had to be dealt with in one way or another.³⁹ The League then established rules of procedure. According to these rules, petitions had to be sent to the Secretariat of the League through the mandatory government. A Mandates Commission then processed the petitions, but few were passed on to the Council. All in all, the procedure was extremely deficient. Petitioners were never heard. No inspection visits to the mandated areas took place. Yet, as a matter of principle, an international control mechanism had been established which later could serve as a model under the trusteeship system of the United Nations.

B. International protection of minorities

Another new development was the establishment of a system for the protection of minorities. Al-

though the Paris Peace Conference of 1919 had endeavoured to reshuffle the European map pursuant to the principle of self-determination of peoples, the disintegration of the Austro-Hungarian Empire, as well as the extensive cessions of territory to which Germany had to consent by virtue of the Versailles Peace Treaty, created new states which were in no way ethnically homogeneous. Concerning, in particular, the successor states of the Austro-Hungarian Empire, the persisting ethnic diversity was even worse than before under Hapsburg rule because the new states saw themselves as nation-states with one lead nation to whose language and culture the remaining minorities should adapt. Thus, many ethnic Hungarians suddenly found themselves in Romania or Czechoslovakia, ethnic Germans became Polish citizens, and ethnic Poles continued to live in Germany, etc.

The Peace Conference realized that the new configuration of the map of Europe could lead to dangerous tensions. It feared that the new nations, which after centuries of foreign domination wished to assert their specific identity, would not be prepared to treat their minorities fairly. Therefore, it demanded that the status of these minorities be specifically regulated by treaty. A

complex system emerged. In accordance with the Peace Treaties, five states: Greece, Czechoslovakia, Poland, Romania, and Yugoslavia, concluded specific agreements with the Principal Allied Powers. Regarding a number of other states, the relevant provisions were included in the Peace Treaties (Austria, Bulgaria, Hungary, and Turkey). Special regimes were laid down for the Memel district and for Danzig. Lastly, Germany and Poland concluded a Convention relating to Upper Silesia. In all of these instruments, special guarantees were laid down for the benefit of the minorities concerned. It may seem strange that such guarantees of an international character were stipulated for smaller groups of the population alone while the main part of the population was not deemed worthy of such protection. But it was felt that the majority group was not in need of outside assistance for the promotion and protection of their rights.

Generally, the relevant clauses were relatively brief. Thus, for instance, the Treaty Concerning the Protection of Minorities concluded between the Allied and Associated Powers and Poland of 28 June 1919⁴⁰ enjoined Poland to practise non-discrimination and required that in educational institutions of the primary level instruction must be given to

children through the medium of their own language. Additionally, it stressed that all inhabitants of Poland 'shall be entitled to the free exercise . . . of any creed, religion or belief' (Article 2(2)). These central elements could be found in other similar instruments as well. It is vital for a minority not to suffer any discrimination. Additionally, however, it needs some special guarantees in order to maintain its cultural identity. If its language is not taught to its children, it will simply disappear through a process of gradual integration of its descendants into the mainstream of the majority group of the population. Thus, a guarantee of special educational institutions does not constitute a privilege, but rather a defence against forced assimilation.⁴¹

Apart from these substantive guarantees, the system of minority protection involved a couple of innovative procedural arrangements. First of all, the Treaty with Poland of 28 June 1919, already mentioned, provided that the stipulations on minority protection were to be recognized as 'fundamental laws' of the country that could not be set aside by any official act, not even by a parliamentary statute. It is well known that normally international treaties leave the method of implementation to the discretion of the state party concerned. Here, the

intention was to guarantee maximum security to the minorities living in Polish territory. The Treaty on Minority Protection was defined as taking precedence over any statute or regulation. One may see it as a precursor of the stringent rules of precedence applied by the Court of Justice of the European Communities/Union (CJEC, CJEU) since its groundbreaking judgment in *Costa v ENEL*.⁴²

Secondly, the minority treaties were placed under the guarantee of the League of Nations. In order to make this guarantee operational, the treaties allowed every member of the Council of the League of Nations to bring any violation or threat of violation of the relevant obligations to the attention of the Council. Lastly, if the Council was unable to settle such disagreement, the member state concerned had a right to appeal to the Permanent Court of International Justice (PCIJ). It was clear from the very outset that this procedure would certainly not be used by just 'any' member of the Council, but essentially by members who had ethnic ties with the affected minority. Strangely enough, this opportunity was put into practice in three cases only, two of which were dropped, so that the PCIJ rendered judgment in just one case.⁴³ But it gave advisory opinions in another six cases.

Petitions from the minorities concerned were admitted from 1920. Such petitions could emanate either from individuals or from associations acting on behalf of a minority group. Details are not relevant in the present context. What matters, though, is the fact that individuals could play an active role before an international body. It is true that the procedure for the treatment of such petitions was extremely unsatisfactory for their authors. They could set a proceeding in motion, but they had no right to influence its further course, which was committed entirely to the discretion of the competent Committee. Yet the model thus established has left its marks on the regime for the protection of human rights as it prevails today.

On the whole, ex post appraisal of the system of minority protection under the authority of the League of Nations leads to rather negative results as far as the factual side is concerned. The system had no teeth. Abuses could not be prevented. Another flaw was the fact that no Western state had submitted to similar obligations. Thus, the nations bound by specific obligations vis-à-vis their minorities felt that the regime as a whole was based on discrimination, a feeling which did not increase their willingness to abide by the commitments they

had undertaken.⁴⁴ It therefore fell into disrepute and was not revitalized under the auspices of the United Nations.

C. Objectives of the International Labour Organization

A cursory glance should also be directed at the International Labour Organization (ILO). Created in 1919 as part of the peace settlement following World War I (its Constitution formed Part XIII of the Treaty of Versailles), it was assigned the task of improving the condition of workers around the world. The preamble proclaimed the following:

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

This mandate was to be discharged primarily by the conclusion of treaties and the adoption of recommendations. Additionally, the ILO engaged in certain activities of supervision.⁴⁵ Although the individual was not directly addressed by its Con-

stitution, the mandate entrusted to it made clear that it is a legitimate concern of an international organization to strive for the betterment of the living conditions of individuals who remain subject to the sovereign powers of a nation state. The former principle of exclusiveness of the jurisdiction of the territorial state thus suffered another derogation.

D. Legal doctrine

At the level of concept-building, the epoch between the two World Wars was still rather trapped in traditional thinking. It had not yet dawned on legal writers that the international community had a legitimate general mandate in seeking to uphold and enforce standards of civilized conduct in the relationship between governments and their citizens.⁴⁶ Although World War I had brought untold suffering on millions of people, it was not realized that, in principle, all the defences of the rule of law may break down in a given historical situation and that then the only conceivable remedy may be recourse to appropriate mechanisms of the international community.

One of the few exceptions to the intellectual aridity of the 20 years between the end of World War I and the outbreak of World War II was the *Déclara-*

tion des droits internationaux de l'homme, adopted by the Institute of International Law⁴⁷ at its New York session on 12 October 1929. This Declaration marked a resolute departure from the traditional stance according to which the relationship between a state and its citizens was a matter of domestic law, not to be interfered with from outside, neither by third states nor by institutions of the international community. Yet its preamble is more courageous than its operative part. Starting off with the words:

que la conscience juridique du monde civilisé exige la reconnaissance à l'individu de droits soustraits à toute atteinte de la part de l'Etat,

it first of all pays tribute to the constitutional developments in France and in the United States, where human rights were for the first time listed in comprehensive catalogues of rights; this was also a gesture of courtesy towards the country the hospitality of which the members of the Institute enjoyed. The last paragraph of the preamble, too, makes the reader anxious to learn more about the transposition of human rights to the international level, inasmuch as it emphasizes that it is important to extend to the entire world the inter-

national recognition of human rights. However, the operative part is characterized by a fundamental ambiguity in stating (Article 1):

Il est du devoir de tout Etat de reconnaître à tout individu le droit égal à la vie, à la liberté, et à la propriété, et d'accorder à tous, sur son territoire, pleine et entière protection de ce droit, sans distinction de nationalité, de sexe, de race, de langue ou de religion.

The following provisions, Articles 2 and 3, also start out with the words: '*Il est du devoir de tout Etat . . .*'. This insistence on the duty of states raises doubts as to whether the Institute really wished to suggest individual entitlements, enforceable at the initiative of the person concerned, or whether it remained stuck within the traditional model of public duties. Nothing is said about remedies. The Institute simply emphasizes, with regard to equality, that it should not be nominal, but must be effective (Article 5). Essentially, however, it seems to view the state as the true and only guardian of human rights, remaining silent as to the ways and means of enforcing the rights committed to the care of the state.⁴⁸

VI The Great Leap Forward: 1945

It was the atrocities committed by the criminal Nazi dictatorship all over Europe which definitively paved the way for a new understanding of the relationships between the individual, the state, and the international community. Never again could it be credibly maintained that human beings were placed, by law, under the exclusive jurisdiction of their home state. It had been learned during the horrendous years from 1933 to 1945 that a state apparatus can turn into a killing machine, disregarding its basic function to uphold and defend the human dignity of every member of the community under its power. The President of the United States and the British Prime Minister, Franklin D Roosevelt and Winston S Churchill, expressed this in very simple words in the Atlantic Charter, a Declaration of Principles of 14 August 1941.⁴⁹ They wished to bring about a world where ‘the men in all the lands may live out their lives in freedom from fear and want’.⁵⁰ It is true that in formulating this noble proposition, they thought more of their own peoples than of the colonial peoples over whom European powers still held sway. Different standards were applied to those peoples in Africa and Asia. It

proved immensely difficult, given the opposition of Britain and the United States, to insert a ban on discrimination on account of race into the UN Charter (Article 1(3)).⁵¹ Yet, compared to the Hitlerian barbarism, all these differences had little significance and were bound to disappear soon. The goal was now clearly defined. 'Men' everywhere in the world were to enjoy a life of human dignity. Diplomatic dealings had ceased to centre exclusively on states as collective entities. The fate of the individual had definitively become a matter of international concern.

The UNCh did not yet fulfil all the hopes for a new world at the centre of which the human being would be placed. During the founding conference in San Francisco, a number of countries wished to establish a complete list of human rights for inclusion in the pending draft.⁵² But time was lacking. Even those pressing for such a revolutionary change had to realize that drawing up a human rights bill required great care and circumspection. The principle that was established was that to promote and encourage respect for human rights and fundamental freedoms belonged to the core purposes of the world organization (Article 1(3)). As a consequence of that determination, the newly

established Commission on Human Rights (HRCion) was entrusted with elaborating a suitable draft.⁵³ Two documents were drawn up by groups from civil society to provide some guidance to the work of the HRCion. A committee of experts, convened under the auspices of the American Law Institute, among whom were such renowned scholars as Manley O Hudson, Wilfred Jenks, Karl Loewenstein, Ernst Rabel, and Quincy Wright, established a 'Statement of Essential Human Rights'.⁵⁴ In particular, this 'Statement' advocated the inclusion of rights that involve positive duties of public authorities. Demonstrably, the Statement exerted a decisive influence on the drafting process in the HRCion, as explicitly acknowledged by John P Humphrey, the then Director of the Human Rights Division of the UN Secretariat.⁵⁵ The impact of the fruit of another collective effort is less clear: the 'Statement on Human Rights', adopted by the American Anthropological Association in December 1947, contained a vigorous plea for true universalism of the envisioned instrument.⁵⁶ In any event, the HRCion discharged its task in the most effective manner. Already at its third session from 24 May to 18 June 1948, it was able to adopt the requested draft Declaration. Via the Economic

and Social Council, that draft was passed on to the General Assembly, which adopted it on 10 December 1948 by a vote of 48 to none, with eight abstentions (Belorussia, Czechoslovakia, Poland, Saudi Arabia, Ukraine, South Africa, USSR, and Yugoslavia). For the first time in the history of mankind, a document had come into being which defined the rights of all human beings, independently of their race, colour, sex, language, or other condition. A new chapter of human history began on that day,⁵⁷ notwithstanding the fact that the UDHR was not binding⁵⁸—and still has not reached that status. It characterizes itself as a ‘common standard of achievement’ (Preamble, last paragraph). Nonetheless, the UDHR has had a tremendous impact on the way the political constitution-making power is generally conceptualized.

¹ R Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 120 *Diogenes* 75, at 78.

² See A Becker Lorca, ‘Eurocentrism in the History of International Law’ in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012) 1034–57. However, the author deals mainly with international law as classic inter-state law.

³ For the earlier epochs see M van Gelderen, 'Vitoria, Grotius and Human Rights, the Early Experience of Colonialism in Spanish and Dutch Political Thought' in W Schmale (ed), *Human Rights and Cultural Diversity* (Goldbach: Keip Publishing, 1993) 215; A Haratsch, *Die Geschichte der Menschenrechte* (3rd edn, Potsdam: Universitätsverlag Potsdam, 2006); M Hertig Randall, 'The History of International Human Rights Law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham UK and Northampton MA, USA: Edward Elgar, 2013) 3; MR Ishay, *The History of Human Rights* (Berkeley: University of California Press, 2004); H Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) 73–126. See also the sketchy remarks by V Butkevych, 'The European Convention on Human Rights in the Context of the History of International Law' in L Caflisch et al (eds), *Liber Amicorum Luzius Wildhaber. Human Rights—Strasbourg Views* (Kehl: N P Engel, 2007) 41.

⁴ On the slow emergence of human rights as a counterweight to sovereign state power see W Reinhard, *Geschichte der Staatsgewalt* (Munich: Beck, 1999) 410–26.

⁵ For an extensive historical account see JPL Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention—Its Current Validity under the UN Charter' (1974) 4 *California Western International Law Journal* 203; P Hilpold, 'Schutzverantwortung und humanitäre Intervention in historischer Perspektive' in

P Hilpold (ed), *Die Schutzverantwortung (R2P)* (Leiden and Boston: Martinus Nijhoff, 2013) 59; V Lowe and A Tzanakopoulos, 'Humanitarian Intervention' (2012) V MPEPIL 47.

⁶ Treaty on the 'Holy Alliance', 14/26 September 1815, reprinted in WG Grewe (ed), *Sources Relating to the History of the Law of Nations* (Vol 3/1, Berlin and New York: de Gruyter, 1992) 107.

⁷ See WG Grewe, *The Epochs of International Law* (Berlin and New York: de Gruyter, 2000) 429–36; D Zacharias, 'Holy Alliance (1815)' in (2012) IV MPEPIL 934.

⁸ We are referring to M Frisch, *Biedermann und die Brandstifter (The Fire Raisers)* (1953), first book edition Frankfurt (Suhrkamp) 1958.

⁹ G Mairret (ed) (Paris: Librairie Générale Française, 1993), bk I, ch VIII: 'le sujet, qui est exempté de la puissance des lois, demeure toujours en la sujétion et obéissance de ceux qui ont la souveraineté' (119–120); 'Mais il n'est pas licite au sujet de contrevenir aux lois de son Prince, sous voile d'honneur, ou de justice . . . il n'est pas licite au sujet de contrevenir à l'édit de son Prince' (131).

¹⁰ Bodin (above [n 9](#)): 'Mais quant aux lois divines et naturelles, tous les Princes de la terre y sont sujets . . . la puissance absolue des Princes et seigneuries ne s'étend aucunement aux lois de Dieu et de nature' (121–2).

¹¹ T Hobbes, *Man and Citizen* (B Gert (ed), Indianapolis and Cambridge: Hackett, 1991) 89: 'Man to man is an ar-rant wolf'.

¹² J Locke, *Two Treatises of Civil Government* (orig edn 1690; WS Carpenter (ed), London/New York: Dent, Every-man's Library, 1966) bk II, ch VIII, para 95.

¹³ Locke (above [n 12](#)) bk II, ch XI, para 135.

¹⁴ Locke also deals with slavery, but only as a fact of life which can result from conquest: bk II, ch IV, paras 22–4, and ch XVI. Thus, Locke does not justify slavery which, within his system of thought, has no legitimate place.

¹⁵ *The Law of Nations or the Principles of Natural Law* (trans from the 1758 edn by CG Fenwick, Washington: Carnegie Institution, 1916) bk I, ch IV, para 54.

¹⁶ *De Jure Belli ac Pacis Libri Tres* (orig edn 1625; FW Kelsey et al trans, New York and London: Oceana and Wildy, 1964) bk I, ch IV, VIII.

¹⁷ *De l'esprit des lois* (orig edn 1748; Ganzague Truc (ed), Paris: Garnier, 1956) vol I, bk XI, ch VI, 'De la Consti-tution d'Angleterre'.

¹⁸ Montesquieu (above [n 17](#)) bk XI, ch III.

¹⁹ 1762, edn by B Bernardi (Paris: GF Flammarion, 2001).

²⁰ Bk II, ch IV: 'Ainsi par la nature du pacte, tout acte de souveraineté, c'est-à-dire tout acte authentique de la volonté générale oblige ou favorise également tous les Citoyens . . . '.

²¹ *Metaphysics of Morals—Introduction to the Doctrine of Right* (1798): ‘Freedom (independence of the compulsory arbitrariness of another) is the sole, original right accruing to every human being by virtue of his humanity to the extent that it can coexist with every other person’s freedom according to a general law’ (translation by the author). For a comment see O Höffe, ‘Kant’s innate right as a rational criterion for human rights’ in L Denis (ed), *Kant’s Metaphysics of Morals. A Critical Guide* (Cambridge: CUP, 2010) 71, at 74–5.

²² Reprinted in WG Grewe, *Sources*, Vol 3/1 (above [n 6](#)) 376.

²³ Although in 1825 the US Supreme Court found that slavery was not prohibited under positive (general) international law, *The Antelope*, 23 US 66 (1825).

²⁴ *The Epochs of International Law* (above [n 7](#)) 557. For a different assessment see Y Onuma, ‘When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective’ (2000) 2 *Journal of the History of International Law* 1, at 43.

²⁵ For a detailed description of the progressive abolition of slavery see S Drescher and P Finkelman, ‘Slavery’ in *The Oxford Handbook of the History of International Law* (above [n 2](#)) 890–916.

²⁶ Of 25 September 1926, 60 LNTS 254.

²⁷ For a summary account of the development of humanitarian law from ancient times to the contempo-

rary epoch see HP Gasser and D Thürer, 'Humanitarian Law, International' (2012) V MPEPIL 59, at 60; LC Green, 'Human Rights in Peace and War: An Historical Overview' in *Crisis Management and Humanitarian Protection. Festschrift für Dieter Fleck* (Berlin: Berliner Wissenschafts-Verlag, 2004) 159; G Herczegh, 'Some Thoughts on Ideas that Gave Rise to International Humanitarian Law' in MN Schmitt and LC Green (eds), *The Law of Armed Conflict—Into the Next Millennium* (Newport, Rhode Island: Naval War College, 1998) 292; R Kolb, 'The Protection of the Individual in Times of War and Peace' in *The Oxford Handbook of the History of International Law* (above [n 2](#)) 317; F Münch, 'History of Laws of War' (2000) IV EPIL 1386; S Schmahl, 'The Development of International Humanitarian Law since the 19th Century' in T Marauhn and H Steiger (eds), *Universality and Continuity in International Law* (The Hague: Eleven, 2011) 485.

²⁸ See on the one hand CJ Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford: OUP, 2008) 1; A Roberts and R Guelff (eds), *Documents on the Laws of War* (3rd edn, Oxford: OUP, 2000) 3; and on the other hand, Münch (above [n 27](#)) 1386.

²⁹ Paris, 1625.

³⁰ Reprinted in Grewe (above [n 6](#)) 551.

³¹ For the subsequent developments see below [ch 16](#).

³² See, for instance, Peace Treaty Concerning the Settlement of the Oriental Question (Act of the Congress of

Berlin), 13 July 1878, reprinted in Grewe (above [n 6](#)) 38, Articles V (Bulgaria), XXVII (Montenegro), LXII (Ottoman Empire).

³³ H Wheaton, *Elements of International Law* (Philadelphia: 1836) 46–8.

³⁴ *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: Beck, 1868) 514.

³⁵ Bluntschli (above [n 34](#)) 529, para 529; 298, para 533. Although in his epoch Bluntschli was a progressive spirit, he also fell prey to racial prejudices: see M Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2001) 42–7, 77, 103–104.

³⁶ See, for instance, AW Heffter and FH Geffcken, *Das Europäische Völkerrecht der Gegenwart* (8th edn, Berlin: Müller, 1888).

³⁷ See also below [ch 15](#) II.

³⁸ GWF Hegel, *Grundlinien der Philosophie des Rechts* (Berlin: Nicolaische Buchhandlung, 1821) § 257.

³⁹ See R Gordon, ‘Mandates’ (2012) VI MPEPIL 989, at 997.

⁴⁰ Reprinted in Grewe (above [n 6](#)) vol 3/2, 921.

⁴¹ *Minority Schools in Albania*, Advisory Opinion, 1935 PCIJ Series A/B, No 64, 6 April 1935, 17.

⁴² Case 6/64 [1964] ECR 585.

⁴³ *Rights of Minorities in Upper Silesia (Minority Schools)* 1928 PCIJ Series A, No 15, 26 April 1928.

⁴⁴ See JE Nijman, 'Minorities and Majorities' in *The Oxford Handbook of the History of International Law* (above ⁿ 2) 95, at 111–6.

⁴⁵ For an assessment of the work of the ILO from today's viewpoint see V Leary, 'Lessons from the Experience of the International Labour Organisation' in P Alston (ed), *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992) 580; L Swepston, 'The International Labour Organization and Human Rights: Access to the ILO' in G Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms* (Leiden and Boston: Martinus Nijhoff, 2009) 291, at 294. A highly critical assessment was made by A Wisskirchen: 'The Standard-Setting and Monitoring Activity of the ILO' (2005) 144 *International Labour Review* 253.

⁴⁶ See F von Liszt and M Fleischmann, *Das Völkerrecht* (12th edn, Berlin: Springer, 1925), who offer a blank space in the index. The word '*Menschenrechte*' (human rights) does not appear (751).

⁴⁷ For a cursory overview see P Macalister-Smith, 'Institut de Droit international' (2012) V MPEPIL 219.

⁴⁸ For a lucid comment see H Mosler, 'Das Institut de Droit International und die völkerrechtliche Stellung der menschlichen Person' in W Wengler (ed), *Justitia et Pace. Festschrift zum 100jährigen Bestehen des Institut de Droit International* (Berlin: Duncker & Humblot, 1974) 77.

⁴⁹ (1941) 35 AJIL Supplement, 191.

⁵⁰ Atlantic Declaration, principle six. For a colourful description of the drafting of the Atlantic Charter see E Borgwardt, “‘When you state a moral principle, you are stuck with it’”, *The 1941 Atlantic Charter as a Human Rights Instrument* (2006) 46 *Virginia Journal of International Law* 501.

⁵¹ See H von Senger, ‘From the Limited to the Universal Concept of Human Rights, Two Periods of Human Rights’ in Schmale (above ^{n 3}) 47, at 80–7.

⁵² In particular, a number of Latin American countries made that request: Chile, UNCIO III, 294; Panama, UNCIO I, 560; Uruguay, UNCIO VI, 628.

⁵³ For the drafting history see the account in *Yearbook of the United Nations* (1948–49) 524–35.

⁵⁴ Reprinted in (1946) 243 *Annals of the American Academy of Political and Social Science* 18; for a comment see T Rensmann, ‘The Constitution as a Normative Order of Values, The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism’ in P-M Dupuy et al (eds), *Common Values in International Law. Essays in Honour of Christian Tomuschat* (Kehl: NP Engel, 2006) 259, at 262–5.

⁵⁵ JP Humphrey, *Human Rights and the United Nations, A Great Adventure* (Dobbs Ferry NY: Transnational Publishers, 1983) 32.

⁵⁶ (1947) 49 *American Anthropologist* 539, at 543. In other respects, however, that Statement is controversial: see K Engle, ‘From Skepticism to Embrace, Human Rights

and the American Anthropological Association from 1947–1999’ (2001) 23 HRQ 536.

⁵⁷ See T Buergenthal, ‘The Evolving International Human Rights System’ (2006) 100 AJIL 783, at 785; A Eide, ‘The Universal Declaration in Space and Time’ in J Berting et al (eds), *Human Rights in a Pluralist World, Individuals and Collectivities* (Westport and London: Meckler, 1990) 15.

⁵⁸ This feature was the determinative element for Lauterpacht’s rather negative assessment of the UDHR (above ^{n 3}, 416–28).