Anthony E. Cassimatis

Human Rights Related Trade Measures under International Law

The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations under General International Law

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by

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Foreword

There is an old schoolyard saying: "Sticks and stones may break my bones but words will never harm me." If all the talk about human rights violations seems sometimes to have little measurable effect, is it in the area of punitive trade measures that violating States are more likely to say "ouch!" and be dissuaded from continuing along the path of either active violations of human rights or passive toleration of them in their countries? A good case can be made for trade sanctions as an instrument for bringing about a greater observance of human rights. But, as in so many things, they are not a panacea; there can be undesirable consequences, and innocent people can become "collateral casualties".

Perhaps it is not a question of finding a single solution to the problem of enforceability of human rights. Each measure should be examined in the light of its positive and negative aspects and of other possible measures available, whether as alternatives or in combination with trade measures.

Dr Cassimatis has written an important and timely study. He addresses the broad issue of the legality of the adoption of human rights related trade measures by single State, or by a group of States, in order to coerce another State to live up to its international obligations to protect the human rights of its people. In his (essentially three) propositions he draws certain conclusions: first, from the situation where the proposed measures are unaffected by the sanctioning State's obligations under the WTO agreement, other trade treaties, or general international law; second, where they are so affected but where there is significant discretionary room for such measures; and finally, from the discernment of criteria against which to measure the merits of the proposed trade measures.

The last of these three propositions is reminiscent – to me at least – of the debate surrounding the legality of the use of force against Iraq. For some, the actions of the United States and its allies in March 2003 were in clear violation of international law, in particular of the UN Charter. For them no further argument is needed. For others, including myself, a more elastic view of the Charter based on an exegesis of the provisions of the Charter led to the conclusion that the use of force was not of itself illegal but required justification also in terms of its effects.

This position is based on just war theory, and a theology dating back to Saint Augustine, as to which there is renewed interest in current scholarly writing. One could support the legitimacy, in itself, of the resort to force, but question the prudence of that resort, and, of course, the actual conduct of operations in the light of international humanitarian law.

It is similar in the case of the imposition of trade sanctions, whether they are expressly mandated under the provisions of the applicable treaty or lie within the discretion of States allowed under general international law. Might the imposition of sanctions cause more harm than good? Is their imposition just, having regard to their impact on the people of the sanctioned State? Might there be, in some cases, hidden agenda in the mind of the sanctioning State?

The imposition of trade sanctions related to human rights concerns must also be considered in the light of human rights conventions and the applicable monitoring and enforcement mechanisms, of which there are many. At the political level, the UN Human Rights Council has powers to investigate and condemn serious and systematic human rights abuses, but its effectiveness in securing respect for its work so far does not appear to be significantly greater than that of its predecessor, the Human Rights Commission. Demonstrations of blind political loyalties and the practice of bloc voting continue to cast doubt on its integrity. The treaty-based bodies of the UN system, such as the Human Rights Committee and the Committee Against Torture, as well as the work of the High Commissioner for Human Rights, have important roles to play in exposure of abuses and the calling of States to account for them, but there is increased evidence of a disdain by certain States for these procedures and of a blatant attitude of contempt for world opinion. The present situation in the Darfur region of Sudan is but one of many cases that cry out for international action.

These questions do not always admit of an easy or clear answer. Dr Cassimatis offers us a clear understanding of the legal framework, and helps us to define our questions with greater precision, pointing us in the right direction for solutions. But the wider questions remain to be explored. These would be the topic of another book.

Ivan Shearer
Emeritus Professor of Law, University of Sydney
Vice-Chairman, (UN) Human Rights Committee

New York, March 2007

Acknowledgements

The research upon which this book is based was begun in the late 1990s as doctoral research under the supervision of Professor Gabriël Moens and Emeritus Professor Kevin Ryan. I have benefited immensely from their expertise and wisdom. I am profoundly indebted to them.

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I remain responsible for all shortcomings, omissions or errors found within the book.

My family and friends have endured much throughout the period of my doctoral candidature and while the manuscript was updated and revised for publication. My parents (on both sides) were extraordinarily patient and were always willing to provide assistance when it was needed. I deeply regret the anxiety that was caused by my failure to meet numerous self-imposed deadlines. I also regret my neglect of my friends (including extended family), in particular during the course of my doctoral candidature. I thank them for the understanding they have shown and for warmly welcoming me back.

My wife, Nicki, has been a constant source of support and inspiration. She has assumed the parental responsibilities that I could not fulfil during my doctoral candidature and while the manuscript was being updated and revised. Whilst caring for our growing family, Nicki found time to type the initial drafts of the dissertation. She has nurtured and guided our children, Emanuel, Yianni, Dimitri and Theano (who have also been extremely forgiving). She has carried these additional burdens while also successfully pursuing her own teaching career. She has always been patient and understanding. She has gently admonished and corrected me when I have lost my way. She has been my constant companion on our journey along the Way. I dedicate this book to her and to Him who travels with and sustains us.

Anthony E Cassimatis
Cambridge
Afterfeast of the Transfiguration
7 August 2007

I have endeavoured to address the law as it stood at 31 December 2006. In some cases it has been possible to take account of more recent developments.

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Chapter 1

Introduction

1. An Important Question

On 19 December 2006 the United Nations General Assembly adopted resolution 61/170 entitled "Human rights and unilateral coercive measures".[1] The resolution was drafted in terms similar to a number of prior resolutions adopted at earlier sessions of the General Assembly.[2] The resolution was adopted with the support of 131 predominantly developing States.[3] Fifty-four predominantly developed States

1 Resolution 61/170 of 19 December 2006, available at <http://www.un.org/documents/resga.htm>, visited on 13 April 2007. United Nations document references will generally be dispensed with where the documents are readily available *via* the internet.

2 See, for example, resolution 51/103 of 12 December 1996; resolution 52/120 of 12 December 1997; resolution 53/141 of 9 December 1998; resolution 54/172 of 17 December 1999; resolution 55/110 of 4 December 2000; resolution 56/179 of 21 December 2001; resolution 57/222 of 18 December 2002; resolution 58/171 of 22 December 2003; resolution 59/188 of 20 December 2004; and resolution 60/155 of 16 December 2005. For all but resolution 56/179, the pattern of developing State support and developed State opposition was in line with the voting pattern for resolution 61/170. Developed States generally abstained in the vote for resolution 56/179. Similar resolutions were adopted by the United Nations Commission on Human Rights – see, for example, resolution 1998/11 adopted during the 54th session of the Commission on 9 April 1998, UN Doc E/CN.4/RES/1998/11. See also Human Rights Council resolution 2/14 adopted on 2 October 2006. The references to economic coercion in these resolutions appear to have been drawn from earlier resolutions – see in particular General Assembly resolution 2131 (XX) adopted on 21 December 1965, Official Records of the General Assembly, Twentieth Session, Supplement Number 14, 11; and General Assembly resolution 2625 (XXV) adopted on 24 October 1970.

3 The States that voted for the resolution were: Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Democratic People's

voted against the resolution.[4] In paragraph one of the resolution all States were urged:

> "… to refrain from adopting or implementing any unilateral measures not in accordance with international law and the Charter of the United Nations, in particular those of a coercive nature with all their extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights … and other international human rights instruments, in particular the right of individuals and peoples to development …".

The terms of this resolution and the lack of consensus surrounding its adoption raise a number of important questions. This book will focus principally on one of these questions, namely – when (if ever) will it be "in accordance with international law" for a State or group of States to adopt trade measures[5] in order to coerce

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Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Russian Federation, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syria, Tajikistan, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Tuvalu, United Arab Emirates, United Republic of Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe – see Official Records of the General Assembly, 61st Session, 81st plenary meeting, 19 December 2006, UN Doc A/61/PV.81, 20-21.

4 The States that voted against the resolution were: Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia (Federated States of), Moldova, Monaco, Montenegro, Netherlands, New Zealand, Norway, Palau, Poland, Portugal, Republic of Korea, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, United States – ibid, 21.

5 The term "trade measures" is used in this book to encompass a variety of measures directed at restricting the import or export of goods. The term covers import and export prohibitions, quotas restricting the volume of imports or exports, charges, whether in the form of tariffs or otherwise, that are imposed in relation to the import or export of goods, and regulations that restrict imports and exports.

another State (the "target State") to comply with its international obligations to ensure respect[6] for human rights?

A number of factors are relevant to how this question is answered. One important factor is whether the trade measures have been imposed pursuant to a resolution adopted under Chapter VII of the Charter of the United Nations. Whilst issues as to the legality of Chapter VII trade measures are not entirely free from controversy,[7] they will not be the subject of detailed consideration in this book. There is already extensive scholarship on the operation of Chapter VII of the Charter[8] and it is therefore not proposed to re-examine this area. Instead the focus will be upon the legality of trade measures that are not authorised by resolutions adopted under Chapter VII of the United Nations Charter.

A second important factor that is relevant to answering the above question is whether the trade measures are subject to the rules contained in the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement")[9] or

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6 Different treaties use different language when dealing with the specific obligations imposed upon States in relation to human rights. For example, Article 2(1) of the *International Covenant on Civil and Political Rights*, annexed to resolution 2200 (XXI) adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, provides that "[e]ach State party … undertakes to respect and to ensure to all …". See Human Rights Committee, General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004. Contrast the language used in the four Geneva Conventions of 1949, *viz* "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" – see, for example, Article 1 of the *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, done at Geneva, 12 August 1949, 75 UNTS 31. For the typology of treaty obligations developed by the committee overseeing compliance with the *International Covenant on Economic, Social and Cultural Rights*, also annexed to General Assembly Resolution 2200 (XXI), see, for example, Christine Breining-Kaufmann, "The Right to Food and Trade in Agriculture" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 341, 363-366.

7 See, for example, the separate opinion of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, *Order of 13 September 1993*, ICJ Reports 1993, 325, 439-441; and the Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8, 12 December 1997.

8 For an extensive collection of references on the interpretation of the Charter, see Bruno Simma (ed), The Charter of the United Nations – A Commentary, Second Edition, Oxford University Press, Oxford, 2002, Volumes I and II.

9 *Marrakesh Agreement Establishing the World Trade Organization*, done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade

other treaty restricting the imposition of trade measures.[10] The disciplines of the WTO Agreement will have no application where the States imposing the trade measures or the target State are *not* parties to the WTO Agreement or where the measures imposed fall outside the terms of the WTO Agreement. Such measures will be considered in Chapter 5. Trade measures that are subject to the disciplines of the WTO Agreement will be considered in Chapters 6 and 7.

A third factor that appears to be important in answering the above question is the nature of the particular trade measures being imposed. Two classes of variable appear significant when assessing the legality of human rights related trade measures that are subject to the rules contained in the WTO Agreement:

– The nature and scope of the human rights violations in response to which the trade measures have been imposed; and
– The way in which the trade measures have been imposed. The measures may, for example, be targeted only at products manufactured in ways that have involved the violation of human rights. Alternatively, the measures may be targeted at all products manufactured by enterprises either owned or connected with the State[11] responsible for a failure to ensure respect for human

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Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994). There were 150 parties to this treaty as at 11 January 2007. References in this book will generally be to *States* parties to the *Marrakesh Agreement*. It should be noted, however, that non-State entities are entitled to become parties to the *Marrakesh Agreement* by virtue of Article XII, which allows accession to the treaty by any "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements…". Thus, for example, both Hong Kong and China are parties to the *Marrakesh Agreement*.

10 An example of such a treaty is the *Treaty Establishing the European Community*, done at Rome on 25 March 1957, entered into force on 1 January 1958. The treaty has been subsequently amended and the consolidated text is reprinted in the Official Journal of the European Communities, C 325/33 (2002). The focus in this book will be upon the rules contained in the WTO Agreement rather than the rules that apply between members of the European Union ("EU"). A practical justification for this focus is that it appears highly unlikely that human rights related trade measures will be imposed by one member of the EU against another. Trade measures within the EU appear unlikely, in part, due to the wider range of human rights enforcement options within the EU compared to outside the EU. On Human rights enforcement within the EU – see, for example, Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999. Other trade treaties addressing human rights will be discussed throughout this book – see, for example the discussion in Chapter 5 of the *North American Agreement on Labor Cooperation*, reprinted in 32 ILM 1499 (1993). This agreement supplements the *North American Free Trade Agreement*, reprinted in 32 ILM 289 and 605. The principal focus of the book, however, will remain on the WTO Agreement.

11 Another alternative would be to target the measures at non-State entities implicated in human rights violations. This appears to be the intention of the Kimberley process

rights. A third alternative is that the measures are directed at trade in products, the manufacture of which has not involved human rights violations, and which have been manufactured by enterprises with no connection with officials of the State responsible for the failure to ensure respect for human rights.[12]

2. Trade and Human Rights under International Law – Two Propositions

This book advances two broad propositions:

1. *In relation to human rights related trade measures that are not subject to the rules contained in the WTO Agreement or similar rules in other treaties, international law is generally permissive.* Notwithstanding the reference to "extraterritorial effects" in the paragraph of resolution 61/170 quoted above, international rules relating to impermissible extraterritorial exercises of jurisdiction are not generally violated by human rights related trade measures. The customary law principle of non-intervention in the internal affairs of a State also has no significant application. Legal restrictions on the resort to such trade measures may arise under human rights treaties and general international law[13] but the extent of these restrictions is limited by the scope of the particular human rights obligations; and

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restrictions on the trade of conflict diamonds – see Joost Pauwelyn, WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds", 24 Michigan Journal of International Law 1177 (2003), Krista Nadakavukaren Schefer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 6 above, 391, and Kevin R Gray, "Conflict Diamonds and the WTO: Not the Best Opportunity to be missed for the Trade-Human Rights Interface" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, ibid, 451.

12 Compare Sarah Cleveland's classification of trade sanctions that are "tailored", "semi-tailored" and "general" – Cleveland, "Human Rights, Sanctions and the World Trade Organisation" in Francesco Francioni (ed), Environment, Human Rights and International Trade, Hart Publishing, Oxford, 2001, 199, 213. According to Cleveland "[*t*]*ailored* sanctions target human rights violations that arise either from the *production* or *use* of the sanctioned goods" – ibid. "*Semi-tailored* sanctions retain a nexus between the restricted goods or services and the targeted human rights violations, but are less directly linked than tailored measures. Semi-tailored sanctions commonly seek to deprive a government or entity committing human rights abuse of a critical source of capital, or to punish states for human rights violations by withholding goods that directly impact the government itself, rather than the general economy" – ibid, 215. It is submitted that trade measures directed at enterprises that support a regime responsible for human rights violations should fall within this category. According to Cleveland "[*g*]*eneral* sanctions … have no direct link between the targeted products or services and the human rights violation" – ibid, 218. [Emphasis in original passages.]

13 The term "general international law" is used in this book to encompass customary international law and general principles of law applicable in relation to all States

2. *In relation to human rights related trade measures that are subject to the rules contained in the WTO Agreement or similar rules in other treaties, there is less scope to impose human rights related trade measures consistently with rules contained in those treaties. The scope to lawfully impose such measures, however, remains significant.* Notwithstanding concerns about possible negative consequences for the multilateral trading system that might flow from recognition of an entitlement to impose human rights related trade measures, there is significant legal support for interpreting the WTO Agreement consistently with such an entitlement. In addition, the jurisprudence of panels and the WTO Appellate Body provides a basis for concluding that concerns expressed about negative consequences are overstated. Fidelity to international human rights standards and rule of law criteria will minimise the extent to which legal justification might be provided for trade measures that invoke human rights concerns but which are predominantly motivated by a desire to protect producers within the States imposing the measures from economic competition from producers in the target State.

3. Municipal Restrictions on Imports and Exports under International Law

Efforts to alter behaviour in other States have in the past included threats of, and the actual use of, force.[14] They have also involved threats, and the use, of economic measures. Trade has been used by States as a tool in foreign policy for centuries.[15] With the negotiation of the Charter of the United Nations and its prohibition of threatened and actual use of force,[16] trade measures have assumed greater significance as a means by which to attempt to influence foreign behaviour.[17]

(with the exception perhaps of persistent objectors). These sources of international obligation correspond to the sources referred in Article 38(1)(b) and (c) of the *Statute of the International Court of Justice*.

14 Sir Gerald Fitzmaurice noted that "up to a comparatively recent date, war, and the use of force generally, did constitute in some sense a recognised method of enforcing international law …" – GG Fitzmaurice, The Foundations of the Authority of International Law and the Problem of Enforcement, 19 Modern Law Review 1, 3 (1956).

15 Various ancient sources record, for example, a Fifth Century BCE Athenian decree that prohibited Athenian trade with the Megarians – see Charles Fornara, Plutarch and the Megarian Decree, 24 Yale Classical Studies 213 (1975).

16 See Article 2 paragraph 4 of the Charter of the United Nations.

17 For an analysis of economic sanctions used in international relations, see Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, Economic Sanctions Reconsidered, second edition, Institute for International Economics, Washington, 1990 – Volume 1 (History and Current Policy) and Volume 2 (Supplemental Case Histories).

State control of over borders and of the movement of persons and goods in and out the State is well recognised under international law.[18] This aspect of sovereignty has meant that States, in the absence obligations under treaties or general international law, have enjoyed an essentially unfettered discretion to control imports and exports into and out of their territory.[19] If a State wished to restrict trade in protest over violations of human rights abroad (whether or not those human rights were the subject of international legal obligations) it was generally free to do so.[20] Such trade measures were not considered impermissible interference or intervention in the affairs of the target State.[21] Rather, restrictions on the entitlement of the State imposing the trade measures to control imports and exports into and out of its territory would have been considered impermissible.[22] Human rights obligations under treaties and general international law that have developed since the Second World War appear to have altered the position to a limited extent. Trade treaties such as the WTO Agreement have altered the position significantly.

These issues are of critical importance to answering the question posed at the outset. They are addressed in more detail in Chapters 2 to 7.

4. Human Rights Obligations under General International Law

Existing and proposed human rights related trade measures often focus on labour standards.[23] This focus appears to reflect, at least in part, the view that labour

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18 See, for example, the observation of Professor W Friedmann, that:

> "…in the absence of … specific [treaty] obligations [such as those under the General Agreement on Tariffs and Trade], any state is free to impose such restrictions on imports and exports as it chooses, by a vast variety of means …" – W Friedmann, Some Impacts of Social Organization on International Law, 50 American Journal of International Law, 475, 497-498 (1956).

See also the references collected in Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, ninth edition, Longman, London, 1992, Volume I, Part 1, 432-434, in particular footnotes 13 and 14.

19 See, for example, J Fischer Williams, Aspects of Modern International Law, Oxford University Press, London, 1939, 108-109, quoted in Antonio Cassese, International Law in a Divided World, Clarendon Press, Oxford, 1986, 25.

20 For example, Egypt, India, Morocco, Pakistan and Tunisia relied on Article XXXV of the General Agreement on Tariffs and Trade, in relation to trade with South Africa, which secured their freedom to impose trade restrictions to place pressure upon South Africa to dismantle its former policy of apartheid – GATT, Analytical Index: Guide to GATT Law and Practice, updated sixth edition, Geneva, 1995, Volume 2, 1036.

21 Jennings and Watts, note 18 above, 432-434.

22 See generally Jennings and Watts, ibid, 385-390.

23 See, for example, United States legislation and European Union regulations addressing trade with developing States that is subject to the generalised system of preferences – these are discussed in Chapters 5 and 7.

abuses give foreign manufacturers a competitive advantage in international trade.[24] Thus labour standards are considered important instrumentally – to ensure "fair" competition.[25] The development, following the Second World War, of international obligations to ensure respect for human rights, by contrast, appears to have been based on a belief in the inherent "dignity and worth of the human person".[26]

The focus of this book will not be limited to labour related human rights standards. In assessing the legality of trade measures imposed to secure respect for human rights, the focus will be upon those human rights standards (including

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24 This alleged competitive advantage has been linked by many to what has been described as a regulatory "race to the bottom" where States with higher standards come under increasing pressure to reduce labour standards in import competing industries – see for example Virginia A Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2, Legal Analysis, 177, 178. Empirical support for the "race to the bottom" phenomenon has been the source of controversy – see the Organisation for Economic Co-operation and Development ("OECD"), Trade Employment and Labour Standards, OECD, Paris, 1996; OECD, International Trade and Core Labour Standards, OECD, Paris, 2000; International Labour Office and Secretariat of the World Trade Organization, Trade and Employment – Challenges for Policy Research, WTO Secretariat, Geneva, 2007; and Jagdish Bhagwati, The Boundaries of the WTO – Afterword: The Question of Linkage, 96 American Journal of International Law 126, 131, footnote 21 (2002). Another alleged phenomenon that appears to be related to the "race to the bottom" is "regulatory chill", which is said to arise where "… governments refrain from raising standards in import-competing industries" – Kyle Bagwell, Petros C Mavroidis and Robert W Staiger, Symposium: The Boundaries of the WTO – It's a Question of Market Access, 96 American Journal of International Law 56, 61 (2002). Compare the third preambular paragraph to the International Labour Organization's constitution which asserts that "… the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries …" – see Part XIII, Treaty of Peace between the Allied and Associated Powers and Germany, done at Versailles on 28 June 1919.

25 Jagdish Bhagwati refers to this view as a form of "'egoistical' (i.e., self-serving)" argument – Bhagwati, ibid, 130.

26 The second preambular paragraph of the Charter of the United Nations refers to a determination:

> "… to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small …".

Bhagwati, ibid, appears to classify this as a form of "'altruistic' (i.e., others-oriented)" argument. Contrast the distinction noted by Frank Garcia between consequentialist justifications for free trade and deontological accounts of human rights standards – Garcia, Symposium: Global Trade Issues in the New Millennium: Building a Just Trade Order for a New Millennium, 33 George Washington International Law Review 1015 (2001).

labour standards) that are protected under general international law. This focus is justified for a number of reasons:

a. Trade measures imposed to secure respect for human rights standards protected under general international law appear to have better prospects of satisfying the requirements of provisions of the WTO Agreement. This issue is examined in detail in Chapter 6;
b. Whilst there have been efforts to expand the rules of international law prohibiting interference or intervention in the internal affairs of another State to include a prohibition of trade measures,[27] it appears clear that these rules do not preclude measures taken to secure respect for human rights obligations under general international law;[28]
c. States appear to be under obligations under general international law not only to protect the human rights of persons within their jurisdiction, but also to ensure that their actions do not result in the infringement of the human rights of persons in other States.[29] The alleged freedom advocated in former times to restrict the export of goods (including food and other essentials) to a neighbouring State[30] appears to now be qualified by human rights obligations under general international law;
d. Human rights obligations under general international law apply to *all* States. The identification of such obligations is important as one objection to trade measures for human rights purposes is that the trade measures relate to human rights standards which the target State has not consented to and is therefore not bound by.[31] This objection has no application to human rights obligations under general international law;[32] and
e. Developing States have expressed serious misgivings about trade measures imposed for human rights purposes. They have, for example, expressed the fear that human rights concerns are being raised merely as a pretext for protectionism and are being raised in an attempt to undermine their comparative advantage.[33] A policy challenge (which has a legal dimension) raised by such

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27 See, for example, the resolutions referred to in note 2 above.

28 See the discussion in Chapters 5 and 6.

29 See, for example, Committee on Economic, Social and Cultural Rights, General Comment 8, note 7 above.

30 See, for example, J Fischer Williams, note 19 above.

31 See, for example, Philip Alston, "Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism?'" in Lance A Compa and Stephen F Diamond (eds), Human Rights, Labor Rights, and International Trade, University of Pennsylvania Press, Philadelphia, 1996, 71.

32 Where the target State is a party to human rights treaties then, in addition to human rights standards under general international law, the specific treaty standards also become relevant.

33 See for example, paragraph 5 of the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour

trade measures is to develop rules that accommodate these concerns, that are capable of impartial and consistent application, and that ensure respect for human rights. The *precise* identification of rules of general international law requiring the protection of human rights appears to be important to the success of efforts to meet this challenge.

5. *Lex Lata – Lex Ferenda*?

There is considerable academic attention currently being directed at the possibilities for expanding linkages between the international trading system and other areas of actual or possible international regulation.[34] The prospects of establishing more formal links between the trading system and the international regulation of anti-competitive behaviour,[35] international environmental protection standards[36] and human rights standards[37] are all currently being debated.

Conference at its 86th Session, Geneva, 18 June 1998. The Declaration is reprinted in 137 International Labour Review 253 (1998); and Jose M Salazar-Xirinachs, The Trade-Labor Nexus: Developing Countries' Perspectives, 3 Journal of International Economic Law 377, 380-381 (2000).

34 For example, the American Society of International Law and the International Law Association are both currently sponsoring studies into the linkage of trade and human rights. See, for example, Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006; and Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 6 above. See also, for example, the Symposium: Boundaries of the WTO, 96 American Journal of International Law, 1-158 (2002).

35 See, for example, Bhagwati, note 24 above, 129-130.

36 See, for example, Andrea Bianchi, "The Impact of International Trade Law on Environmental Law and Process" in Francesco Francioni (ed), Environment, Human Rights and International Trade, Hart Publishing, Oxford, 2001, 105.

37 See generally Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 34 above; and Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 6 above. For a 1997 bibliography of the literature addressing, *inter alia*, international trade and human rights – see David Weissbrodt and Marci Hoffman, The Global Economy and Human Rights: A Selective Bibliography, 6 Minnesota Journal of Global Trade 189 (1997). In the context of trade and human rights linkage Professor Alston has commented that "… multilateralism has always tended to attract considerably more than its fair share of idealistic but naïve and largely impractical proposals" – Alston, "Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism'" in Lance A Compa and Stephen F Diamond (eds), Human Rights, Labor Rights, and International Trade, University of Pennsylvania Press, Philadelphia, 1996, 71, 88. For more recent theoretical assessments of "trade and …" linkages see Symposium, Linkage as Phenomenon: An Interdisciplinary Approach, 19 University of Pennsylvania Journal of International Economic Law 209 (1998); and Symposium: The Boundaries of the WTO, 96 American Journal of International Law 1 (2002). José Alvarez has observed

Linkage *proposals* have been assessed by scholars employing insights from "law and economics"[38] and "the new institutional economics".[39] Other scholars[40] have taken perspectives comparable to the "policy oriented" approach to international regulation often associated with the Yale Law School and Professors Harold Lasswell and Myres McDougal.[41] Other scholars have offered proposals from per-

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that in the view of some the apparent "scholarly obsession with linkage vastly overstates the importance of issues primarily of interest to 'left-leaning' academics (as well as political groups in the West with whom they sympathize) while only antagonizing governments of the South, which see arguments for linking the trade regime with labor and environmental concerns as at best irrelevant to their priorities, or worse still as thinly veiled forms of protectionism." He concludes, however, with the assessment that "linkage concerns remain of intense political and academic interest" – José E Alvarez, Symposium: The Boundaries of the WTO – Foreword, 96 American Journal of International Law 1 (2002), 1-2. For an application of the liberal theory of John Rawls to international trade, see Frank J Garcia, Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade, Transnational Publishers, Ardsley, 2003. See also Ernst-Ulrich Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 European Journal of International Law 621 (2002). For responses to this article, see – Robert Howse, Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann, 13 European Journal of International Law, 651 (2002); and Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 European Journal of International Law 815 (2002). For Petersmann's rejoinder to Alston's reply, see Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, 13 European Journal of International Law 845 (2002); and Petersmann, "Human Rights and International Trade Law: Defining and Connecting the Two Fields" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, ibid, 29.

38 See, for example, Alan O Sykes, "International Trade and Human Rights: An Economic Perspective" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, ibid, 69; Bagwell, Mavroidis and Staiger, note 24 above; and Joel P Trachtman, Symposium: The Boundaries of the WTO – Institutional Linkage: Transcending 'Trade and …', 96 American Journal of International Law, 77 (2002).

39 Trachtman, ibid.

40 See, for example, Steve Charnovitz, Symposium: Boundaries of the WTO – Triangulating the World Trade Organization, 96 American Journal of International Law, 28 (2002). The comparison between Charnovitz's approach and "policy oriented jurisprudence" is made by José E Alvarez, Symposium: The Boundaries of the WTO – Foreword, 96 American Journal of International Law, 1, 4 (2002).

41 For a brief description of the "policy oriented jurisprudence" of the Yale Law School, see Steven R Ratner and Anne-Marie Slaughter, Symposium on Method in International Law – Appraising the Methods of International law: A Prospectus for Readers, 93 American Journal of International Law, 291, 293-294 (1999).

spectives of "ordo liberalism" and "constitutional economics".[42] These proposals have been criticised by scholars writing from various theoretical perspectives.[43]

Chapters 2 to 7 focus on *existing* rules of international law and their interaction. These chapters contain important clarification and analysis of the legal issues that currently arise when human rights related trade measures are imposed. *Reform* proposals and critiques of such proposals undertaken from the various theoretical perspectives referred to above will not be subjected to detailed analysis in these chapters.[44] Chapter 4 does, however, offer a modest contribution to the normative linkage debate by identifying essential features of one particular conception of the international rule of law which might be used to assess linkage proposals. Particular international human rights standards might also be used as criteria to assess linkage proposals.

In terms of legal methodology I have, throughout the book, endeavoured to adopt what has been described as a "soft positivist"[45] perspective combined with

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42 Ernst-Ulrich Petersmann, Human Rights and International Economic Law in the 21st Century – The Need to Clarify their Interrelationship, 4 Journal of International Economic Law 3 (2001); and Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, note 37 above. For a brief description of Petersmann's ordo liberal perspective – see Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law, University Press Fribourg, Fribourg, 1991, 61-72.

43 See, for example Howse, note 37 above. See also Howse, Symposium: Boundaries of the WTO – From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime, 96 American Journal of International Law, 94 (2002). Professor Alvarez, note 40 above, describes the perspective taken by Professor Howse in this article as drawing on insights from critical legal scholars (at 4); and international relations scholarship – Alvarez, Symposium: Boundaries of the WTO – The WTO as Linkage Machine, 96 American Journal of International Law, 146, 155 (2002). Alston, note 37 above, criticizes Petersmann from a perspective that is supportive of existing international human rights standards.

44 I will therefore not be considering proposals such as the establishment of human rights criteria for admission as a member of the World Trade Organization – this issue was, for example, considered by Professors Damrosch and Garcia during the panel session at the 96th annual meeting of the American Society on 14 March 2002 – see Human Rights, Terrorism and Trade, 96 ASIL PROC 128-134 (2002). Nor will I be considering mechanisms by which human rights obligations *of* the World Trade Organization might be made more prominent in trade negotiations leading to new international trade agreements, see the comments of Professor Frederick Abbott during the same panel session – ibid, 121-128. Issues related to the human rights obligations of the World Trade Organization will only be considered in so far as they relate to the legality of human rights related trade measures imposed by States.

45 The term is found in Professor Hart's Postscript to the second edition of the Concept of Law, Clarendon Press, Oxford, 1994, where Professor Hart noted that his doctrine had been so described – 250. In his response to one of Professor Dworkin's criticisms

the "flexible" positivism identified by Professor Brownlie.[46] Thus my analysis will be principally State centred but will not exclude consideration of other subjects of international law, such as intergovernmental organisations, individuals and juridical entities established under municipal law. Evidence of express or tacit State acceptance or acquiescence regarding the existence of international legal rules will, nonetheless, remain the main focus.[47] Consistent with a "soft positivist" perspective, I will also consider moral principles and substantive values when these appear relevant to the identification or operation of legal rules. Consistent with a

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of Hart's conception of law, Professor Hart observed that "… the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints" – 247. For a detailed consideration of Professor Hart's positivism in the context of the international legal system , see GJH van Hoof, Rethinking the Sources of International Law, Kluwer Law and Taxation Publishers, Deventer, 1983, 1-82.

46 See Brownlie, "Discussion – Lex lata *and* lex ferenda", in Antonio Cassese and Joseph HH Weiler (eds), Change and Stability in International Law-Making, Walter de Grutyer, Berlin, 1988, 90, 91. Professors Hart and Brownlie do not appear to have been in complete agreement as to the value of Professor Hart's theoretical insights. See, for example, Brownlie, The Reality and Efficacy of International Law, 52 British Year Book of International Law, 1, 5-8 (1981). Professor Brownlie's flexible positivism may be similar to "enlightened positivism" as described by Professors Simma and Paulus – The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 American Journal of International Law 302, 303-308 (1999).

47 The methodology adopted in relation to the establishment of rules of customary international law will be that generally applied by the International Court of Justice – see, for example, *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3, 28-45, paras 37-81; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, 14, 92-115, paras 172-220; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, 253-255, paras 64-73. See also Michael Akehurst, Custom as a Source of International Law, 47 British Year Book of International Law, 1. Compare Final Report of the Committee on Formation of Customary (General) International Law, in International Law Association, Report of the Sixty-Ninth Conference, London, 25-29 July 2000, International Law Association, London, 2000, 712; and van Hoof, Rethinking the Sources of International Law, note 45 above, 76-82. The more restrictive approaches to customary international law favoured by Anthony A D'Amato, The Concept of Custom in International Law, Cornell University Press, Ithaca, 1971, 87-88; and HWA Thirlway, International Customary Law and Codification, AW Sijthoff, Leiden, 1972, 57-59, have not been applied.

"flexible" positivist perspective I will also consider so-called "soft law"[48] instruments.[49]

6. Regimes, Rule Conflict and Fragmentation of International Law

In its judgment in the *Case Concerning the United States Diplomatic and Consular Staff in Tehran*[50] the International Court of Justice concluded that the "rules of diplomatic law … constitute[d] a self-contained regime".[51] This reference to "a self-contained regime" might be thought to invoke a branch of international relations theory, namely "regime theory".[52] On closer analysis, however, it appears that the International Court of Justice was referring to an entirely different concept. It has been observed that "regime theory" in international relations scholarship "assumes that each international regime is discrete and governs only a single issue area (such as trade or human rights) without formal or informal relationships to other regimes".[53] As has been demonstrated by a study group of the International

48 Soft law instruments are generally considered to be instruments that are not in and of themselves sources of obligation under international law. Note, however, Professor Simma's observations on what constitutes soft law – Simma, "International Human Rights and General International Law: A Comparative Analysis", Collected Courses of the Academy of European Law, Volume IV, Book 2, 153, 233-236 (1995).

49 Professor Brownlie's description of himself as an "informal or flexible positivist" was offered in the context of a discussion of the legal significance of General Assembly resolutions. He observed that his "… conception of positivism is precisely one that reflects what is happening. … I think the first duty of an international jurist is at least to monitor what is going on. … And what is going on includes soft law, and includes the possibility that the effect of a catalyst may produce hard law, and thus you may get a constructive transition. So flexible positivism is perfectly capable of taking on board General Assembly resolutions and other such material in appropriate circumstances" – Brownlie, "Discussion – Lex lata *and* lex ferenda", note 46 above, 91. The positivist perspective taken in this book is therefore distinctly broader than the positivist perspective described by Professor Prosper Weil – Towards Relative Normativity in International Law? 77 American Journal of International Law, 413 (1983).

50 *United States Diplomatic and Consular Staff in Tehran, Judgment*, 1CJ Reports 1980, 3.

51 Ibid, 40, para 86. For a review of the international legal literature on "self-contained" or "special regimes" of international law, see International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi ("ILC Study Group Report on Fragmentation"), UN Doc A/CN.4/L.682, 13 April 2006, 65-101, paras 123-194. See also Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law, 17 European Journal of International Law 483 (2006).

52 See, for example, Volker Rittberger (ed), Regime Theory and International Relations, Clarendon Press, Oxford, 1993.

53 Laurence R Helfer, "Mediating Interactions in an Expanding International Intellectual Property Regime" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and

Law Commission, this is not the sense in which the International Court of Justice used the term "regime" in the *Tehran Hostages Case*. In its 2006 report on fragmentation of international law the Study Group identified three different types of regimes identified by international lawyers.[54] The third type of regime identified by the Study Group was one in which:

> "… all the rules and principles that regulate a certain problem area are collected together so as to express a 'special regime'. Expressions such as 'law of the sea', 'humanitarian law', 'human rights law', 'environmental law' and 'trade law', etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety."[55]

The existence of these types of regimes, however, does not undermine the systemic nature of international law nor does their existence preclude links between regimes and with general international law.[56] According to the Study Group:

> "Although the degree to which … a branch of international law needs to be supplemented by general law varies, there is no support for the view that anywhere general law would be fully excluded. …[S]uch exclusion may not be even conceptually possible."[57]

International Trade, note 6 above, 180, 183.

54 ILC Study Group Report on Fragmentation, note 51 above, 66-73, paras 124-137.

55 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, 411, para 251(12). The Study Group offered the following observations regarding the other two forms of "special regime" under international law:

> "Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the articles on Responsibility of States for internationally wrongful acts." [The *Tehran Hostages Case* was cited as an illustration of this form of regime.]
>
> "Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law)" – ibid. The Permanent Court's decision in the *Wimbledon Case* was cited as an illustration of this second form of regime.

56 See, for example, ILC Study Group Report on Fragmentation, note 51 above, 85-99, para 159-190.

57 Ibid, 82, para 152(5). Compare Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law, 17 European Journal of

The confusion caused by the word "self-contained" led the Study group to prefer the expression "special regimes".[58]

The International Law Commission's research into fragmentation of international law reflected concerns expressed over a number of years regarding the proliferation of tribunals, rules and "rule systems" that potentially threaten the coherence of the international legal system.[59] The 2006 report by the Study Group provided a response to substantive (as opposed to procedural[60]) issues raised by the increasing complexity of the international legal system. The Study Group's report assessed the traditional rules and principles that have been developed by international lawyers to *avoid* (principally through interpretative rules) and *resolve* conflicts between rules of international law.[61] The Study Group emphasised the limits of these legal technical rules and principles:

> "Public international law does not contain rules in which a global society's problems are, as it were, already resolved. Developing these is a political task."[62]

International Law 483, 494-512 (2006).

58 ILC Study Group Report on Fragmentation, ibid.

59 On the topic of fragmentation see, for example, Gilbert Guillaume, The Future of International Judicial Institutions, 44 International and Comparative Law Quarterly 848 (1995); Martti Koskenniemi and Päivi Leino, Fragmentation of International Law? Postmodern Anxieties, 15 Leiden Journal of International Law 553 (2002); Andreas Fischer-Lescano and Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Michigan Journal of International Law 999 (2003); and the numerous other works cited in the ILC Study Group Report on Fragmentation, ibid.

60 The Study Group decided to leave to one side the institutional dimension of conflicts between rules and principles of international law. According to the Study Group the "issue of institutional competencies is best dealt with by the institutions themselves" – ILC Study Group Report on Fragmentation, ibid, 13.

61 The Study Group considered international legal principles applicable to relations between special and general norms of international law and to relations between prior and subsequent norms of international law. The Study Group noted, for example, in the context of conflicts between prior and subsequent norms, that contract law analogies might lead one to prefer an earlier international legal rule while analogies with statute law might lead one to prefer a later rule – ILC Study Group Report on Fragmentation, ibid, 117, para 226, footnote 296. The Study Group also considered rules and principles of international law having different normative power and the impact of such differences on the avoidance and resolution of conflict. Finally the Study group examined the importance of maintaining the systemic integrity of international law, in particular through the operation of rules of treaty interpretation. The conclusions reached by the Study Group are summarised in the International Law Commission's 2006 report, note 55 above, 407-423, para 251.

62 ILC Study Group Report on Fragmentation, ibid, 247, para 488.

In particular the Study Group identified difficulties in applying legal technical conflict rules in cases of conflict *between* regimes of the third type identified above.[63] It emphasised, for example, the importance of independent adjudication to address conflicts between regimes.[64]

The rules and principles of conflict avoidance (through the application of interpretative techniques) and conflict resolution analysed by the International Law Commission's Study Group on the fragmentation of international law will be an important part of the analysis in Chapters 4 and 6. With the focus on human rights obligations under general international law, conflict resolution rules that rely upon hierarchical relations amongst rules of international law will have particular relevance.

7. Other Limits on the Scope of the Book

As indicated above, the focus of the present study will be on human rights related trade measures directed at failures to ensure respect for human rights in *other* States. The focus is therefore upon the legality of what have been referred to variously as "outwardly directed",[65] "extraterritorial",[66] "extra-jurisdictional"[67] or "externally directed"[68] trade measures. Aspects of the analysis in Chapters 6 and 7 are relevant to the legality of inwardly directed measures and it is possible to offer human rights related defences of such measures.[69] Inwardly directed measures are not, however, the subject of detailed analysis.

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63 Ibid, 130, para 255.

64 See, for example, ibid, 142, para 280.

65 This terminology is used by Steve Charnovitz, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law, 689, 695 (1998).

66 The panel established in 1990 to hear the dispute between Mexico and the United States over whether United States Dolphin conservation measures violated obligations under the General Agreement on Tariffs and Trade ("GATT") used the expression "extrajurisdictional" in its report – see *United States – Restrictions on Imports of Tuna*, not adopted by the GATT contracting parties, GATT Basic Instruments and Selected Documents, 39th Supplement, 155, paragraph 5.28; the panel report is also reprinted in 30 ILM 1597 (1991).

67 Mexico, in its submissions to the GATT panel in *United States – Restrictions on Imports of Tuna*, ibid, appears to have used the term "extraterritorial" – see paragraph 3.47.

68 This term is used by Professor Hudec, see "GATT Legal Constraints on the Use of Trade Measures against Foreign Environmental Practices" in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2, Legal Analysis, 95, 96.

69 An attempt, for example, might be made to defend safeguard measures by reference to labour related human rights. The Thai measures, directed at cigarette imports, that were unsuccessfully defended under Article XX of GATT could also be characterised as human rights related – see *Thailand – Restriction on Importation of and Internal*

Nor does the book analyse in detail the linkage of development finance or aid to respect for human rights. Literature on such linkage is briefly considered in Chapters 5 and 7. The focus here, however, is upon human rights related *trade* measures.

The legality of human rights related trade measures raises issues that are related but not identical[70] to those raised by trade measures designed to enhance environmental protection. Given similarities between such measures and the legal assessments of environmentally related trade measures by panels and the WTO Appellate Body, it has been necessary to include a consideration of such environmental measures. In particular, jurisprudence on environmental measures that has developed under the original *General Agreement on Tariffs and Trade*[71] and the WTO Agreement is subjected to detailed scrutiny in Chapter 6. Important differences in the nature of environmental regulation and the international protection of human rights are also noted in Chapter 6.

As this book focuses on the *legality* of human rights related trade measures it does not comprehensively address empirical issues raised by such measures.[72] In particular, a critical issue in any comprehensive assessment of human rights related trade measures is the efficacy of such measures in bringing about improved respect for human rights. Rather than undertake an empirical analysis of the effectiveness of human rights related trade measures that have already been implemented, reliance has instead been placed on the empirical analysis of Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliot. Their analysis of 115 cases of sanctions to secure changes in policy in other States identified a modest "success rate" in certain cases.[73] My research is based on a related assumption that human rights related

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Taxes on Cigarettes, adopted 7 November 1990, Basic Instruments and Selected Documents, 37th Supplement, 200; reprinted in 30 ILM 1122 (1991).

70 See, for example, the discussion of differences between the protection of the environment and human rights under international law by Daniel Bodansky, "The Role of Reporting in International Environmental Treaties: Lessons for Human Rights Supervision", in Philip Alston and James Crawford (eds), The Future of UN Human Rights Treaty Monitoring, Cambridge University Press, Cambridge, 2000, 361, 363-365.

71 This agreement was negotiated in 1947 and its provisions came into force for States *via* the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, done at Geneva, 30 October 1947, 55 UNTS 308 (1950), and numerous accession protocols. The agreement was superseded by the WTO Agreement in 1995.

72 It has been necessary, for example, to address the efficacy of human rights related trade measures in Chapter 6 as part of the application of the requirements of Article XX of GATT 1994.

73 According to Hufbauer, Schott and Elliot:

> "[a]lthough it is not true that sanctions 'never work,' they are of limited utility in achieving foreign policy goals that depend upon compelling the target country to take actions it stoutly resists. Still, in some instances, particularly situations involving small target countries and modest policy goals, sanctions have helped alter foreign behaviour. …

trade measures can be successful in encouraging improved respect for human rights.[74] Testing the accuracy of the conclusions reached by Hufbauer, Schott and Elliot and the assumption upon which this book is based would be a subject worthy of further analysis on another occasion.

In relation to international human rights standards, the book has focussed on international obligations to respect human rights in times of relative peace. A strict separation between international legal obligations during times of armed conflict and peace is impossible to maintain[75] and obligations to respect human rights in

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> Sanctions have been successful – by our definition – in 34 percent of the cases overall. However, the success rate importantly depends on the type of policy or governmental change sought. Episodes involving destabilization succeeded in half the cases, usually against target countries that were small and shaky. Cases involving modest goals and attempts to disrupt minor military adventures were successful about a third of the time. Efforts to impair a foreign adversary's miliary potential, or otherwise to change its policies in a major way, succeeded only infrequently" – Hufbauer, Schott and Elliot, note 17 above, Volume 1, 92-93.

For additional references to studies that apparently question the effectives of sanctions see Robert W McGee, Trade Embargoes, Sanctions and Blockades – Some Overlooked Human Rights Issues, 32(4) Journal of World Trade 139, 140 and 143-14 (1998). Assessments of the effectiveness of human rights measures are often controversial. Compare the assessments by Jagdish Bhagwati and Ernst Ulrich Petersmann (both published in 2002) of the effectiveness of the International Labour Organization – Bhagwati, note 24 above, 132; Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, note 37 above, 625. On the effectiveness of preferential trade measures liked to human rights conditions see Emilie M Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 International Organization 593 (2005). There is also controversy regarding the general effectiveness of human rights treaties – see, for example, Oona A Hathaway, Do Human Rights Treaties Make a Difference, 111 Yale Law Journal 1935 (2002); Ryan Goodman and Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 European Journal of International Law 171 (2003); and Oona A Hathaway, Testing Conventional Wisdom, 14 European Journal of International Law 185 (2003).

74 In this regard note in particular Hufbauer, Schott and Elliot's conclusion that "[e]conomic sanction seem most effective when aimed against erstwhile friends and close trading partners. In contrast, sanctions directed against target countries that have long been adversaries of the sender country [imposing the sanctions], or against targets that have little trade with the sender country, are generally less successful" – Hufbauer, Schott and Elliot, ibid, Volume 1, 99. General scepticism regarding the effectiveness of trade measures in securing increased respect for international human rights obligations is difficult to reconcile with the effective use of retaliatory trade measures as the ultimate response to violation of rules under the WTO Agreement.

75 Consider, for example, the human rights treaties that generally apply in times of peace but which include derogation provisions that apply in periods of public emergency that include armed conflict. These provisions are discussed further in Chapter 4. On

times of armed conflict have been briefly considered in Chapters 2 and 4. The book's focus on human rights obligations in times of relative peace corresponds to a common division in analyses of international legal obligations and has also been necessary in order to control the length of the work.

8. Summary of Chapters

Chapter 2 introduces international legal rules, procedures and institutions that are relevant to the protection of human rights. The focus is upon human rights obligations under international law that apply to all States.

Chapter 3 introduces rules regulating international trade. The focus of the chapter is on those obligations of particular relevance to the legality of human rights related trade measures.

Chapter 4 examines interaction between these different rules and principles of international law. Issues of hierarchy amongst rules of international law and the avoidance and resolution of conflict between such rules are the major focus of the chapter. Mechanisms developed to avoid and resolve conflict are designed to maintain the coherence and integrity of the international legal system.

Chapter 5 examines trade measures initiated by the United States ("US") and European Union ("EU") that link access to US and EU markets to respect for human rights standards. These measures may fall outside the scope of WTO disciplines. The analysis of such measures provides insights into some of the difficulties that arise when human rights related trade measures are taken.

Chapter 6 provides a detailed analysis of the legality of human rights related trade measures under existing WTO rules. This analysis includes a review of the jurisprudence developed by panels established under the *General Agreement on Tariffs and Trade*, 1947,[76] and WTO panels and the Appellate Body. Chapter 7 focuses on

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the relationship between international humanitarian law obligations and international human rights obligations, see for example, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Cambridge University Press, Cambridge, 2005, Volume I, Rules, xxx-xxxi; and Human Rights Committee, General Comment No 29, States of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 10 especially footnote 6. The WTO waiver for the Kimberley process regarding trade in "conflict diamonds", addressed in Chapter 6, refers to both areas of international law.

76 As indicated in note 71 above, the terms of the *General Agreement on Tariffs and Trade* entered into force by virtue of the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*. The *Protocol of Provisional Application* and subsequent accession protocols were superseded by the WTO Agreement, although the terms of the *General Agreement on Tariffs and Trade* were incorporated into one of the agreements set out in Annex 1A of the WTO Agreement, note 9 above.

human rights related trade measures from the perspective of developing States that are members of the WTO.

In the final chapter the legal rules and principles that have been developed to secure the coherence and the integrity of the international legal system are revisited. International legal rules and principles, that have been accepted and recognised by States and which essentially reflect a developing "public interest" of the international community, provide the necessary foundation for interpretation and application of the WTO Agreement and similar treaties. Human rights related trade measures have the capacity to advance or undermine this community interest. The final chapter reaffirms the proposition, developed through the course of the book, that rules and principles of international law allow, and in some cases require, international lawyers to distinguish between such measures.

Chapter 2

The Protection of Human Rights under International Law

1. Introduction

This chapter begins with a brief description of the development and scope of obligations to ensure respect for human rights under international law. It then addresses the sources of international legal obligation to ensure respect for human rights. A catalogue of international human rights standards that appear to bind all States is provided. International mechanisms designed to secure the enforcement of human rights standards are then examined. These international mechanisms are designed to operate in conjunction with municipal enforcement regimes.[1] This chapter provides the foundation for the consideration of the interaction of human rights and trade norms and other rules and values in Chapter 4.

2. The Protection of Human Rights under International Law

Following the atrocities committed during the Second World War, government representatives from around the World committed their States to the promotion and protection of human rights. This commitment found expression in the Charter of the United Nations, which contains a number of references to "human rights and fundamental freedoms."[2] This phrase is, however, nowhere defined in the Charter.[3]

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1 Ensuring respect for international human rights obligations appears to depend principally on the level of non-governmental and governmental commitment *within* States to ensure respect for the international standards. This commitment is reflected, *inter alia*, in the effectiveness of municipal enforcement mechanisms.

2 The preamble to the Charter refers to "fundamental human rights" and the "equal rights of men and women". The phrase "human rights and … fundamental freedoms" appears in Articles 1(3), 13(1)(b), 55(c), 62(2) and 76(c) of the Charter. These articles variously refer to "respect for", "observance of" or "realization of" human rights and fundamental freedom "for all without distinction as to race, sex, language, or religion". Article 68 refers to "the promotion of human rights".

3 Although as noted in note 2 above, impermissible grounds of distinction are set out in various articles of the Charter.

On 10 December 1948, the General Assembly adopted a resolution proclaiming a "universal declaration of human rights".[4] The Universal Declaration of Human Rights set out in some detail the human rights that most governments at the time considered to be "common standard[s] of achievement for all peoples and all nations."[5] The declaration drew heavily on ideas that influenced the English, American and French revolutions of the 17th and 18th Centuries.[6] It was also inspired by political philosophies of the 19th Century and painful memories of economic depression and war in the 20th.[7] The Declaration was based on the belief in the inherent dignity of the human person.[8]

The Universal Declaration has had profound legal significance.[9] The Declaration has, for example, served as the basis for the negotiation of numerous human

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4 See General Assembly resolution 217A (III), United Nations Document A/810, 71 (1948). Forty-eight States voted for the resolution: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Venezuela. No State voted against the adoption of the resolution. Eight members of the United Nations abstained – Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics and Yugoslavia. There were 58 members of the United Nations in 1948. Honduras and Yemen did not participate in the vote.

5 See the last preambular paragraph of the declaration.

6 On the ideological roots of the declaration, see Antonio Cassese, Human Rights in a Changing World, Temple University Press, Philadelphia, 1990, 41-43.

7 Ibid, 14-16 and 28-32.

8 By the first paragraph of the preamble the General Assembly asserts that "… recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …".

9 The declaration is, for example, referred to in numerous resolutions of the General Assembly and other United Nations bodies – most of the resolutions cited in Chapter 1, note 2 above, expressly refer to the declaration. There are references to the declaration in judgments of the International Court of Justice – see the references set out in Bruno Simma (ed), The Charter of the United Nations – A Commentary, 2nd Edition, Oxford University Press, Oxford, 2002, Volume II, 927. The declaration has influenced the constitutions and other laws of States – see, for example, the constitutions of Canada, South Africa and Tanzania, set out in Gisbert H Flanz (ed), Constitutions of the Countries of the World, Oceana Publications, Dobbs Ferry, 2003, Binders IV, XVI and XVIII. The declaration has been relied upon in decisions of municipal courts – see, for example, *Mabo v Queensland* (1988) 166 Commonwealth Law Reports 186, 217 (High Court of Australia); *India v Gill*, All India Reporter, 2000, Supreme Court, Second Supplement, 3425, 3430; *O'Connor v R*, [1995] 4 Supreme Court Reports 411, 484 (Canadian Supreme Court); and *R v Bow Street Metropolitan Stipendiary*

rights treaties.[10] Human rights are now protected by a wide range of international legal rules, procedures and institutions.[11]

(a) Civil and Political Rights

The conventional distinction in classifying human rights under international law is that drawn between civil and political rights *and* economic, social and cultural rights. International instruments, both global and regional, often reflect this distinction.[12] There is, however, some overlap between these rights and strict separation of the two categories of rights does not appear possible.[13]

Magistrate, Ex parte Pinochet Ugarte (Number 3) [2000] 1 Appeal Cases 147, 274 (House of Lords). See generally Hurst Hannum, The Status and Future of the Customary International law of Human Rights, 25 Georgia Journal of International and Comparative Law 287 (1995-1996).

10 See, for example, the express references to the declaration in the preambles to the *International Covenant on Economic, Social and Cultural Rights*, annexed to resolution 2200 (XXI) adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976, 993 UNTS 3; the *International Covenant on Civil and Political Rights*, annexed to the same resolution, entered into force 23 March 1976 , 999 UNTS 171; the *European Convention on Human Rights and Fundamental Freedoms*, done at Rome on 4 November 1950, entered into force 3 September 1953, 213 UNTS 222; and the *American Convention on Human Rights*, done at San Jose on 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123.

11 These will be discussed in detail below.

12 Compare, for example, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, note 10 above. Regional examples of such divisions include the European *Convention on Human Rights and fundamental Freedoms*, note 10 above, and the *European Social Charter*, done at Turin on 18 October 1961, entered into force 26 February 1965, 529 UNTS 89. A number of treaties, however, combine both sets of rights. See, for example, the *Convention on the Elimination of All Forms of Discrimination against Women*, annexed to General Assembly resolution 34/180 which was adopted on 18 December 1979, entered into force on 3 September 1981, and the *Convention on the Rights of the Child*, annexed to General Assembly resolution 44/25 which was adopted on 29 November 1989, entered into force on 2 September 1990. In a regional context, see the *African [Banjul] Charter on Human and Peoples' Rights*, adopted at Nairobi on 27 June 1981, entered into force 21 October 1986, reprinted in 21 ILM 58 (1982).

13 One example is the right to freedom of association. This right is generally classified as a civil and political right and appears in the *International Covenant on Civil and Political Rights*, ibid, in Article 22. In the context of employment associations, however, freedom of association is effectively classified as an economic and social right, being also set out in Article 8 of the *International Covenant on Economic, Social and Cultural Rights*, ibid. Self-determination also appears in the first article of both covenants. This probably reflects the right's political (in the sense of self government), economic (Article 1(2) of both covenants refers to disposal of "natural wealth and resources") and social/cultural (it is a right of "peoples") implications. The European *Convention on Human Rights and Fundamental Freedoms*, ibid, applies generally to

Civil and political rights appear to generally protect bodily integrity and autonomy.[14] Bodily integrity and autonomy are integral to respect for human dignity, which is the central concept upon which the human rights provisions of the United Nations Charter and other international instruments appear to be based.[15]

The civil and political rights enshrined in international instruments reflect the rights expressed in documents emanating from the English,[16] American[17] and French[18] revolutions of the 17th and 18th centuries. The rights are commonly associated with Western States, although today they have advocates in all parts of the World.[19]

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civil and political rights but under the first protocol to the convention, done at Paris on 20 March 1952, entered into force 18 May 1954, 213 UNTS 262, the right to education (a right contained in the *International Covenant on Economic, Social and Cultural Rights* in Article 13) is also addressed.

14 Thus, for example, protection of the right to life and protection from torture and other forms of ill treatment are always included with prohibitions of slavery.

15 The Charter invokes "the dignity and the worth of the human person" in its preamble. See also note 8 above and the references to "inherent dignity … of all members of the human family" in the preambles to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, note 10 above. On "human dignity" see, for example, Andrew Clapham, Human Rights Obligations of Non-State Actors, Oxford University Press, Oxford, 2006, 535-548; Oscar Schachter, Editorial Comment – Human Dignity as a Normative Concept, 77 American Journal of International Law 848 (1983); and Dianne Otto, Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law, 18 Australian Year Book of International Law 1, 5-11 (1997).

16 See the Bill of Rights of 1688, 1 William and Mary, Session 2, Chapter 2; reprinted in Martin Flynn, Human Rights in Australia, Butterworths, Sydney, 2003, 266-270.

17 See, for example, the American Declaration of Independence (1776), extracted in part in Louis Henkin, Gerald L Neuman, Diane F Orentlicher and David W Leebron (eds), Human Rights, Foundation Press, New York, 1999, 30. For brief references to other declarations made in North America in the late 18th Century, see Cassese, note 6 above, 24-27.

18 See, for example, the Declaration of the Rights of Man and of the Citizen (1789), extracted in Henkin, Neuman, Orentlicher and Leebron, ibid, 32-33.

19 As demonstrated by the widespread support for the protection of human rights at the World Conference on Human Rights held at Vienna in 1993. The Vienna Declaration and Programme of Action, United Nations Document A/CONF.157/23 (1993), reprinted in 32 ILM 1661 (1993), was supported by 171 States. For a discussion of the positions of various non-governmental organisations in the lead-up and during the conference in Vienna, see Donna J Sullivan, Women's Human Rights and the 1993 World Conference on Human Rights, 88 American Journal of International Law 152 (1994).

The major international instruments which address civil and political rights include the United Nations Charter,[20] the Universal Declaration of Human Rights[21] ("UDHR"), the *International Covenant on Civil and Political Rights*[22] ("ICCPR") and protocols,[23] and various global treaties addressing racial[24] and gender based[25] discrimination, torture and other forms of ill treatment,[26] the rights of children,[27] the rights of persons with disabilities,[28] and the protection of all from enforced

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20 See the references to human rights in the Charter set out in note 2 above.

21 See note 4 above.

22 See note 10 above. As at 27 April 2007 there were 160 States that were parties to the ICCPR.

23 See the *Optional Protocol to the International Covenant on Civil and Political Rights*, annexed to General Assembly resolution 2200 (XXI) which was adopted on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 302, 109 parties as at 27 April 2007; and *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty, annexed to General Assembly resolution 44/128 which was adopted on 15 December 1989, entered into force on 11 July 1991, 60 parties as at 27 April 2007.

24 The *International Convention on the Elimination of All Forms of Racial Discrimination*, annexed to General Assembly resolution 2106 (XX) which was adopted on 20 November 1963, entered into force on 4 January 1969, 660 UNTS 195, 173 parties as at 27 April 2007.

25 The *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, 185 parties as at 27 April 2007; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, annexed to General Assembly resolution 54/4 which was adopted on 6 October 1999, entered into force on 22 December 2000, 86 parties as at 27 April 2007.

26 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, annexed to General Assembly resolution 39/46 which was adopted on 10 December 1984, entered into force on 26 June 1987, 144 parties as at 27 April 2007; and the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, was annexed to General Assembly resolution 57/199 which was adopted on 18 December 2002, entered into force on 22 June 2006, 34 parties as at 27 April 2007.

27 The *Convention on the Rights of the Child*, note 12 above. The convention had 193 parties as at 27 April 2007. See also the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, annexed to General Assembly resolution 54/263 which was adopted on 25 May 2000, entered into force on 12 February 2002, 114 parties as at 27 April 2007; and the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, also annexed to General Assembly resolution 54/263, entered into force on 18 January 2002, 119 parties as at 27 April 2007.

28 The *Convention on the Rights of Persons with Disabilities*, annexed to General Assembly resolution 61/106 which was adopted on 13 December 2006, not yet in force, signed by 83 States and the European Community, with one party, as at 16 April 2007; and the *Optional Protocol to the Convention on the Rights of Persons with*

disappearance.[29] The four Geneva conventions of 1949 and the protocols of 1977[30] protect certain civil and political rights during armed conflict.

Civil and political rights are also dealt with in regional instruments such as the American Declaration of the Rights and Duties of Man,[31] the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[32] ("ECHR"), the *Charter of the Organization of American States*,[33] the *American Convention of Human Rights*[34] ("American Convention") and protocols to the ECHR and the

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Disabilities, annexed to the same resolution, not yet in force, signed by 49 States as at 27 April 2007.

29 The *International Convention for the Protection of All Persons from Enforced Disappearance*, annexed to General Assembly resolution 61/177 which was adopted on 20 December 2006, not yet in force, signed by 59 States as at 16 April 2007.

30 The *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* , 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 UNTS 135; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287. The four Geneva conventions were all done at Geneva on 12 August 1949 and they entered into force on 21 October 1950. There were 194 parties to the conventions as at 17 April 2007; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* ("Protocol I"), 1125 UNTS Series 3; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* ("Protocol II"), 1125 UNTS 609. The protocols were done at Geneva on 8 June 1977. Both protocols entered into force on 7 December 1978. Protocol I had 167 parties and Protocol II had 163 parties as at 17 April 2007.

31 The American Declaration of the Rights and Duties of Man, Organization of American States resolution XXX, adopted by the Ninth International Conference of American States on 2 May 1948, reprinted in 43 American Journal of International Law – Supplement 133 (1949).

32 See note 10 above. The ECHR, as amended by Protocol Number 11, done at Strasbourg on 11 May 1994 and which entered into force on 1 November 1998, ETS No 155, had 46 parties as at 28 April 2007.

33 The *Charter of the Organization of American States*, signed at Bogotá in 1948, 119 UNTS 3, entered into force on 13 December 1951 – subsequently amended on a number of occasions. The Charter, as amended, had 35 parties as at 8 January 1991.

34 See note 10 above. The American Convention had 24 parties as at 9 April 2002.

American Convention,[35] and the *African Charter of Human and Peoples' Rights*[36] ("African Charter").

The following civil and political rights are found in one or more of these or other instruments:

– The right to life;[37]
– Freedom from genocide;[38]
– Freedom from torture and cruel, inhuman or degrading treatment or punishment;[39]

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35 See, for example, the first protocol to the ECHR, note 13 above, (which protects the "peaceful enjoyment of possessions"); and Protocol Number 4, done at Strasbourg on 16 September 1963, entered into force 2 May 1968, ETS No 46, (no imprisonment for breach of contractual obligations, freedom of movement and freedom from expulsion); and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, adopted 8 June 1990, reprinted in 29 ILM 1447 (1990).

36 See note 12 above. The African Charter had 53 parties as at 7 January 2005.

37 The UDHR, note 4 above, Article 3; the ICCPR, note 10 above, Article 6; the ECHR (as amended by Protocol Number 11), note 32 above, Article 2; the American Convention, note 10 above, Article 4; and the African Charter, note 12 above, Article 4. The terms of these articles are not identical. Contrast, for example, Article 6(1) of the ICCPR with Article 4(1) of the American Convention. There exists variation in most of the treaties that protect the rights set out in the text accompanying this note.

38 The *Convention on the Prevention and Punishment of the Crime of Genocide*, annexed to General Assembly resolution 260 (III) which was adopted on 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277, 140 parties as at 27 April 2007. Though similar to right to life, the right to be free from genocide is not identical. Genocide, as defined in the convention, does not require the killing of persons. The forcible transfer of children from one group to another with intent to destroy a "national, ethnical, racial or religious group" meets the definition contained in Article II of the treaty.

39 The UDHR, note 4 above, Article 5; the ICCPR, note 10 above, Article 7; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, note 26 above, defines torture in Article 1 while other forms of ill treatment are addressed in Article 16; the ECHR (as amended by Protocol Number 11), note 32 above, Article 3; *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, done at Strasbourg on 26 November 1987, entered into force on 1 February 1989, ETS No 126, 47 parties as at 28 April 2007 (there are also 2 protocols to this treaty); the American Convention, note 10 above, Article 5; *Inter-American Convention to Prevent and Punish Torture*, done at Cartagena de Indias on 9 December 1985, entered into force 28 February 1987, reprinted in 25 ILM 519 (1986), 17 parties as at 21 November 2006; and the African Charter, note 12 above, Article 5. Note also the various instruments addressing disappearances – see, for example, the Declaration on the Protection of All Persons from Enforced Disappearances, contained in General Assembly resolution 47/133 which was adopted (without vote) on 18 December 1992; *Inter-American Convention on Forced Disappearance of Persons*, done at Belem on 9 June 1994, entered into force on 28 March 1996, reprinted in 33

– Freedom from slavery, the abolition of the slave trade, and freedom from forced or compulsory labour;[40]
– Freedom from arbitrary arrest and detention;[41]
– Rights of those in official custody;[42]
– The right not to be imprisoned for debt;[43]
– Freedom of movement and residence for nationals and foreigners, and a right to return to the State of one's nationality;[44]
– Rights of foreigners lawfully in a State's territory, including migrant workers;[45]

ILM 1529 (1994), 10 parties as at 9 April 2002; and the *International Convention for the Protection of All Persons from Enforced Disappearance*, note 29 above.

40 The *Slavery Convention*, done at Geneva on 25 September 1926, entered into force on 9 March 1927, 60 LNTS 253, as amended by protocol of 7 December 1953, 212 UNTS 17, 96 parties to the amended convention as at 27 April 2007; UDHR, ibid, Article 4; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, done at Geneva on 7 September 1956, entered into force on 30 April 1957, 266 UNTS 3, 121 parties as at 27 April 2007; the ICCPR, ibid, Article 8; the ECHR, ibid, Article 4; the American Convention, ibid, Article 6; and the African Charter, ibid, Article 5. There are also a number of conventions negotiated under the auspices of the International Labour Organization that address forced labour – see, for example, *International Labour Organization Convention (Number 105) Concerning the Abolition of Forced Labour*, adopted on 25 June 1957, entered into force on 17 January 1959, 320 UNTS 291, 167 parties as at 28 August 2006.

41 The UDHR, ibid, Article 9; the ICCPR, ibid, Article 9; *International Convention for the Protection of All Persons from Enforced Disappearance*, note 29 above, Article 12-21; the ECHR, ibid, Article 5; the American Convention, ibid, Article 7; and the African Charter, Article 6.

42 The UDHR, ibid, Article 10; the ICCPR, ibid, Article 10; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173 which was adopted (without vote) on 9 December 1988; Basic Principles for the Treatment of Prisoners, annexed to General Assembly resolution 45/111 which was adopted (without vote) on 14 December 1990; the ECHR, ibid; the American Convention, ibid.

43 The ICCPR, ibid, Article 11; Protocol Number 4 to the ECHR, note 35 above, Article 1; and the American Convention, note 10 above, Article 7.

44 The UDHR, note 4 above, Article 13; the ICCPR, ibid, Article 12; Protocol Number 4 to the ECHR, ibid, Article 2; the American Convention, ibid, Article 22; and the African Charter, note 12 above, Article 12.

45 The ICCPR, ibid, Article 13; the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, annexed to General Assembly resolution 45/158 which was adopted on 18 December 1990, entered into force on 1 July 2003, 36 parties as at 19 April 2007; Protocol Number 4 to the ECHR, ibid, Article 4; Protocol No. 7 to the ECHR, done at Strasbourg on 22 November 1984,

- Rights of refugees;[46]
- The right of individuals to legal personality;[47]
- Equality before the law (with special rights with respect to criminal trials);[48]
- Non-retrospectivity of criminal law;[49]
- Rights to privacy and the protection of honour and reputation;[50]
- Rights to property;[51]
- Freedom of thought, conscience and religion;[52]
- Freedom of expression;[53]
- Freedom from propaganda for war and the advocacy of national, racial or religious hatred;[54]

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entered into force on 1 November 1988, ETS No 117, Article 1; and the American Convention, ibid; the African Charter, ibid.

46 The UDHR, note 4 above, Article 14; the *Convention relating to the Status of Refugees*, done at Geneva on 28 July 1951, entered into force on 22 April 1954, 189 UNTS 150; and the *Protocol Relating to the Status of Refugees*, done at New York on 31 January 1967, entered into force on 4 October 1967, 606 UNTS 267. The convention, as amended by the protocol, had 144 parties as at 17 April 2007.

47 The UDHR, ibid, Article 6; the ICCPR, note 10 above, Article 16; the American Convention, note 10 above, Article 3; and the African Charter, note 12 above, Article 5.

48 The UDHR, ibid, Articles 7, 10 and 11; the ICCPR, ibid, Article 14; the ECHR (as amended by Protocol Number 11), note 32 above, Article 6; Protocol Number 7 to the ECHR, note 45 above, Articles 2 and 3; the American Convention, ibid, Articles 8 and 10; and the African Charter, ibid, Article 7.

49 The UDHR, ibid, Article 11; the ICCPR, ibid, Article 15; the ECHR, ibid, Article 7; the American Convention, ibid, Article 9; and the African Charter, ibid.

50 The UDHR, ibid, Article 12; the ICCPR, ibid, Article 17; the ECHR, ibid, Article 8; Protocol Number 7 to the ECHR, note 45 above, Article 4; and the American Convention, ibid, Article 11.

51 The UDHR, ibid, Articles 17 and 27; the *International Covenant on Economic, Social and Cultural Rights*, note 10 above, Article 15; the *Convention on the Rights of Persons with Disabilities*, note 28 above, Article 12(5); the first protocol to the ECHR, note 13 above, Article 1; the American Convention, ibid, Article 21; and the African Charter, note 12 above, Article 14.

52 The UDHR, ibid, Article 18; the ICCPR, ibid, Article 18; the ECHR (as amended by Protocol Number 11), note 32 above, Article 9; the American Convention, ibid, Articles 12 and 13; and the African Charter, ibid, Article 8.

53 The UDHR, ibid, Article 19; the ICCPR, ibid, Article 19; the ECHR, ibid, Article 10; the American Convention, ibid, Articles 13 and 14; and the African Charter, ibid, Article 9.

54 The UDHR, ibid, Article 7; the ICCPR, ibid, Article 20; and the American Convention, ibid, Article 13.

- Freedom of assembly and association;[55]
- Rights of political participation and representation;[56]
- Protection of the family, children and persons with disabilities;[57]
- Freedom from discrimination on the grounds of gender, race, descent, colour, language, religion, political or other opinion, national or social origin, property, birth, disability or other status;[58] and
- The right to municipal legal protection of internationally recognised human rights.[59]

Human rights treaties impose international obligations on States parties to incorporate international human rights standards into their municipal legal systems and to provide municipal enforcement mechanisms.[60] Such treaties also generally

55 The UDHR, ibid, Article 20; the ICCPR, ibid, Articles 21 and 22; the ECHR (as amended by Protocol Number 11), note 32 above, Article 11; the American Convention, ibid, Articles 15 and 16; and the African Charter, note 12 above, Articles 10 and 11.

56 The UDHR, ibid, Article 21; the ICCPR, ibid, Article 25; the first protocol to the ECHR, note 13 above, Article 3; the American Convention, ibid, Articles 15 and 16; and the African Charter, ibid, Articles 10 and 11.

57 The UDHR, ibid, Article 16; the ICCPR, ibid, Articles 23 and 24; the *Convention on the Rights of the Child*, note 12 above, enshrines the rights of children in relative detail; the *Convention on the Rights of Persons with Disabilities*, note 28 above, enshrines the rights of those with disabilities in relative detail; the ECHR (as amended by Protocol Number 11), note 32 above, Article 12; Protocol Number 7 to the ECHR, note 45 above, Article 5; the American Convention, ibid, Articles 17 and 19; and the African Charter, ibid, Article 18.

58 The UDHR, ibid, Articles 2 and 7; the ICCPR, ibid, Articles 2, 3 and 26; the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above, enshrines rights to be free from racial discrimination; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, enshrines rights to be free from gender based discrimination; see also the Declaration on the Elimination of Violence Against Women, contained in General Assembly resolution 48/104 which was adopted (without vote) on 20 December 1993; the ECHR, ibid, Article 14; the American Convention, ibid, Article 24; the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, done at Belém do Pará on 9 June 1994, entered into force March 5, 1995, reprinted in 33 ILM 1534 (1994), 32 parties as 14 December 2005; the *Convention on the Rights of Persons with Disabilities*, note 28 above, Articles 3-7; and the African Charter, ibid, Articles 2 and 18.

59 The UDHR, ibid, Article 8; the ICCPR, ibid, Articles 2, 9 and 17; *International Convention for the Protection of All Persons from Enforced Disappearance*, note 29 above, Articles 3-11; the ECHR, ibid, Article 13; and the American Convention, ibid, Article 25.

60 See, for example, Article 2 of the ICCPR, ibid; Article 13 of the ECHR, ibid; and Articles 1 and 2 of the American Convention, ibid.

establish international supervision and enforcement mechanisms.[61] International enforcement of human rights treaties and standards is dealt with below.

States which are not parties to human rights treaties are obviously not bound by those treaties,[62] although they do have human rights obligations under general international law. Human rights obligations under general international law reflect, in many respects, the terms of the major international human rights instruments.[63] The obligations of States parties to human rights treaties may vary in cases where parties have made reservations when adhering to these treaties. Reservations to human rights treaties will be addressed further below.

(b) Economic, Social and Cultural Rights

Economic, social and cultural rights are the other half of the traditional human rights dichotomy. As with civil and political rights, human dignity appears to be the central value that these rights formally seek to uphold. Economic and social rights address basic "needs" for human existence. They include a strong emphasis on material needs, but also seek to ensure the enjoyment of less tangible benefits.[64] If civil and political rights are associated with the Western revolutions of the 17th and 18th centuries, then economic and social rights can be seen as a response to Marxist/Leninist theories of the 19th and 20th centuries.[65] The inclusion by Presi-

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61 See, for example, Article 28 of the ICCPR, ibid, which establishes the Human Rights Committee that performs supervisory functions under the ICCPR and the first optional protocol to the ICCPR, note 23 above. Similar committees are established under other global human rights treaties. Regional human rights courts have been established under the ECHR, ibid, the American Convention, ibid and in respect of the African Charter, note 12 above.
The protocol to establish the African court came into force on 25 January 2004 and judges were elected in January 2006 – see <http://www.asil.org/insights/2006/09/insights060919.html>, visited 28 April 2007.

62 This is by virtue of the customary rule enshrined in Article 34 of the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 108 parties as at 27 April 2007.

63 On relationship between treaty practice and the development of customary international law, see generally the decision of the International Court of Justice in *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3. On the potential relationship between international instruments and general principles of law, see Bruno Simma and Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Australian Yearbook of International Law 82 (1988-1989).

64 See, for example, the rights in relation to education and in relation to scientific, literary and artistic productions recognised in Articles 13 and 15 respectively of the *International Covenant on Economic, Social and Cultural Rights*, note 10 above.

65 According to Virginia Leary, the International Labour Organization which was established in 1919 "to abolish the 'injustice, hardship, and privation' which workers suffered and to guarantee 'fair and humane conditions of labour'" [*ie* economic and social rights] was "conceived as a response of Western countries to the ideologies of

dent Roosevelt in his 1941 "State of the Union Address" of "freedom from want" as one of the four basic freedoms illustrates that it was not only those in the socialist bloc who have supported such rights.[66]

Economic and social rights were drawn into the ideological war fought between advocates of capitalism and communism after World War Two. Initial support for the UDHR reflected this conflict.[67] A *single* United Nations ("UN") sponsored treaty embodying the rights affirmed in the UDHR was a victim of this conflict[68] and thus there are *two* main treaties setting out the rights contained in the UDHR, the ICCPR *and* the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").[69]

Whilst some may still persist in treating economic and social rights more as "aspirations" than rights,[70] the existence of human rights treaties setting out

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Bolshevism and Socialism arising out of the Russian Revolution" – Virginia A Leary, "Lessons from the Experience of the International Labour Organisation" in Philip Alston (ed), The United Nations and Human Rights – A Critical Appraisal, Clarendon Press, Oxford, 1992, 580, 582. The abstention of Soviet bloc States from the General Assembly vote on the UDHR, note 4 above, has been linked to the inadequacy of the economic and social rights provisions of the UDHR – see Henry J Steiner and Philip Alston, International Human Rights in Context, second edition, Oxford University Press, Oxford, 2000, 238. See also Cassese, note 6 above, 35-38.

66 See, for example, Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), Economic, Social and Cultural Rights – A Textbook, second revised edition, Martinus Nijhoff, Dordrecht, 2001, 9, 15. The other three freedoms were freedom from fear, freedom of speech and freedom of belief. The four freedoms are referred to in the second preambular paragraph of the UDHR, ibid. For a subsequent (1944) elaboration by President Roosevelt of what "freedom from want" should encompass, see Steiner and Alston, ibid, 243-244. On support for economic and social rights in the works of Thomas Paine, see Paul Hunt, Reclaiming Social Rights, Dartmouth, Aldershot, 1996, 5-7.

67 Cassese, note 6 above, 35-38; Steiner and Alston, note 65 above, 238.

68 For an account of the lead up to the decision to draft two treaties enshrining the rights set out in the UDHR, see Annotations on the text of the draft International Covenants on Human Rights (Prepared by the Secretary-General), UN Doc A/2929, 7-8, reprinted in Official Records of the General Assembly, Tenth Session, 1955, Annexes, Agenda Item 28 (Part II).

69 See note 10 above. As at 27 April 2007 there were 156 parties to the ICESCR.

70 Consider, for example, the views of Michael J Dennis and David P Stewart, Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health, 98 American Journal of International Law 462 (2004). Professor Gillian Triggs observed in 1988 that "[a]t least some civil and political rights now command respect as rights in customary international law, whereas it is doubtful that economic, social and cultural rights are more than political aspirations" – Triggs, "The Right of 'Peoples' and Individual Rights: Conflict or Harmony?" in James Crawford (ed), The Rights of Peoples, Clarendon Press, Oxford, 1988, 141. Maurice Cranston denied that the rights

economic and social rights (some with enforcement mechanisms[71]) and municipal legislation establishing justiciable economic and social rights[72] makes this view difficult to sustain. Economic, social and cultural rights are implicitly protected by the UN Charter[73] and are expressly addressed in the UDHR,[74] the ICESCR, various global instruments addressing discrimination against women and protecting

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set out in the ICESCR were "universal human rights at all" – Cranston, What are Human Rights? Bodley Head, London, 1973, 66.

71 Complaint procedures in relation to economic and social rights exist under global instruments, see, for example, the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, note 25 above; and the freedom of association complaints procedure established by the International Labour Organization, described in N Valticos and G von Potobsky, International Labour Law, second revised edition, Kluwer, Deventer, 1995, 295-299. At the regional level, complaints relating to the right to education can be made to the European Court of Human Rights under the first protocol to the ECHR, note 13 above, Article 2. Complaint procedures are also established under the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, done at Strasbourg on 9 November 1995, entered into force on 1 July 1998, ETS No 158, 12 parties as at 28 April 2007; and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, done at San Salvador on 14 November 1988, entered into force on 16 November 1999, reprinted in 28 ILM 161 (1989), 14 parties as at 5 October 2006 ("Protocol of San Salvador"). For a general assessment of the European Social Charter's supervisory mechanisms (including a brief assessment of the collective complaints procedure), see Philip Alston, "Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System" in Gráinne de Búrca and Bruno de Witte (eds), Social Rights in Europe, Oxford University Press, Oxford, 2005, 45. An international procedure for complaining about non-enforcement of national labour standards is provided under *North American Agreement on Labor Cooperation*, reprinted in 32 ILM 1499 (1993). This agreement supplements the *North American Free Trade Agreement*, reprinted in 32 ILM 289 and 605.

72 There is a discussion in Hunt, note 66 above, 28-31, of the municipal laws of Guyana, South Africa and Finland that provide for the protection of economic and social rights. The South African Constitutional Court considered, for example, a claim related to the right to health in *Soobramoney v Minister of Health, KwaZulu-Natal*, 12 Butterworths Constitutional Law Reports 1696 (1997). For a consideration of the right to education under the India Constitution, see Philip Alston and Nehal Bhuta, "Human Rights and Public Goods: Education as a Fundamental Right in India" in Philip Alston and Mary Robinson (eds), Human Rights and Development – Towards Mutual Reinforcement, Oxford University Press, Oxford, 2005, 242.

73 Economic and social rights are implicitly protected by the Charter to the extent that the term "human rights" in the Charter derives its meaning from the UDHR. In this regard, it is relevant to note that the preamble to the UDHR appears to refer to Article 55 of the Charter.

74 Note 4 above, Articles 22 to 27.

the rights of persons with disabilities and children,[75] and in instruments sponsored by the International Labour Organization[76] and the United Nations Educational, Scientific and Cultural Organization ("UNESCO").[77] Regional instruments include the American Declaration on the Rights and Duties of Man,[78] the *European Social Charter*,[79] the American Convention[80] and relevant protocol,[81] and the African Charter.[82] A catalogue of economic, social and cultural rights contained in such instruments includes:

– The right to an adequate standard of living including adequate food,[83] shelter, clothing and health care;[84]

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75 See, for example, the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, Articles 10 to 14; the *Convention on the Rights of Persons with Disabilities*, note 28 above, Articles 24 to 28; and the *Convention on the Rights of the Child*, note 12 above, Articles 23 to 32.

76 See, for example, the *Convention concerning Freedom of Association and Protection of the Right to Organise* (International Labour Organization Convention Number 87), adopted 9 July 1948, entered into force on 4 July 1950, 68 UNTS 17, 147 parties as at 6 September 2006; the *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (Number 98), adopted 1 July 1949, entered into force on 18 July 1951, 96 UNTS 257, 156 parties as at 6 September 2006; the *Discrimination (Employment and Occupation) Convention* (Number 111), adopted on 25 June 1958, entered into force on 15 June 1960, 362 UNTS 31, 165 parties as at 28 July 2006; and the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (Number 182), adopted on 17 June 1999, entered into force on 19 November 2000, 38 ILM 1207 (1999), 163 parties as at 19 December 2006.

77 See, for example, the *Convention against Discrimination in Education*, adopted on 14 December 1960, entered into force on 22 May 1962, 429 UNTS 93; and the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, done at the Hague, 14 May 1954, entered into force on 7 August 1956, 249 UNTS 240, 116 parties as at 17 April 2007.

78 See note 31 above, Articles XI to XVI.

79 See note 12 above.

80 See note 10 above, Article 26.

81 See the Protocol of San Salvador, note 71 above.

82 See note 12 above, Articles 15 to 17.

83 The UDHR, note 4 above, Article 25; the ICESCR, note 10 above, Article 11; and the Protocol of San Salvador, note 71 above, Article 12.

84 The UDHR, ibid; the ICESCR, ibid, Articles 11 and 12; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, Articles 12 and 14; the *Convention on the Rights of the Child*, note 12 above, Articles 24 and 27; the *Convention on the Rights of Persons with Disabilities*, note 28 above, Articles 25, 26 and 28; the *European Social Charter*, note 12 above, Articles 11 and 13; Protocol of San Salvador, ibid, Articles 10 to 12; and the African Charter, note 12 above, Article 16.

- Rights associated with employment ranging from a basic right to work, to guarantees as to working conditions;[85]
- Rights to form and join trade unions and freedom in relation to the conduct of union activities, including the right to collectively bargain;[86]
- Rights to social security;[87]
- Rights to protection of the family, pregnant women and children;[88]
- Rights to education;[89]

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85 The UDHR, ibid, Articles 23 and 24; the ICESCR, ibid, Articles 6 and 7; the *Convention on the Rights of Persons with Disabilities*, ibid, Article 27; and numerous treaties negotiated under the auspices of the International Labour Organization, including, in addition to those set out in note 76 above, the *Convention concerning Forced or Compulsory Labour* (International Labour Organization Convention Number 29), adopted 28 June 1930, entered into force on 1 May 1932, 39 UNTS 55, 171 parties as at 5 March 2007; the *Convention concerning the Abolition of Forced Labour* (Number 105), note 40 above; the *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (Number 100), adopted on 29 June 1951, entered into force on 23 May 1953, 165 UNTS 303, 163 parties as at 28 July 2006; and the *Convention concerning Minimum Age for Admission to Employment* (Number 138), adopted on 26 June 1973, entered into force on 19 June 1976, 1015 UNTS 297, 148 parties as at 15 March 2007. See also the *Convention on the Elimination of All Forms of Discrimination against Women*, ibid, Article 11; the *European Social Charter*, ibid, Articles 1 to 4 and 7 to 10; the *Additional Protocol to the European Social Charter*, done at Strasbourg on 5 May 1988, entered into force on 4 September 1992, ETS No 128, 13 parties as at 28 April 2007, Articles 1 to 3; the Protocol of San Salvador, ibid, Articles 6 and 7; and the African Charter, note 12 above, Article 15.

86 The UDHR, ibid, Article 23; the ICESCR, ibid, Article 8; various International Labour Organization conventions, in particular, the *Convention concerning Freedom of Association and Protection of the Right to Organise* (Number 87) and the *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (Number 98), note 76 above; the *European Social Charter*, ibid, Articles 5 and 6; and the Protocol of San Salvador, ibid, Article 8.

87 The UDHR, ibid, Article 22; the ICESCR, ibid, Article 9; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, Articles 13 and 14; the *Convention on the Rights of the Child*, note 12 above, Articles 25 and 26; the *European Social Charter*, ibid, Articles 12 to 15; and the Protocol of San Salvador, ibid, Article 9.

88 The UDHR, ibid, Article 25; the ICESCR, ibid, Article 10; the *Convention on the Elimination of All Forms of Discrimination against Women*, ibid, Article 16; the *Convention on the Rights of the Child*, ibid, Articles 19 to 23; the *European Social Charter*, ibid, Articles 16 and 17; the Protocol of San Salvador, ibid, Articles 15 and 16; and the African Charter, note 12 above, Article 18.

89 The UDHR, ibid, Article 26; the ICESCR, ibid, Article 13; the *Convention on the Elimination of All Forms of Discrimination against Women*, ibid, Article 10; the *Convention on the Rights of the Child*, ibid, Articles 28 and 29; the *Convention on the Rights of Persons with Disabilities*, note 28 above, Article 24; the first protocol to the ECHR, note 13 above, Article 2; the *European Social Charter*, ibid, Articles 7 and 10;

– Rights to take part in the cultural life of communities and to enjoy the benefits of scientific progress;[90]
– Rights of minorities in relation to culture, religion and language;[91]
– Rights of indigenous peoples;[92]
– The right of peoples to self determination;[93] and
– Protection from discrimination with respect to the enjoyment of economic, social and cultural rights.[94]

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the *European Social Charter (revised)*, done at Strasbourg on 3 May 1996, entered into force on 1 July 1999, ETS No 163, 23 parties as at 28 April 2007, Article 17; the Protocol of San Salvador, ibid, Article 13; and the African Charter, ibid, Article 17.

90 The UDHR, ibid, Article 27; the ICESCR, ibid, Article 15; the *Convention on the Elimination of All Forms of Discrimination against Women*, ibid, Article 13; the *Convention on the Rights of the Child*, ibid, Article 29; the *Convention on the Rights of Persons with Disabilities*, ibid, Article 30; the Protocol of San Salvador, ibid, Article 14; and the African Charter, ibid, Article 17.

91 The ICCPR, note 10 above, Article 27; the *Convention on the Rights of the Child*, ibid, Article 30; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, annexed to General Assembly resolution 47/135 which was adopted (without vote) on 18 December 1992; and the Framework Convention for the Protection of National Minorities, done at Strasbourg on 1 February 1995, entered into force on 1 February 1998, ETS No 157, 39 parties as at 28 April 2007.

92 The Convention concerning Indigenous and Tribal Peoples in Independent Countries (International Labour Organization Convention Number 169), adopted on 27 June 1989, entered into force on 5 September 1991, reprinted in 28 ILM 1384 (1989), 18 parties as at 15 February 2007; and the United Nations Declaration on the Rights of Indigenous Peoples, annexed Human Rights Council Resolution 1/2, adopted on 29 June 2006 (30 States members of the Council in favour, 2 against with 12 abstentions).

93 The Charter of the UN, Articles 1 and 55; Article 1 common to both the ICCPR and the ICESCR, note 10 above; the Declaration on the Granting of Independence to Colonial Countries and Peoples, annexed to General Assembly resolution 1514 (XV) which was adopted on 14 December 1960, reprinted in Official Records of the General Assembly, Fifteenth Session, 1961, Supplement Number 16, 66-67; and the Declaration on Permanent Sovereignty over Natural Resources, contained in General Assembly resolution 1803 (XVII) which was adopted on 14 December 1962, reprinted in Official Records of the General Assembly, Seventeenth Session, 1962, Supplement Number 17, 15-16.

94 The UDHR, note 4 above, Article 2; the ICESCR, ibid, Article 3; the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above, Article 5; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above, Articles 10 to 14; the Protocol of San Salvador, note 71 above, Article 3; and Protocol Number 12 to the ECHR, done at Rome on 4 November 2000, in force 1 April 2005, ETS No 177, 14 parties as at 28 April 2007.

Whilst economic, social and cultural rights are set out in human rights treaties, the nature of the obligations imposed under such treaties and the international enforcement mechanisms differ significantly from those contained in human rights treaties dealing with civil and political rights. For example, in relation to civil and political rights, there is an emphasis in human rights treaties on *judicial* enforcement of these rights within municipal systems, and on individual complaints mechanisms internationally.[95] Treaties addressing economic, social and cultural rights appear to rely more heavily on non-judicial measures taken within municipal systems and there are more limited individual complaints procedures.[96]

Other differences exist in State practice in relation to economic, social and cultural rights, when compared to the practice in support of civil and political rights. Such differences appear to affect the scope of human rights obligations binding under general international law. No State asserts, for example, a legal entitlement to take life arbitrarily in times of peace or to use torture.[97] States have, however,

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95 See, for example, Article 2(3) of the ICCPR, note 10 above; and the first optional protocol to the ICCPR, note 23 above. Contrast Article 2 of the ICESCR, ibid, and the absence of a complaint procedure under the ICESCR similar to that provided under the first optional protocol to the ICCPR.

96 The proposal for an optional protocol to the ICESCR allowing individual complaints of violations of the ICESCR to be heard by the supervising committee appears to lack significant State support. Relatively few States have commented on the draft optional protocol and some of those that have commented have expressed concerns about the proposal – see the reports of the High Commissioner for Human Rights on the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Docs E/CN.4/2001/62 and E/CN.4/2001/62/Add.1; and E/CN.4/2000/49; the note by the Secretariat on the draft optional protocol, E/CN.4/1999/112 and E/CN.4/1999/112/Add.1; and the report by the Secretary-General on the draft optional protocol, E/CN.4/1998/84 and E/CN.4/1998/84/Add.1. For developments up to 2004, see Dennis and Stewart, Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health, note 70 above. The Human Rights Council extended the mandate of the Open-ended Working Group on an optional protocol for a further two years on 29 June 2006, see Council Resolution 1/3. As noted above, international complaints procedures in relation to alleged violations of economic and social rights already exist – see note 71 above.

97 See, for example, statements made on behalf of the United States following the terrorist attacks of 11 September 2001 affirming the continuing commitment of the United States to the elimination of torture and other cruel, inhuman or degrading treatment or punishment – reported in the Economist, 5 July 2003, 33. The definitions of torture and other cruel, inhuman or degrading treatment or punishment employed by United States officials may not, however, be the same as those employed by independent judicial bodies such as the European Court of Human Rights. See, for example, Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers – The Road to Abu Ghraib, Cambridge University Press, Cambridge, 2005.

openly advocated policies which violate economic and social rights.[98] Even the United States, which, notwithstanding occasional rhetoric, does maintain a system of social security, is said to be a welfare State only "by the grace of Congress".[99] States which torture or arbitrarily take people's lives invariably face international criticism. States violating economic and social rights are not dealt with in the same way.[100] The extent of obligations under general international law in relation to economic, social and cultural rights is addressed further below.

(c) Solidarity Rights

Rules of international law are constantly being developed and this is particularly true in relation to human rights. From the late 1970s, there has been support for the recognition of what have sometimes been referred to as "third generation" human rights[101] or "rights of solidarity".[102] These rights appear to share a close affinity

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98 In August 1994 the Singaporean Prime Minister (Mr Goh Chok Tong) reportedly delivered a speech during a Singapore National Day rally in which he announced that unmarried mothers would be prohibited from purchasing flats from the relevant government housing body in Singapore. He also apparently confirmed the Government's practice of not allowing medical benefits for families of female public servants "as this would alter the balance of man and woman in the family" – Zuraidah Ibrahim, PM: New Steps to Strengthen the Family, the Straits Times (Singapore), 22 August 1994, 1 – [the above quotation is from the article and may not be a direct quotation from the speech]. In its concluding observations on the first report of the Republic of Korea under the ICESCR, the Committee on Economic, Social and Cultural Rights noted that the South Korean government had imposed a "ban on the formation of trade unions by groups such as the teaching profession" – Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, 7 June 1995, UN Doc E/C.12/1995/3, paragraph 8. Professor Alston has reported that "[v]ery few states have made a clear, unambiguous statement of commitment to the realization of economic, social and cultural rights at the national level" – Philip Alston, "Economic and Social Rights" in Louis Henkin and John Lawrence Hargrove (eds), Human Rights: An Agenda for the Next Century, American Society of International Law, Washington, 1994, 137, 155.

99 Louis Henkin, The Age of Rights, Columbia University Press, New York, 1990, 153.

100 See, for example, the observation that "… the concern of most UN organs – surely of the Commission [on Human Rights] – is overwhelmingly with civil and political rights rather than with … economic and social rights …" – Steiner and Alston, note 65 above, 602.

101 "Third generation" human rights are thereby distinguished from "first generation" rights (civil and political rights) and "second generation" rights (economic, social and cultural rights). The "generation" terminology has provoked academic controversy – see, for the example, the references cited in Philip Alston, "Introduction" in Alston (ed), Peoples' Rights, Oxford University Press, Oxford, 2001, 1, 2.

102 Karel Vasak used these terms in 1977 – see K Vasak, A 30-Year Struggle – The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, 30 UNESCO Courier, November 1977, 29.

with the right to self-determination.[103] At least one commentator has equated collective (as opposed to individual) human rights with this "third generation" of rights,[104] although, as noted below, a number of the more traditional human rights have collective qualities. For others writing in this area, solidarity rights *and* collective rights do not appear to be coextensive.[105] Rather, the concept of solidarity at the core of third generation rights is said to relate to the fact that the rights are secured by international cooperation.[106]

In 1981 Stephen Marks suggested the following candidates for recognition as solidarity rights:

– Environmental human rights;
– A human right to development;
– Human rights to peace;
– Human rights to the "common heritage of mankind";
– Human rights of communication; and
– Human rights of humanitarian assistance.[107]

The asserted existence of distinct categories of solidarity human rights raises a number of conceptual and practical difficulties.[108] These solidarity rights appear to be based, *in part*, on well established principles of international law.[109] However, formulations of solidarity rights appear to couple well-established principles of international law with more contentious principles.[110]

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103 As noted below, catalogues of solidarity rights generally include a human right to development. Paragraph one of Article 1 common to both the ICESCR and the ICCPR, note 10 above, provides that "all peoples" by virtue of the right of self-determination are entitled to "… freely pursue their economic, social and cultural development."

104 See Louis B Sohn, The New International Law: Protection of the Rights of Individuals rather than States, 32 American University Law Review 1, 48 (1982).

105 See Stephen P Marks, Emerging Human Rights: A New Generation for the 1980s? 33 Rutgers Law Review 435, 441 and 444 (1981).

106 See, for example, Marks, ibid, 441. Compare Philip Alston, A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law? 29 Netherlands International Law Review 307, 316-319 (1982).

107 Marks, ibid, 442-450. In this catalogue, Marks apparently closely follows Karel Vasak – see, Vasak, For the Third Generation of Human Rights: The Rights of Solidarity, Inaugural Lecture to the 10th Study Session of the International Institute of Human Rights, Strasbourg, 2 to 27 July 1979.

108 See, for example, Alston, note 106 above, 314-320.

109 See, for example, Professor Brownlie's analysis of the right to development – Brownlie, The Human Right to Development, Commonwealth Secretariat, London, 1989, 7-18, paragraphs 15-39.

110 See, for example, Professor Brownlie's criticism of this phenomenon in Brownlie, "The Rights of Peoples in Modern International Law" in Crawford, note 70 above, 1, 14.

Of all the solidarity rights it is the human right to development that appears to have the most secure foundation under international law. The right to development has been the object of study by the UN Commission on Human Rights and other UN bodies for a number of years[111] and was the subject of a declaration adopted by the General Assembly in 1986.[112] The right to development has found expression in a number of other international instruments.[113] The right to development has also figured in debates involving international trade.[114] Features of the right to development remain controversial.[115] The right to development will be discussed further below.

Governmental support for solidarity rights appears to have peaked in the 1980s.[116] Since the end of the Cold War, however, solidarity rights have been unable to attract significant levels of governmental support.[117] The rights are not generally the subject of international treaty obligations.[118]

Lack of governmental support for formal *human* rights to environmental protection or to peace makes it difficult to argue that there exist free-standing and distinct environmental human rights or a human right to peace under international

111 For an assessments of the right to development, see Anne Orford, "Globalization and the Right to Development" and Philip Alston "Peoples' Rights: Their Rise and Fall" in Alston, note 101 above, 127-184 and 283-286. For a more general consideration of human rights and development, see Alston and Robinson (eds), Human Rights and Development – Towards Mutual Reinforcement, note 72 above.

112 The declaration on the Right to Development was annexed to General Assembly resolution 41/128 which was adopted on 4 December 1986. One hundred and forty-six States voted for the resolution, eight abstained, and one State voted against adoption of the resolution.

113 See, for example, the Vienna Declaration and Programme of Action, note 19 above, Section I, paragraph 10.

114 See, for example, Agreed Conclusions 454 (XLV) of the Trade and Development Board of the United Nations Conference on Trade and Development adopted on 23 October 1998, paragraph 12; and the address by the Honourable Vicente Fox Quesada, President of Mexico, at the opening ceremony of the Fifth Ministerial Conference of the World Trade Organization, Cancún, Mexico, 10 September 2003, WT/MIN(03)/13, 3.

115 For references dealing with controversial aspects of the right to development, see generally, Orford, note 111 above, and Allan Rosas, "The Right to Development" in Eide, Krause and Rosas, note 66 above, 119. For a critique of the right to development from a feminist perspective, see Hilary Charlesworth, The Public/Private Distinction and the Right to Development in International Law, 12 Australian Year Book of International Law 190 (1992).

116 See Alston "Peoples' Rights: Their Rise and Fall", note 111 above, 264-288.

117 Ibid.

118 One exception is the African Charter, note 12 above, which refers to the right to development in Article 22. For a recent assessment of the practical importance of the African Charter, see Alston, ibid, 286-287.

law. Human rights protected under international law can be used to protect a particular environment[119] and respect for human rights may generally contribute to peace,[120] but this does not create environmental *human rights* or a *human right* to peace. International obligations exist in relation to environmental protection[121] and the prohibition of aggression.[122] These obligations, however, are not generally conceived of as *human rights* obligations.[123]

Similar points can be made in relation to other solidarity rights.[124] Given the level of support for a human right to development and the right's potential relevance to international trade relations, it is proposed to limit the examination of solidarity rights in this book to the right to development.[125]

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119 For a review of cases under human rights instruments that have involved environmental issues, see Dinah Shelton, "Environmental Rights" in Alston, note 101 above, 185, 218-231.

120 According to Professor Schachter "… the provisions on human rights were included in the [UN] Charter largely on the assumption that a primary cause of the Second World War was the barbarous violation of human rights by the Hitler régime" – Oscar Schachter, International Law in Theory and Practice, Martinus Nijhoff, Dordrecht, 1991, 331.

121 Professor Edith Brown Weiss reported in 1992 that there were more than 870 international legal instruments "in which at least some provisions are concerned with environmental issues" – introductory note to documents of the United Nations Conference on Environment and Development, 31 ILM 814 (1992). See also the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, 241-242, para 29.

122 See, in particular, Article 2(4) of the UN Charter. The use of force is also prohibited under customary international law and the prohibition is considered to be a peremptory norm – see the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, 14, 99-101, paras 188-190.

123 Note, however, developments in this direction described by Shelton, note 119 above, 231-236.

124 There appears to be little Governmental support for a solidarity right of communication distinct from the right to freedom of expression. The right of humanitarian assistance is supported by the provision of international assistance in times of natural disaster or conflict but State practice does not yet appear sufficient to declare the existence of legal obligations to provide such assistance. Note, however, the endorsement by States of the notion of a "responsibility to protect" in the 2005 World Summit Outcome, General Assembly resolution 60/1, adopted on 16 September 2005, without vote, paras 138-140.

125 Given the prominence of environmental measures having international trade implications, international environmental standards will be briefly considered in Chapter 6. These environmental standards are, however, not treated as human rights standards under international law.

3. Holders of Human Rights under International Law

(a) Individual and Group Human Rights

Whilst many civil and political rights are essentially rights of individuals,[126] a number of civil and political rights have collective qualities. The prohibition of genocide has an important collective quality,[127] and rights to freedom of association and political participation have collective elements.[128] Article 1 of the ICCPR and Article 1 of the ICESCR refer to the right of "peoples" to self-determination.[129] The notion of group rights received academic and governmental support in the 1970s and 1980s and, as noted above, new group rights were proposed in this period. One of these new rights was the human right to development.[130]

There appear to be differences in the collective qualities of various group rights.[131] For example, the collectives protected by the prohibition of genocide

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126 Even freedom of association is cast in terms of an individual right in Article 20 of the UDHR, note 4 above, and Article 22 of the ICCPR, note 10 above. Both articles refer to the "right" of "everyone" to freedom of association. Article 20 of the UDHR goes on to provide that "no one" may be compelled to belong to an association.

127 The right to protection from genocide protects "national, ethnical, racial or religious" groups – see Article 2 of the Genocide Convention, note 38 above. General Assembly resolution 96 (I) which was unanimously adopted on 11 December 1946, Resolutions Adopted by the General Assembly during the second part of its first session from 23 October to 15 December 1946, UN Doc A/64/Add.1, 188-189, begins with the following statement:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings …".

128 According to Professor Crawford "[t]he two covenants of 1966, concerned respectively with economic, social and cultural rights and with civil and political rights, were coeval in formulation if not inspiration, and both contain mainly individual rights. Indeed the distinction between individual and collective rights can be problematic; many rights (eg to democratic participation, to freedom of organization, especially the freedom to form trade unions, and also minority rights) have both individual and collective elements and can be formulated so as to emphasize one rather than the other" – James Crawford, "The Right to Self-Determination in International Law: Its Development and Future", in Alston, note 101 above, 7, 21.

129 See also Article 47 of the ICCPR, note 10 above. For a discussion of the reference to self-determination in the UN Charter and the absence of any reference to the term in the UDHR, see Alston "Peoples' Rights: Their Rise and Fall", note 111 above, 260-262.

130 The human right to development is said to have both individual and collective aspects – see, for example, Article 1(1) of the 1986 declaration, note 112 above.

131 There is also debate about whether certain rights have a collective quality. See, for example, the debates over minority rights. Article 27 of the ICCPR, note 10 above, protects certain rights of persons belonging to minorities. This provision has no equivalent in the UDHR. Apparently, post-war reluctance to refer to minority rights reflected concerns about political manipulation of alleged mistreatment of minorities

("national, ethnical, racial or religious" groups) appear to differ from the subjects of the right to self-determination ("peoples").[132]

The notion of group rights has lost significant government support since the end of the Cold War.[133] This loss of support has significance in relation to the status of various group rights under general international law.

(b) Corporations and Human Rights

The position under international law of entities created by municipal legal systems (such as corporations) raises conceptually difficult though important questions. Corporations are, for example, extremely significant in international trade.

The ICCPR does not recognise rights of corporations.[134] The ECHR, however, does allow the protection of certain corporate interests[135] and allows corporations to complain of human rights violations.[136] Human rights such as freedom of association impact on the capacity to create corporations.[137] Failure to allow corpora-

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in order to justify territorial claims such as those made by the Nazi regime in Germany – see Peter Leuprecht, "Minority Rights Revisited: New Glimpses of an Old Issue" in Alston, note 101 above, 111, 117. Whilst Article 27 of the ICCPR is framed in terms of individual rights ("…*persons* belonging to such minorities shall not be denied…" – emphasis added), it has been argued that the "underlying issue addressed by Article 27" is the "guarantee of the maintenance of group identity" – see Brownlie, note 110 above, 6.

132 A small geographically dispersed minority within a State is protected by the prohibition of genocide. As to the potential scope of the term "people" for the purposes of self-determination, see Antonio Cassese, Self-Determination of Peoples – A legal reappraisal, Cambridge University Press, Cambridge, 1995, 59-62 and 146-147; and Crawford, note 128 above, 58-60.

133 See Alston "Peoples' Rights: Their Rise and Fall", note 111 above, 268-288.

134 The ICCPR only appears to refer to the rights of human beings. This is confirmed procedurally by the reference to the entitlement of "individuals" to make claims under the first optional protocol to the ICCPR, note 23 above (Article 1).

135 Article 1 of the first protocol to the ECHR, note 13 above, provides that "[e]very natural or *legal* person is entitled to the peaceful enjoyment of his possessions" [emphasis added].

136 Article 34 of the ECHR, note 32 above, provides that the European Court of Human Rights "… may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." See Marius Emberland, The Human Rights of Companies – Exploring the Structure of ECHR Protection, Oxford University Press, Oxford, 2006. The American Convention, in Article 44, allows "any nongovernmental entity legally recognized" in a member State of the Organization of American States to complain to the Inter-American Commission on Human Rights of violations by a State party of rights contained in the American Convention.

137 There is a certain irony in advocates of "group rights" disparaging the notion of "human" rights for corporations. Similarly, it appears ironical for those who advocate

tions (such as those owning newspapers) to complain of violations of freedom of expression would have profound significance for the enjoyment of this human right.[138] Further, the human right to property appears to extend to the protection of the property rights of shareholders in a corporation.[139] In relation to the rights of a corporation itself, the rules of international law relating to diplomatic protection draw no fundamental distinction between property rights of individuals and corporations.[140]

Whilst the conceptual difficulty of describing corporate rights as "human" rights should be acknowledged, it is submitted that the practical intersections between the rules of international law protecting human rights and the rules of international law protecting the rights of corporations should also be acknowledged.[141] The issue of corporations having direct international legal obligations in relation to human rights is discussed further below.

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extensive international legal protection for corporations to disparage group rights as human rights.

138 An example of such a case is the *Sunday Times Case*, 2 European Human Rights Reports 245 (1979). This case was initiated by, *inter alia*, Times Newspapers Ltd, the publisher of the Sunday Times newspaper.

139 A shareholding in a corporation qualifies as a possession for the purposes of Article 1 of the first protocol to the ECHR, note 13 above – see, for example, *Gasus Dosier- und Fördertechnik GmbH v the Netherlands*, 20 European Human Rights Reports 403 (1995), where the European Court of Human Rights observed that the notion of possessions in Article 1 of the protocol "… is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions', for the purposes of this provision" – paragraph 53.

140 See, for example, Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, ninth edition, Longman, London, 1992, Volume I, 517, footnote 2. Fundamental differences, however, remain between rules of diplomatic protection and international obligations to respect human rights. One important example of such differences, dealt with in Chapter 4, are the rules governing the invocation by one State of the responsibility of another State for a violation of an international obligation. According to the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited, Judgment*, ICJ Reports 1970, 3, 32, paragraph 33, "… 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."

141 Thus in Chapter 4, where human rights to property are considered, no distinction is drawn between property rights of individuals and property rights of corporations. In practical terms it is assumed that harm to the property rights of corporations will generally result in harm to the property rights of individuals.

4. Addressees of Human Rights Obligations under International Law

(a) States, Individuals and Juridical Entities under Municipal Law

Human rights can be violated by governmental and non-governmental entities. Slavery, forced labour, and racial and gender based discrimination are examples of human rights violations that can readily be committed by non-governmental entities. While human rights treaties recognise that non-governmental entities may violate human rights that are to be protected under the municipal law of treaty parties,[142] the primary obligations *under the treaties* are placed on *States* parties.[143] Thus under the ICCPR, for example, parties are required enact laws and enforce those laws in order to provide protection for the rights set out in the treaty.[144] The treaty does not purport to impose obligations directly on non-State entities.

The focus of human rights treaties appears to have supported an argument that human rights obligations under international law do not apply directly to non-State entities. Professor Henkin made the following observation in 1990:

> "… government must protect me from assault by my neighbor, or from wolves, and must ensure that I have bread or hospitalisation; in human rights terms my rights are against the state, not against the neighbor or the wolves, the baker, or the hospital."[145]

This apparent limitation on the scope of human rights obligations under international law can be challenged by reference to a number of developments.[146] One

142 See, for example, Human Rights Committee, General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8.

143 This is not surprising given that the treaties are generally negotiated by the representatives of States and are adhered to by States. Non-governmental entities have been involved in the negotiation of treaties in various different contexts – note, for example, the role of non-governmental organisations in the adoption of treaties by the International Labour Conference of the International Labour Organization – discussed in Leary, note 65 above, 583-588; Various non-governmental organisations took part in the preparations for the conference on trade and employment in the 1940s – see, for example, Report of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, UN Doc E/PC/T/186, 10 September 1947, 6, footnote 6.

144 See Article 2 of the ICCPR, note 10 above.

145 Henkin, note 99 above, 3-4. See also Steven R Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale Law Journal 443, 465-468 (2001).

146 See generally Clapham, Human Rights Obligations of Non-State Actors, note 15 above.

of the most significant developments in this regard has been the recognition and expansion of individual criminal responsibility directly under international law.[147]

The notion of individual criminal responsibility for violations of international law may have had its beginnings in the treatment of piracy[148] and has been confirmed and expanded by the establishment of the Nuremberg and Tokyo tribunals in the 1940s,[149] the tribunals for the former Yugoslavia and Rwanda in the 1990s,[150]

147 Sir Hersch Lauterpacht observed in 1950 that "… the Charter and the judgment of the [Nuremburg] Tribunal, in so far as they recognise in principle crimes against humanity, have a direct bearing on the question of recognition, in the international sphere, of fundamental rights of the individual. Crimes against humanity are crimes regardless of whether they were committed in accordance with and in obedience to the national law of the accused. Such acts were deemed to violate the sanctity of human personality to such a degree as to make irrelevant reliance upon the law of the State which ordered them. To lay down that crimes against humanity are punishable is, therefore, to assert the existence of rights of man grounded in a law superior to the law of the State. Thus, upon analysis, the enactment of crimes against humanity in an international instrument signifies the acknowledgement of fundamental rights of the individual recognised by international law. … In terms of law, with the conception of crimes against humanity there must correspond the notion of fundamental human rights recognised by international law and, as a further result, of an international status of the individual whose rights have thus been recognised" – Lauterpacht, International Law and Human Rights, Stevens and Sons Ltd, London, 1950, 36-37. A similar point might be made about the *duties* of the individual that have also been recognised.

148 Although note the uncertainty as to whether piracy reflects a crime under international law or is merely conduct in respect of which all States can exercise jurisdiction – see Lauterpacht, ibid, 9-10; and references to contrasting positions in DJ Harris, Cases and Materials on International Law, 6th ed, Sweet and Maxwell, London, 2004, 458-459.

149 See the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, done at London on 8 August 1945, reprinted in 39 American Journal of International Law – Supplement, 257 (1945). The judgment of the tribunal is reprinted in 41 American Journal of International Law 172 (1947). On the International Military Tribunal for the Far East, see Solis Horwitz, The Tokyo Trials, 1950 International Conciliation 473 (November 1950, Number 465).

150 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was established by the UN Security Council by resolution 827 (1993) adopted on 25 May 1993. The resolution adopted the statute of the tribunal that was annexed to a report of the UN Secretary-General, UN Document S25704 and Add.1. The statute has been subsequently amended by various Security Council resolutions. The statute, as initially adopted, was reprinted in 32 ILM 1192 (1993). By resolution 955 (1994) adopted on 8 November 1994, the UN Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States,

and the International Criminal Court in 2002.[151] The Nuremberg Tribunal also declared certain juristic non-State entities to be criminal organisations.[152]

The tribunals for the former Yugoslavia and Rwanda and the International Criminal Court have jurisdiction in relation to genocide and crimes against humanity.[153] Crimes against humanity, as defined in the *Statute for the International Criminal Court*, encompass acts such as "murder", "torture", "enslavement", "deportation" and "imprisonment … in violation of fundamental rules of international law".[154]

The link between crimes against humanity and violations of human rights protected under international law is apparent in the work of the International Law Commission. In 1991 the Commission provisionally adopted the "draft Code of Crimes against the Peace and Security of Mankind" which dealt with crimes under international law for which there could be individual responsibility. Article 21 of this draft was entitled "[s]ystematic or mass violations of human rights".[155] Article 21 was subsequently redrafted and retitled "crimes against humanity". The redrafted Article was adopted by the Commission in 1996 as Article 18 of the draft code.[156] The terms of Article 18, however, remained similar to those of Article 21 of the 1991 draft.[157]

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between 1 January 1994 and 31 December 1994. The tribunal's statute was annexed to the resolution. It has also been subsequently amended by the Security Council.

151 See the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998), done at Rome on 17 July 1998, entered into force on 1 July 2002, reprinted in 37 ILM 1002 (1998), 104 parties as at 27 April 2007.

152 The Leadership Corps of the Nazi Party, Die Geheime Staatspolizei (Gestapo), Der Sicherheitsdienst des Reichsführer SS (SD) and Die Schtzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS) were effectively declared criminal organisations in accordance with Article 9 of the Charter of the International Military Tribunal – see the judgment of the tribunal, note 149 above, 255-256, 261-262 and 266-267. Declarations under Article 9 of the Charter of the tribunal were for the purposes of establishing individual criminal responsibility of members of the group or organisation declared criminal.

153 See Article 5 of the statute of the tribunal for the former Yugoslavia and Article 3 of the statute of the Rwanda Tribunal, note 150 above.

154 See Article 7(1) of the Rome Statute of the International Criminal Court, note 151 above.

155 See the Yearbook of the International Law Commission, 1991, Volume II, Part 2, 96-97, paragraph 176.

156 See the Report of the International Law Commission on the work of its 48th Session, 6 May – 26 July 1996, General Assembly Official Records, Fifty-first Session, Supplement Number 10, 12 and 13, paragraphs 40 and 45.

157 Article 21 as provisionally adopted by the Commission in 1991 read as follows:

"[a]n individual who commits or orders the commission of any of the following violations of human rights:
– murder

There has been State practice that also appears to support the notion of direct responsibility under international law for non-State entities that violate human rights. For example, members of the Security Council and States members of the UN Commission on Human Rights appear to have recognised the existence of individual responsibility under international law for violations of human rights in East Timor in 1999.[158] Decisions of international and municipal courts also sup-

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– torture
– establishing or maintaining over persons a status of slavery, servitude or forced labour
– persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
– deportation or forcible transfer of population

shall, on conviction thereof, be sentenced [to …]"

See the Yearbook of the International Law Commission, note 155 above, 94 and 96-97, paragraph 176.

Article 2 of the draft code as adopted by the International Law Commission in 1996 provided, in paragraph 3, that individuals "shall be responsible for a crime set out [*inter alia*] in article … 18" – see the Report of the International Law Commission on the work of its 48th Session, ibid, 18. Article 18 provided that:

"[a] crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:
(a) murder;
(b) extermination;
(c) torture;
(d) enslavement;
(e) persecution on political, racial, religious or ethnic grounds;
(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) arbitrary deportation or forcible transfer of population;
(h) arbitrary imprisonment;
(i) forced disappearance of persons;
(j) rape, enforced prostitution and other forms of sexual abuse;
(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm"

Ibid, 93-94.

158 See Security Council resolution 1264 (1999), adopted 15 September 1999, in the penultimate preambular paragraph, where the security Council expressed its concern arising from:

"… reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor, and stressing that persons committing such violations bear individual responsibility …".

Resolution 1272 (1999) adopted by the Security Council on 25 October 1999 included an identical paragraph.

port the notion of direct non-state responsibility for human rights violations under international law. The European Court of Justice has ruled in a number of cases that fundamental rights contained in the *Treaty Establishing the European Economic Community* were directly enforceable against non-State entities.[159] Municipal court decisions, in particular in the United States under the *Alien Tort Claims Act*,[160] have recognized that non-State entities (both natural persons and juridical entities) can be liable directly under international law for violations of human rights.[161]

The UN Commission on Human Rights expressed similar concerns in its resolution 1999/s-41/1, adopted 27 September 1999 at the Commission's fourth special session. The resolution was supported by 27 States members of the Commission, whereas 12 States voted against the resolution. The opposition, however, did not appear to relate to the issue of individual responsibility for human rights violations. In the decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Tadic*, Case No IT-94-1-T, 7 May 1997, the tribunal, at para 655, placed importance upon the International Law Commission's *transmission to governments, for their comments and observations,* of the following commentary to draft Article 21 entitled "Systematic or mass violations of human rights" (referred to in note 157 above):

> "It is important to point out that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code."

159 See *Walrave v Association Union Cycliste Internationale*, [1974] European Court Reports 1405; and *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] European Court Reports 455. Compare Article 68 of the *Treaty Establishing the European Coal and Steel Community*, done at Paris on 18 April 1951, entered into force on 23 July 1952, 261 UNTS 141 (1957).

160 See, for example, the decision of the United States Court of Appeals (Second Circuit) in *Kadic v Karadzic* 70 F3d 232 (1995), certiorari denied, 518 US 1005 (1995). On corporate liability for human rights violations, see generally Carlos Manuel Vázquez, "*Sosa v Alvarez-Machain* and Human Rights Claims against Corporations under the Alien Tort Statute" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 137; Ratner, note 145 above; and Sarah Joseph, Corporations and Transnational Human Rights Litigation, Hart Publishing, Oxford, 2004.

161 For references to comparable German and Dutch decisions, see Donald P Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed, Duke University Press, Durham, 1997, 158 and 361-369; and André Nollkaemper, "Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands" in Menno T Kamminga and Saman Zia-Zarifi (eds), Liability of Multinational Corporations under International Law, Kluwer, The Hague, 2000, 265, 271-273. For additional references see Ratner, ibid, 471; and Michael K Addo, The Applicability of Human Rights Standards to

The issue of direct corporate responsibility for human rights violations has been raised in recent years.[162] As noted above, the Nuremberg Tribunal found a number of non-governmental juridical entities to be criminal organisations in accordance with Article 9 of the tribunal's Charter.[163] The failure of the statutes for the tribunals for the former Yugoslavia and Rwanda and of the International Criminal Court to provide for criminal responsibility of juridical entities[164] does not appear to undermine the State practice in support of direct responsibility.[165] This practice may include the universal affirmation by States within the General Assembly of the "principles of international law" recognised both in the Nurem-

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Private Corporations – General Report, presented at the XVI[th] International Congress of the Academy of Comparative Law, July 2002 – on file with the author – which addresses the position, *inter alia*, under Israeli law, 15-18.

162 See, for example, Ratner, ibid; Robert McCorquodale, "Human Rights and Global Business" in Stephen Bottomley and David Kinley, Commercial Law and Human Rights, Dartmouth, Aldershot, 2002, 89; Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Kamminga and Zia-Zarifi, ibid, 75; and Craig Scott, "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights" in Eide, Krause and Rosas, note 66 above, 563.

163 See note 152 above. For a discussion of the provisions of the Charter of the International Military Tribunal addressing criminal organisations, see Nina HB Jørgensen, The Responsibility of States for International Crimes, Oxford University Press, Oxford, 2000, 61-65.

164 See Article 6 of the Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 5 of the Statute for the International Criminal Tribunal for Rwanda, note 150 above. Article 25(1) of the Statute of the International Criminal Court, note 151 above, is to same effect. Early drafts of the Statute of the International Criminal Court included provisions addressing criminal responsibility of non-State legal persons. In a footnote to the relevant paragraphs of the draft the conference's preparatory committee made the following observations:

> "There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Other have an open mind"

– Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1, 49.
For a discussion of the various views on criminal responsibility of juridical entities that were expressed during the Rome conference, see Andrew Clapham, "The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court" in Kamminga and Zia-Zarifi, note 161 above, 139, 143-158.

165 Compare the trials of German industrialists after the war. According to Ratner "although in all these cases the courts were trying individuals, they nonetheless routinely spoke in terms of corporate responsibilities and obligations" – Ratner, note 145 above, 477.

berg Tribunal's Charter and judgment.[166] That practice is also supported by rules of international humanitarian law that are premised on direct application to non-state entities engaged in armed conflict.[167]

It seems untenable, having succeeded in escaping the long held view that *only* one type of juridical entity (the State) was capable of possessing international rights and duties,[168] that it should now be accepted that international law does not recognise that another type of juridical entity (corporations) could be the holder of duties to respect human rights under international law. The possession by corporations of entitlements directly under international law (for example, under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[169]) undermines any principled defence of the absence of direct human rights obligations.

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166 See General Assembly resolution 95(I) adopted unanimously on 11 December 1946, Resolutions Adopted by the General Assembly during the second part of its first session from 23 October to 15 December 1946, UN Doc A/64/Add.1, 188. See, however, the International Law Commission's formulation of the Nuremberg principles in 1950 – Yearbook of the International Law Commission 1950, Volume II, 195. This formulation did not include the notion of criminal responsibility of juristic entities. At least three members of commission appeared to question whether this was a principle of international law – Yearbook of the International Law Commission, 1949, Volume I, 132 and 204. At least one member of the Commission appeared to accept criminal responsibility of juristic entities as a principle of international law – Yearbook of the International Law Commission, 1949, Volume I, 133 and 204. The Commission, however, decided, by six votes to two, not to address the issue in its formulation of the Nuremberg principles – 204. See also the discussion of subsequent consideration of the issue in Clapham, note 164 above, 171-172.

167 Steven Ratner cites the Protocol II to the 1949 Geneva Conventions, note 30 above, in support of the following observation – "[i]nternational humanitarian law … places duties on rebel groups (qua groups, rather than individuals) to respect certain fundamental rights of persons under their control" – Ratner note 145 above, 466. Article 1 of the Protocol II refers to "organized armed groups which, under responsible command, exercise such control over a part of … [a State party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". See generally Clapham, Human Rights Obligations of Non-State Actors, note 15 above. But see Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Cambridge University Press, Cambridge, 2005, Volume I, Rules, 299. Compare Christine Chinkin, Third Parties in International Law, Clarendon Press, Oxford, 1993, 132-133.

168 For references to the "orthodox positivist doctrine" that only States are subjects of international law and arguments undermining this position – see Lauterpacht, note 147 above, 6-12; and Theodor Meron, The Humanization of International Law, Martinus Nijhoff, Leiden, 2006, 314-318.

169 Opened for signature at Washington on 18 March 1965, entered into force on 14 October 1966, 575 UNTS 159, 143 parties as at 15 December 2006.

The above defence of direct obligations on individuals and juridical entities to respect human rights under international has relied heavily on developments of international criminal law. Stephen Ratner has argued that "… international criminal law and humanitarian law conventions have thus far recognized only a relatively small category of human rights abuses as crimes … International criminal law does not simply incorporate human rights law."[170] Whilst it is true that there exists only a relatively small number of recognised crimes under international law, it is also important to acknowledge the breadth, in particular, of crimes against humanity. As noted above, crimes against humanity, as defined in the *Statute for the International Criminal Court*, encompass acts such as "murder", "torture", "enslavement", "deportation" and "imprisonment … in violation of fundamental rules of international law".[171] The scope of such crimes has potential significance when assessing the legality of trade measures directed at corporate human rights abuses. It will be addressed further in subsequent chapters.

(b) Human Rights Obligations Owed by International Organisations

In an advisory opinion in 1949 the International Court of Justice concluded that an international organisation could have "objective international personality".[172] International legal personality involves not only the possession of rights directly under international law, but also the capacity to assume international legal obligations.[173] International organisations can and do, for example, enter into treaties.[174]

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170 Ratner, note 145 above, 467-468.

171 Provided, of course, that the acts form part of "widespread or systematic attack directed against any civilian population" – see Article 7(1) of the *Rome Statute of the International Criminal Court*, note 151 above. Contrast the definition of "attack directed against any civilian population" in Article 7(2)(a) of the *Rome Statute* with the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Prosecutor v Kunarac*, Case No IT-96-23 & IT-96/23/1-A, Judgment of 12 June 2002, paragraph 98.

172 *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion*, ICJ Reports 1949, 174, 185.

173 See, for example, International Law Commission, Fourth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, UN Doc A/CN.4/564, 28 February 2006, A/CN.4/564.Add.1, 12 April 2006 and A/CN.4/564.Add.2, 20 April 2006. The Commission's work on the responsibility of international organisations began in 2000. See also Karel Wellens, Remedies against international organisations, Cambridge University Press, Cambridge, 2002.

174 The International Court of Justice took a functional approach to the question of the international rights and duties of an international organisation. The Court stated that "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" – ibid, 180. See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*,

Accordingly, there is little doubt that, in principle, international organisations might become parties to human rights treaties. Such organisations would thereby assume international legal obligations to respect human rights. In 1996 the European Court of Justice ruled that the European Community could not accede to the ECHR without amendment to the *Treaty Establishing the European Community* ("EC Treaty").[175] The Court implicitly accepted the possibility, once necessary amendments to the EC Treaty had been made, of accession by the European Community to the ECHR.[176]

Article 43 of the *Convention on the Rights of Persons with Disabilities* now expressly provides that the treaty may be signed or acceded to by "regional integration organizations". The European Community signed the treaty on 30 March 2007.[177]

Specific concerns have been raised about the human rights obligations of the specialised agencies of the UN.[178] It has been noted that, in accordance with Articles 24 and 46 of the ICESCR and ICCPR respectively, adherence by States to the covenants appears to be without prejudice to the constitutions of the specialised agencies.[179] Further, it has been argued in relation to the International Monetary Fund that the specific arrangements governing its status as a specialised agency

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ICJ Reports 1980, 73, 89-90, paragraph 37; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, 62, 88-89, paragraph 66.

175 *Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] European Court Reports I-1759, paragraphs 35 and 36. The decision is commented upon by Giorgio Gaja, 33 Common Market Law Review 973 (1996).

176 The position will change (for the "European Union") if the 2004 treaty to establish a European constitution comes into force – see the Treaty establishing a Constitution for Europe, done at Rome on 29 October 2004, not yet in force, Official Journal of the European Union, C 310/1 (2004), Article 1-9, para 2. See also Protocol No 14 to the ECHR, done at Strasbourg on 13 May 2004, not yet in force, ETS No 194, Article 17.

177 Presumably "formal confirmation" of signature will have wait until the 2004 Treaty establishing a Constitution for Europe, ibid, comes into force.

178 See, for example, Sia Spiliopouou Åkermark, "International Development Finance Institutions: The World Bank and the International Monetary Fund" in Eide, Krause and Rosas, note 66 above, 515; Daniel D Bradlow, Symposium: Social Justice and Development: Critical Issues facing the Bretton Woods System: The World Bank, the IMF, and Human Rights, 6 Transnational Law and Contemporary Problems 47 (1996); and Clapham, Human Rights Obligations of Non-State Actors, note 15 above, 137-159.

179 Articles 46 and 24 of the ICCPR and the ICESCR, note 10 above, respectively, are in identical terms and provide that:

> "[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which

restrict the extent to which UN bodies or actions within the UN are relevant to the operation of the Fund.[180] A UN specialised agency is, however, effectively bound by relevant resolutions of the Security Council[181] and would also appear to be subject to the operation of Article 103 of the Charter.[182]

The obligations of *States* that are parties to human rights treaties are not suspended simply as a result of the States also being bound by other treaties, such as the *Articles of Agreement of the International Monetary Fund*. The obligations of parties to the ICESCR to *cooperate within* international institutions have been emphasised by the Committee overseeing the operation of the ICESCR. For example, in its concluding observations following consideration in 2002 of the

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define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant."

180 In a paper delivered on 7 May 2001 at the "International consultation on economic, social and cultural rights in development activities of international institutions" organised by the Committee on Economic, Social and Cultural Rights, François Gianviti, General Counsel for the International Monetary Fund made the following claims:

> "…the Fund is not a 'United Nations body', but a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations. In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in which the United Nations recognizes that, 'by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent organization.' Furthermore, Article X of the Fund's Articles of Agreement, while requiring the Fund to cooperate with 'any general international organization' [*ie,* the United Nations], specifies that 'Any arrangements for such cooperation which would involve a modification of any provision of [the Articles of Agreement] may be effected only after amendment to [the Articles].' Thus the relationship established by the 1947 Agreement is not one of 'agency' but one of 'sovereign equals'. It follows that the Fund's relationship agreement with the United Nations does not require it to give effect to resolutions of the United Nations, such as the resolutions under which the members of the General Assembly adopted the Universal Declaration or the Covenant [on Economic, Social and Cultural Rights], or to international agreements, such as the Covenant, entered into by the members of the United Nations"

– Paragraph 16 [Footnotes not reproduced.]. The paper is available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf>. Visited 1 May 2007. The paper is commented upon by Clapham, Human Rights Obligations of Non-State Actors, note 15 above, 145-149.

181 See, for example, Security Council resolution 1160, adopted on 31 March 1998, which, in paragraph 10, specifically calls on international organisations "… to act strictly in conformity with this resolution".

182 See Simma (ed), The Charter of the United Nations – A Commentary, note 9 above, Volume II, 1294-1302. Article 103 of the UN Charter provides that:

> "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

United Kingdom's fourth report on implementation of the ICESCR, the Committee encouraged:

> "… the State party, as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties under the Covenant, in particular with the obligations contained in articles 2.1, 11.2, 15.4 and 23 concerning international assistance and cooperation."[183]

Reliance on a duty to cooperate internationally is one possible means by which the apparent jurisdictional limitations found in some human rights treaties can be avoided. Under Article 2(1) of the ICCPR, for example, parties undertake:

> "… to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant…" [emphasis added].

Such clauses have been held to restrict the operation of enforcement mechanisms under human rights treaties.[184]

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183 Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland – Dependent Territories. 5 June 2002, UN Doc E/C.12/1/Add.79, paragraph 26. Note also the Committee's General Comment No 3, in which the Committee claims that:

> "… in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries" – paragraph 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.8, 8 May 2006, 15.

184 See, for example, *Banković v Belgium*, European Court of Human Rights, Application number 52207/99, judgment 12 December 2001. Compare *Loizidou v Turkey*, judgment 23 March 1995 (preliminary objections), Series A number 310, para 62; *Coard et al v United States*, Report Number 109/99, Case Number 10.951, 29 September 1999, para 37 (Inter-American Commission on Human Rights); and *Issa v Turkey*, merits decision, Application 31821/96, judgment 16 November 2004, para 71. Note also the interpretation by the International Court of Justice of the jurisdictional clauses of ICCPR, ICESCR and *Convention on the Rights of the Child* in *Legal Consequences of*

Whatever the position in relation to human rights treaties, there appears to be no principled reason for the non-application of human rights obligations under *general international law* to international organisations (and States acting within those organisations).[185] On the contrary, the universal character of human rights and the existence of peremptory norms (*jus cogens*) and *erga omnes* obligations (dealt with in Chapter 4) suggest that international organisations should be subject to similar human rights obligations to those that apply to the States that create the organisations.[186] Similarly the jurisdictional limitations of human rights treaties do not appear to be consistent with the universal character of the human rights obligations of States and international organisations under general international law.[187]

The extent to which an international organisation such as the World Trade Organization is itself subject to human rights obligations has had prominence in the recent literature addressing trade and human rights.[188] The issue has particular relevance to questions of institutional reform.[189] It also has relevance to the interpretation of existing provisions of the *Marrakesh Agreement Establishing the World Trade Organization*.[190] This issue of interpretation will be addressed in

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the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136, 178-181, paras 107-113.

185 In its advisory opinion on the interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, note 174 above, the International Court of Justice observed that:

> "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"

– 89-90, paragraph 37.

186 See, for example, Ernst-Ulrich Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 European Journal of International Law 621, 630 (2002). Contrast the decisions of the European Court of Justice in *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1970] European Court Reports 1125, 1134; and *Nold v Commission of the European Communities*, [1974] European Court Reports 491, 507.

187 Compare the decision of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, 1CJ Reports 1996, 595, 615-616, para 31.

188 See, for example, Gabrielle Marceau, WTO Dispute Settlement and Human Rights, 13 European Journal of International Law 753 (2002); and the, at times surprising, critique of Anne Orford, "Trade, human rights and the economy of sacrifice" in Anne Orford (ed), International law and its Others, Cambridge University Press, Cambridge, 2006, 156.

189 See, for example, the various contributions to – Symposium – The Boundaries of the WTO, 96 American Journal of International Law 1-158 (2002).

190 Article 31(3) of the *Vienna Convention on the Law of Treaties*, note 62 above, appears to have particular relevance in this regard.

greater detail in Chapters 4 and 6. The issue of interpretation also involves consideration of those human rights obligations binding on all members of the World Trade Organization.[191] This in turn requires a consideration of the sources of international legal obligations to protect human rights. It is to this topic that attention will now be turned.

5. Sources of Legal Obligation – Human Rights under International Law

The three traditional sources of international legal obligations: treaties; customary international law; and general principles of law[192] – have all been invoked as sources of obligation to protect human rights under international law. Treaties provide the most extensive source of obligation,[193] ranging from the general provisions of the Charter,[194] to the specific requirements of particular human rights treaties.[195] Global and regional human rights treaties enshrine relatively precise human rights standards and combine obligations on States to incorporate international human rights standards into municipal law with international supervision mechanisms. International supervision ranges from sophisticated international judicial proce-

191 Article 31(3)(c) of the *Vienna Convention*, ibid, recognises that when interpreting a treaty regard may be had to "any relevant rules of international law applicable in the relations between the parties".

192 See Article 38(1) of the Statute of the International Court of Justice for a statement of the sources of international legal obligation.

193 According to Bruno Simma "… from a legal point of view … the system of treaties for the protection of human rights constitutes by far the most important part of the international human rights regime" – Simma, "International Human Rights and General International Law: A Comparative Analysis", Collected Courses of the Academy of European Law, Volume IV, Book 2, 153, 173 (1995).

194 See the preamble to the Charter and Articles 1, 13, 55, 56, 62, 68 and 76.

195 See, for example, the 1926 *Slavery Convention* and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, note 40 above; the *Convention on the Prevention and Punishment of the Crime of Genocide*, note 38 above; the *Convention Relating to the Status of Refugees* and 1967 protocol, note 46 above; the *International Convention of the Elimination of all Forms of Racial Discrimination*, note 24 above; the ICCPR and the ICESCR, note 10 above; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, note 26 above; the *Convention on the Rights of the Child*, note 12 above; the ECHR, note 32 above; the *European Social Charter*, note 12 above; the American Convention, note 10 above; the Protocol of San Salvador, note 71 above; the African Charter, note 12 above; numerous International Labour Organization conventions, see notes 40, 76 and 85 above; and treaties setting out humanitarian obligations during armed conflict, note 30 above.

dures allowing individual complaints[196] to more basic reporting obligations.[197] The general provisions of the UN Charter referring to human rights may also be the source of specific legal obligation, with instruments such as the UDHR serving as authoritative interpretations of the Charter's human rights provisions, placing flesh on the Charter's bones.[198]

Customary international law forms an important source of obligation, particularly with respect to States that are not parties to major human rights treaties. Customary obligations do not appear to be subject to the same jurisdictional limitations that restrict the operation of human rights treaties.[199] Customary international law status may also be significant in relation to the enforcement within a particular State where the State's constitution gives some priority to customary obligations over treaty obligations, which are sometimes assimilated by municipal constitutions to the position of legislation.[200] Common law based municipal legal systems may automatically incorporate the "law of nations" into their common law or may provide for judicial transformation.[201] Municipal legislation may allow for the enforcement of customary law through municipal courts.[202]

The third source, general principles of law, corresponds to the source identified in Article 38(1)(c) of the Statute of the International Court of Justice, namely "general principles of law recognised by civilised nations".[203] A strong case has been made that human rights obligations can be derived from this source. What

196 The procedure under the ECHR, ibid, appears to be the most sophisticated.

197 The ICCPR, the ICESCR and the global treaties addressing specific human rights include reporting obligations.

198 See, for example, Egon Schwelb, The International Court of Justice and the Human Rights clauses of the Charter, 66 American Journal of International Law 337 (1972). This position is discussed further below – see the discussion in the text accompanying note 234 below.

199 See the text accompanying note 187 above.

200 See, for example, Article 25 of the German Basic Law, reproduced in Kommers, note 161 above, 511. Compare FA Mann, The Consequences of an International Wrong in International and National Law, 48 British Year Book of International Law 1, 17-28 (1976-1977).

201 See, for example, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Queen's Bench 529; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 Appeal Cases 61 at 77 and 90; and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 Appeal Cases 147 at 276; and *Nulyarimma v Thompson*, 165 Australian Law Reports 621 (1999).

202 See, for example, the *Alien Tort Claims Act 1789*, Title 28 United States Code §1350.

203 See generally Simma and Alston, note 63 above.

may have begun[204] as a source of essentially procedural rules[205] may have developed into a substantive source of international legal obligations to respect human rights.[206]

(a) Treaties

(i) Human Rights Treaties

As noted above, global and regional human rights treaties enshrine specific human rights standards. The treaties impose obligations on States to incorporate these human rights standards into municipal law and create institutions and procedures for international supervision of treaty compliance.[207]

A treaty formally binds only those States that are parties to the treaty.[208] The major global and regional human rights treaties have significant numbers of parties.[209] The nature of the obligations assumed depends on the terms of the particular treaty, the circumstances surrounding its negotiation and subsequent practice in relation to the treaty.[210] Provision for third-party adjudication as to the interpretation and application of a treaty is an important factor in ensuring the efficacy of the

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204 See Cassese, "The Role of General Principles of Law and General Assembly Resolutions – Discussion" in Antonio Cassese and Joseph HH Weiler (eds), Change and Stability in International Law-Making, Walter de Grutyer, Berlin, 1988, 53, 53-54.

205 General principles of law have been conceived of as a source of procedural rules that ensure the efficacy of decision-making by the International Court of Justice. General principles of law are said to allow the Court to avoid pleas of "*non liquet*" (ie that there is simply no law on a particular point) – see, for example, Prosper Weil, 'The Court Cannot Conclude Definitively…' *Non Liquet* Revisited, 36 Columbia Journal of Transnational Law 109 (1998).

206 Simma and Alston, note 63 above.

207 See, for example, Articles 2, 28, 40 and 41 of the ICCPR, note 10 above.

208 The obligations of a party to a treaty are enshrined in Article 26 of the *Vienna Convention on the Law of Treaties*, note 62 above. The rules that third States are not bound by and do not automatically derive benefits from treaties to which they are not parties are enshrined in Articles 34 to 37 of the Vienna Convention. See also Lord McNair, The Law of Treaties, Clarendon Press, Oxford, 1961, 309-321; Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, second edition, Manchester University Press, Manchester, 1984, 98-106; and Chinkin, note 167 above.

209 See notes 22, 24, 25, 26, 27, 30, 32, 34, 36, 38, 40, 46, 69, 76, and 85 above.

210 See the rules of treaty interpretation enshrined in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, note 62 above. Compare the discussion by Dame Rosalyn Higgins of the relevance of the ICESCR to the interpretation of the ICCPR – Higgins, The United Nations: Still a Force for Peace, 52 Modern Law Review 1, 6-7 (1989).

treaty.[211] Human rights treaties do not always provide for such third-party adjudication.[212] International enforcement of human rights standards will be addressed in the final section of this chapter.

The obligations of a State that is a party to a human rights treaty may not be identical to the obligations of other States that are also parties to the treaty. A State may attempt to vary its treaty obligations by making reservations at the time that it binds itself to a treaty. Treaties addressing economic and social human rights, such as the ICESCR, sometimes link the treaty obligations assumed by each State party to "available resources" of the State.[213]

Reservations to human rights treaties have given rise to particular concerns about the integrity of treaties that have been the subject of extensive reservations.[214] The international rules governing reservations to multilateral treaties were considered by the International Court of Justice in an advisory opinion (sought by the UN General Assembly in 1950) on the effect of reservations to the *Genocide*

211 Although the level governmental and non-governmental commitment within a municipal system to the human rights standards contained in a treaty appears much more significant than whether international adjudicative mechanisms are provided by the treaty. On the efficacy of human rights treaties see Oona A Hathaway, Do Human Rights Treaties Make a Difference, 111 Yale Law Journal 1935 (2002); Ryan Goodman and Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 European Journal of International Law 171 (2003); and Oona A Hathaway, Testing Conventional Wisdom, 14 European Journal of International Law 185 (2003).

212 The ICCPR, note 10 above, whilst it creates reporting obligations and gives the Human Rights Committee established under the treaty the capacity to review such State reports (Article 40), does not automatically provide for the hearing of complaints by States or individuals of violations of the treaty. Specific consent is required under Article 41 of the ICCPR in order for the Human Rights Committee to have the competence to receive complaints by States as to violation of the treaty by other States. The Human Rights Committee is only competent to receive individual complaints when the respondent State is also a party to the first optional protocol to the ICCPR, note 23 above. The Human Rights Committee, however, in performing its functions under Article 41 of the ICCPR (which has never in fact been relied upon) or the optional protocol acts in a quasi-judicial manner. There exists no formal legal obligation on States to comply with the recommendations of the Human Rights Committee – see Articles 41(1)(h) and 42(7)(c) of the ICCPR and Article 5(4) of the first optional protocol to the ICCPR.

213 See, for example, Article 2(1) of the ICESCR, note 10 above.

214 Steiner and Alston, note 65 above, report that as at January 2000, "67 states parties to … [the convention on the elimination of discrimination against women] had entered reservations or declarations, either addressed to a specific provision or of a general character that embraced the convention as a whole" – 442.

Convention.[215] The rules supported by the majority of the Court were subsequently enshrined in the *Vienna Convention on the Law of Treaties*.[216]

Tensions appear to have arisen in relation to reservations to human rights treaties for at least two reasons. First, human rights treaties generally purport to

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215 *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Reports 1951, 15.

216 See Articles 19 to 23, note 62 above. The rules governing reservations may be summarised as follows. Whether a State is entitled to bind itself to a treaty subject to reservations is in the first instance dependent on the terms of the treaty. If the treaty prohibits the making of reservations then States are unable to adhere to the treaty subject to reservations – see Article 19(a) of the *Vienna Convention*. If a treaty does not prohibit the making of reservations then a State may adhere to the treaty subject to reservations provided that the reservations are consistent with the "object and purpose" of the treaty – see Article 19(c). The advisory opinion of the International Court of Justice on reservations to the Genocide Convention indicates that a State purporting to make a reservation that is inconsistent with the object and purpose of the treaty is precluded from becoming a party to the treaty – ibid, 29. Where reservations are consistent with the object and purpose of the treaty, the State making the reservation can become a party to the treaty notwithstanding objections to the reservation by treaty parties provided at least one treaty party accepts the reserving State as a party to the treaty. Existing treaty parties, when confronted by a State proposing to adhere to the treaty subject to reservations have at least three options – they can accept the reservations [in which case treaty relations between the reserving State and the party accepting the reservations are established and obligations under the treaty are varied *inter se* in accordance with the reservations – under the *Vienna Convention* failure to object to a reservation within 12 months of the making of the reservation is treated as acceptance of the reservation – see Article 20(5)]; they can object to the reservations but accept the reserving State as a party to the treaty [in which case treaty relations between the reserving State and the party objecting to the reservations are established but obligations under the treaty are varied *inter se* by excluding the provisions of the treaty that were the subject of the reservations and the objections – see Article 21(3) – objections to reservations may be made for many reasons and need not necessarily reflect any principled objection to the reservations, see DW Bowett, Reservations to Non-restricted Multilateral Treaties, 48 British Year Book of International Law 67, 86-87 (1976-1977)]; or they can refuse to accept the reserving State as a party to the treaty (in which case the reserving State and the State refusing to accept it as a party do not enter into treaty relations – again the State refusing to accept the reserving State as a party to the treaty may do so for many reasons including for reasons unrelated to the reservation). The International Law Commission has been considering reservations to treaties for a number of years – see, for example, International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, Chapter VIII. The International Court of Justice revisited issues raised by reservations in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment of 3 February 2006, paras 64-70; and the Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

enshrine universal human rights standards. The capacity to make reservations is therefore difficult to reconcile with the universal nature of human rights treaties.[217]

Secondly, on a more practical level, the rules governing reservations identified by the International Court of Justice, and enshrined in the *Vienna Convention on the Law of Treaties*, place weight upon how parties to a treaty respond to the State seeking to adhere to the treaty subject to reservations. Objections by treaty parties to proposed reservations appear relevant, for example, to the determination of whether a reservation is consistent with the object and purpose of the treaty.[218]

In many areas of international law the existence of reciprocal benefits and burdens ensures vigilance on the part of treaty parties when other States propose to bind themselves to a treaty subject to reservations. If a proposed reservation will undermine benefits that treaty parties expect to derive from the adherence of a new party to the treaty, assessments of self interest generally ensure that objections are made to the proposed reservation. In human rights treaties, however, the normal incentives for State party vigilance are generally absent.[219] The direct beneficiaries of the provisions of a human rights treaty will in most cases be the nationals of the State proposing to adhere to the treaty with reservations. If the State proposes to

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217 Although the International Court of Justice accepted that reservations could be made to the *Genocide Convention*, it did appear to recognise this tension – note 215 above, 23.

218 Article 20(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above, provides that:

"[a] reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."

The United Kingdom emphasised the relevance of the views of States parties to any determination of whether a reservation is consistent with the object and purpose of a human rights treaty – see Observations by the Governments of the United States and the United Kingdom on General Comment No. 24 (52) relating to reservations, 16 Human Rights Law Journal 422, 424-426 (1995). These observations were in response to Human Rights Committee, General Comment No 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6, 11 November 1994, reprinted in 34 ILM 839 (1995).

219 This is all but expressly recognised in the advisory opinion on reservations to the Genocide Convention, note 215 above, 23. On the general tension between traditional reciprocity between States and what has been described as a "community interest" see Bruno Simma, From Bilateralism to Community Interest in International Law, 250 Recueil des cours, 221 (1994, VI). See in particular 342-349 for a discussion of reservations to human rights treaties.

restrict rights under the treaty by way of reservations, its own nationals will suffer but the effect on nationals of other States will normally be quite limited. There is therefore a reduced incentive for existing treaty parties to object to reservations to human rights treaties and reservations are often met by silence from the treaty parties. It is for this reason that the Human Rights Committee in its General Comment Number 24, on reservations to the ICCPR and protocols, concluded that the "absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant".[220]

The General Comment also addresses other issues that have generated controversy in relation to reservations. For example, the Human Rights Committee expressed the view that it could sever reservations that it considered to be inconsistent with the object and purpose of the ICCPR, thus depriving the reserving State of the benefit of its reservations and subjecting it to the unconditional operation of the ICCPR.[221] This aspect of the General Comment was criticised by parties to the ICCPR, with at least one party indicating that if its reservations to the ICCPR were ruled to be inconsistent with the object and purpose of the treaty, it could not be considered to be a party to the treaty.[222] Other aspects of the General Comment will be considered below and in Chapter 4. For present purposes it appears important

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220 Human Rights Committee, General Comment 24 (52), note 218 above, paragraph 17. The Inter-American Court of Human Rights has also observed that:

> "… modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction"

– the *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Articles 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-American Court of Human Rights, Series A, Number 2, reprinted in 22 ILM 37 (1983), paragraph 29.

Compare the subsequent of observation of the Court that "the question of reciprocity" is "not fully applicable as far as human rights treaties are concerned" – *Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights)*, – Advisory Opinion OC-3/83 of 8 September 1983, Inter-American Court of Human Rights, Series A, Judgments and Opinions, No 3, reprinted in 23 ILM 320 (1984), paragraph 62. In this advisory opinion the court linked non-derogability of certain human rights obligations with the rules governing reservations to treaties. The Court found that a reservation allowing a State to suspend a non-derogable right would be contrary to the object and purpose of the American Convention – paragraph 61.

221 Human Rights Committee, General Comment 24 (52), ibid, paragraph 18.

222 Observations by the Governments of the United States and the United Kingdom on General Comment No. 24 (52) relating to reservations, note 218 above, 423-424. See also, for example, Simma, note 219 above, 346-349.

simply to note the complexity that can arise in relation to the scope of obligations under human rights treaties that are the subject of reservations.

States may enter a number of human rights treaties addressing the same human rights. Obligations under these treaties may not be identical. For example, most European States are parties to both the ECHR and the ICCPR.[223] Obligations under these treaties are not identical.[224] Such differences can produce some complexity when supervisory bodies adopt different interpretations of similar rights.[225] One potential source of uncertainty is the doctrine of margin of appreciation. This doctrine, developed by the European Commission of Human Rights and the European Court of Human Rights,[226] involves showing a degree of deference to assessments made by national authorities that measures derogating from obligations under the Convention are "strictly required".[227] The doctrine has also been applied to national assessments of the necessity to limit certain human rights on the grounds such as "national security, public safety, … the prevention disorder or crime, … the protection of health or morals, or … the protection of the rights or freedoms of others".[228] There appears to have been some reluctance to endorse a similar approach in relation to the ICCPR.[229] This reluctance may reflect concerns about potential abuse of the margin of appreciation doctrine when applied outside of the relatively homogeneous context of Europe.

A State that is proposing to take trade measures against another State for violations of provisions of a human rights treaty to which both States are party

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223 Of the 46 parties to the ECHR, note 32 above, all appear to be parties to the ICCPR.

224 Compare, for example, Article 17 of the ICCPR, note 10 above, with Article 8 of the ECHR, ibid.

225 Compare, for example, the decision of the European Court of Human Rights in *Soering v United Kingdom*, 11 European Human Rights Reports 439 (1989), with *Barrett and Sutcliffe v Jamaica*, UN Doc CCPR/C/44/D/271/1988, 6 April 1992, paragraph 8.4.

226 See, for example, the discussion of the doctrine in P van Dijk and GJH van Hoof, Theory and Practice of the European Convention on Human Rights, 3rd ed, Kluwer, The Hague, 1998, 82-95; and Paul Mahoney, Marvellous Richness of Diversity or Invidious Cultural Relativism? 19 Human Rights Law Journal 1 (1998).

227 See, for example, van Dijk and van Hoof, ibid, 84.

228 See, for example, *Handyside v United Kingdom*, European Court of Human Rights, 1976 Series A, Number 24, 1 European Human Rights Reports 737, 753-755, paras 48-50.

229 It appears that the Human Rights Committee has only once explicitly endorsed the application of a "margin of discretion", in relation to a State limiting freedom of expression on the grounds of public morality – *Hertzberg v Finland*, UN Doc CCPR/C/15/D/61/1979, 2 April 1982, para 10.3. The Human Rights Committee expressly refused to apply the margin of appreciation doctrine to Article 27 of the ICCPR – *Länsman v Finland*, UN Doc CCPR/C/52/D/511/1992, 26 October 1994, para 9.4; although the Committee has allegedly applied the doctrine without explicitly referring to it, see Markus Schmidt, Book Review: Coming to Grips with Indigenous Rights, 10 Harvard Human Rights Journal 333, 338 (1997).

may be able to justify such measures under international law.[230] This issue will be discussed again when enforcement issues are addressed. A State proposing to take such trade measures may have to take into account reservations to the treaty. Different issues arise if the target State is not party to relevant human rights treaties. The existence of general obligations to respect human rights becomes particularly relevant in such cases. It is to such general obligations that attention will now be turned.

(ii) Human Rights Obligations *via* the UN Charter

One potential source of general obligation in relation to human rights is the UN Charter. With the admission of Montenegro in 2006, the parties to this treaty numbered 192 States.[231] The Charter refers to "equal rights and self-determination of peoples" and "human rights and fundamental freedoms".[232] Article 56 provides that "[a]ll Members [of the UN] pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." Article 55 provides that the UN "shall promote", *inter alia*, "universal respect for; and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[233]

Whilst the Charter does not define these rights, it can nonetheless be seen as the source of obligation with respect to human rights.[234] It has been argued that the content of the Charter's human rights obligations is to be found in subsequent conduct, particularly the adoption of the UDHR, the Human Rights covenants and other human rights treaties and instruments. This subsequent conduct is said to authoritatively interpret the Charter's general provisions.[235] The authoritative interpretation approach builds on views expressed soon after the adoption of the UN Charter by publicists of the stature of Sir Hersch Lauterpacht.[236] It is supported

230 See, for example, Joost Pauwelyn, "Human Rights in WTO Dispute Settlement" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 160 above, 205.

231 For general information on the parties to the UN Charter, see <http://www.un.org/members/index.shtml>, visited 18 April 2007.

232 See the preamble to the Charter and Articles 1, 13, 55, 56, 62, 68 and 76.

233 For a general discussion of these provisions, see Simma (ed), The Charter of the United Nations, note 9 above, Volume II, 917-944.

234 See generally Jennings and Watts, note 140 above, Volume I, Part 2, 988-991.

235 Sohn, note 104 above, 15-17; compare Schachter, note 120 above, 337.

236 Lauterpacht, note 147 above, 145-160. See also Philip C Jessup, A Modern Law of Nations, Macmillan, New York, 1952, 87- 93; Schwelb, note 198 above, where the views of various publicists on this issue are described. For opposing views see Manley O Hudson, Editorial Comment – Integrity of International Instruments, 42 American Journal of International Law 105 (1948); and Hans Kelsen, The Law of the United Nations – A Critical Analysis of Its Fundamental Problems, Stevens and Sons Ltd, London, 1951, 27-32 and 99-101. The views of Hudson and Kelsen appear to be based

by the practice within the General Assembly and other UN bodies of condemning human rights violations of UN Members that are not parties to human rights treaties protecting the violated human rights.[237] The approach also appears to be supported by the majority of judges of the International Court of Justice in the *Namibia Advisory Opinion*.[238]

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on the argument that the obligation contained within Article 56 is an obligation to cooperate with the United Nations and is not an obligation on a State to take separate action in respect of human rights violations within its territory – see Hudson, ibid, 106 and Kelsen, ibid, 99. The drafting history of Article 56 is inconclusive. An initial draft of the Article provided that:

> "[a]ll Members of pledge themselves to take separate and joint action and to co-operate with the Organisation and with each other to achieve these purposes."

A subsequent draft provided that:

> "[a]ll Members undertake to co-operate jointly and severally with the Organisation for the achievement of these purposes."

A number of delegations expressed concern about the apparent removal of a pledge to take separate action. The final form of Article 56 appears to have been accepted as a compromise – see Kelsen, ibid, 100-102. Although Kelsen describes Article 56 as "one of the most obscure provisions of the Charter" he concedes that the language of the Article suggests legal obligations – "'All Members pledge themselves' means that all Members are obligated" – ibid, 99. Contrast the views expressed, in 2006, of the England and Wales Court of Appeal in *R (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, 29 March 2006, paras 50 and 77.

237 See, for example, General Assembly resolution 57/231, adopted (without vote) on 18 December 2002, on the situation of human rights in Myanmar. The resolution refers to the "International Covenants on Human Rights" notwithstanding that Burma is not a party to these treaties. See also the procedures under resolutions 1235 and 1503 of the Economic and Social Council, which involved the scrutiny by the (now abolished) UN Commission on Human Rights and its sub-commission of the human rights situation in UN member States. Note also thematic procedures commenced under the auspices of the Commission on Human Rights and the work of the UN High Commissioner for Human Rights. On each of these procedures see generally Steiner and Alston, note 65 above, 599 and 611-648. Specifically on the thematic procedures – see Jeroen Gutter, Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community, Intersentia, Antwerpen, 2006. Human rights scrutiny by these UN bodies was not tied to particular human rights treaties. The Human Rights Council has assumed responsibility for the operation of the procedures formerly administered by the Commission.

238 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, 16, 57, paras 129-131. Compare the judgment of the Court in *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, 3, 42, para 91.

The Inter-American Court of Human Rights essentially adopted the authoritative interpretation approach in relation to the *Charter of the Organization of American States* and the Declaration on the Rights and Duties of Mankind adopted by the organisation in 1948.[239] This approach is also paralleled within the International Labour Organization ("ILO") by a procedure established in the 1950s in relation to freedom of association. Member States of the ILO, by virtue of their membership of the organisation, are considered to be bound to protect freedom of association rights regardless of whether they are parties to specific ILO conventions dealing with those rights.[240] A similar approach has now been adopted in relation to other employment related rights.[241]

The authoritative interpretation approach does not necessarily sever the identification of Charter obligations from State practice or recognition. The Charter may not be the source of legal obligation in relation each and every human right enshrined in the UDHR.[242] It is possible to conceive of the authoritative interpretation approach as an application of the rule enshrined in Article 31(3) of the *Vienna Convention on the Law of Treaties*, 1969.[243] Article 31 paragraphs (1) and (3) provide, *inter alia*, that:

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239 See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention of Human Rights*, Advisory Opinion, OC-10/89, 14 July 1989, Inter-American Court of Human Rights, Series A, Number 10, reprinted in 29 ILM 378 (1990). See also *Filartiga v Peña-Irala* 630 F.2d 876, 883 (Second Circuit 1980).

240 See Valticos and von Potobsky, note 71 above, 295.

241 See the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998. The Declaration is reprinted in 137 International Labour Review 253 (1998). The freedom of association procedure is significantly different to the procedure under the 1998 declaration (which does not include a complaints procedure). For opposing views on the efficacy of the 1998 declaration, see Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 European Journal of International Law 457 (2004); Brian A Langille, Core Labour Rights – The True Story (Reply to Alston), 16 European Journal of International Law 409 (2005); Francis Maupain, Revitalizaion Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights, 16 European Journal of International Law 439 (2005); and Philip Alston, Facing Up to the Complexities of the ILO's Core Labour Standards Agenda, 16 European Journal of International Law 467 (2005). *Cf* Maupain, ibid, 447, on whether the 1998 declaration is an authoritative interpretation of the Constitution of the ILO.

242 See the American Law Institute, Restatement of the Law Third – The Foreign Relations Law of the United States, American Law Institute Publishers, St Paul, 1987, Volume 2, §701, Comment *d*, 153, where it is asserted that "... states parties to the Charter are legally obligated to respect *some* of the rights recognized in the Universal Declaration" [emphasis added].

243 DW Greig, Reflections on the Role of Consent, 12 Australian Year Book of International Law 125, 150 (1988-1989).

"(1) [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

…"

Article 31 has been accepted as reflecting the position under customary international law.[244]

Subsequent practice in the application of a treaty, in this case the Charter, such as the adoption of the UDHR, its endorsement on numerous occasions in General Assembly resolutions[245] and the wide ratification of or accession to basic human rights treaties[246] can be regarded as evidence of the agreement of parties regarding the Charter's interpretation. However, rights set out in the UDHR or the international covenants which are observed more in the breach would not by virtue of their presence in the relevant instruments automatically become obligations under the Charter, *ie* the subsequent practice may not establish an "agreement of the parties" *vis-à-vis* these rights. Statements made on behalf of States in response to alleged violations appear to be important in this regard.[247] Statements made on behalf of States allegedly implicated in torture or genocide that deny that such crimes have occurred or that deny responsibility for such crimes (on the ground, for example in the case of torture, that perpetrators will be brought to justice) may

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244 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement,* ICJ Reports 1994, 6, 21-22; and the cases cited in the International Law Commission's commentary to its draft articles on the Law of Treaties – Report of the International Law Commission on the work of the second part of its 17th session, UN Doc A/6309/Rev.1, reprinted in Yearbook of the International Law Commission 1966, Volume II, 169, 220-222. See also *Golder v United Kingdom*, European Court of Human Rights, Series A, Number 18, 1 European Human Rights Reports 524, para 29 (1975); *Kasikili/Sedudu Island (Botswana v Namibia), Judgment*, ICJ Reports 1999, 1045, 1059, para 18; panel report – *United States – Sections 301-310 of the Trade Act 1974*, WTO Document WT/DS152/R, 22 December 1999, para 7.21 – these references are cited in Lori F Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit (eds), International Law Cases and Materials, 4th edition, West Group, St Paul, 2001, 543-544

245 For example, the UDHR and the two covenants were referred to in the following resolutions adopted in 2002 by the UN General Assembly during its 57th session – 57/174, 57/203, 57/204, 57/205, 57/211, 57/212, 57/231, 57/232, 57/233 and 57/234.

246 See note 209 above.

247 This point is discussed further below – see the text accompanying note 259 below.

be taken to reflect agreement as to the human rights obligations of the Charter.[248] The lack of consensus in relation to certain economic and social rights may undermine the existence of an agreement in respect of these norms.[249]

Attempting to constrain this approach within the terms of Article 31(3)(b) is not without its difficulties. The notion of agreement in this context is at best tacit and at worst notional.[250] If anything more than tacit agreement is required to substantiate Charter obligations in relation to human rights then the effect of the authoritative interpretation approach would be narrowed considerably. If a requirement of tacit agreement is accepted as forming the basis of the authoritative interpretation approach then it may be that the human rights obligations under the UN Charter will in almost all respects reflect those human rights the subject of customary law obligation.[251] Obligations to respect human rights under customary international law will now be considered.

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248 This approach is similar to the approach taken by the International Court of Justice to the development of custom in the face of inconsistent practice, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 122 above, 98, para 186.

249 See note 98 above. Thus a State may not violate the UN Charter even though it fails to guarantee the right to periodic holidays (set out in Article 24 of the UDHR, note 4 above).

250 In the International Law Commission's 1966 draft articles on the law of treaties, the reference in what was to become Article 31(3)(b) of the Vienna Convention was to "the understanding of the parties". The Commission made the following general comments on the provision:

> "The value of subsequent practice varies according as it shows the *common* understanding of the parties as to the meaning of the terms [of the treaty]. … The text provisionally adopted [by the Commission] in 1964 spoke of a practice which 'establishes the understanding of *all* the parties'. By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means the 'parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where *it suffices that it should have accepted the practice*" – Yearbook of the International Law Commission 1966, note 244 above, 222, para 15 [emphasis added].

In Sir Humphrey Waldock's fourth report to the Commission as Special Rapporteur on the law of treaties the following comment was made in relation to the 1964 draft of the relevant provision:

> "Clearly, to amount to an 'authoritative interpretation', the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally" – the relevant passages of Sir Humphrey's report are extracted in Ralf Günter Wetzel and Dietrich Raushning, The Vienna Convention on the Law of Treaties – Travaux Preparatoires, Alfred Metzner Verlag GmbH, Frankfurt, 1978, 247.

251 An approach requiring at least tacit agreement could produce an abridged catalogue of human rights obligations when compared to customary human rights obligations. This is because the tacit agreement approach would not apply to rights in relation to which there is explicit opposition from a small number of States. Such opposition may not,

(b) Human Rights and Customary International Law

Customary international law provides another basis upon which to assert the existence of general human rights obligations that bind all States under international law. Before addressing the particular human rights that may be protected under customary international law, there are some preliminary points that will be noted. A number of these points will be addressed in greater detail in Chapter 4.

The first preliminary point relates to the requirements for the establishment of customary law[252] and how those requirements apply when addressing human rights. One of the reasons for controversy[253] when considering likely human rights candidates for customary status relates to the formidable practical difficulty noted above in the discussion of reservations to human rights treaties. The development of customary international law is based on State practice. The generally reciprocal nature of international relations ensures that when a dispute arises as to the violation of rules of customary international law, an aggrieved State is likely, at the very least, to lodge a diplomatic protest in response to an alleged violation of customary law. Patterns of diplomatic protest, along with other forms of State practice, are important as evidence in the formation of customary law.[254]

In the context of human rights, however, the rights at issue are held not by States but by the natural persons within States. The rights are often violated by the State of the victim's nationality. Assessments of self-interest do not readily prompt *other* States to protest or take any other form of action in response to violations of human rights. This leads to a relative paucity of traditional evidence to support customary human rights obligations.[255] Given the wide recognition of customary

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however, be sufficient to preclude the existence of a customary obligation (although customary obligations may not apply to the dissenting States if the persistent objector rule is applicable – see the discussion below).

252 Two requirements are traditionally identified; general and consistent State practice in support of the alleged customary rule; and, secondly, that the State practice is accompanied by a sense of legal obligation or entitlement – see generally *North Sea Continental Shelf, Judgment*, note 63 above, 41-43, paras 71-74, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 122 above, 98, para 186.

253 Compare, for example, Simma and Alston, note 63 above; and Richard B Lillich, Introduction: The Growing Importance of Customary International Human Rights Law, 25 Georgia Journal of International and Comparative Law 1 (1995-1996).

254 Michael Akehurst, Custom as a Source of International Law, 47 British Year Book of International Law, 1, 1-10 (1974-1975).

255 Schachter, note 120 above, 336; and Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, Clarendon Press, Oxford, 1989, 99-100.

human rights obligations,[256] it has been plausibly asserted that a modified approach to identifying customary human rights obligations has developed.[257]

Professor Oscar Schachter suggested that State practice and *opinio juris* was to be found, *inter alia*, in international *fora* (both global and regional) where "human rights issues are actually discussed, debated and sometimes resolved by general consensus".[258] Schachter indicated that a broad range of actions and statements will be relevant to the development of customary law. He acknowledged certain significant factors in determining customary status:

> "One essential test is whether there is a general conviction that particular conduct is internationally unlawful. Occasional violations do not nullify a rule that is widely observed. The depth and intensity of condemnation are significant indicators of State practice in this context. The extent of agreement across geographical and political divisions is also pertinent."[259]

Professor Meron has made several observations in relation to the criteria for the creation of customary human rights norms. In the context of humanitarian norms, he has argued that given the nature of armed conflict, the international community will accept "gradual or partial compliance [with humanitarian norms] as fulfilling the requirements for the formation of customary law".[260] Generally in relation to human rights, Professor Meron suggests that greater weight has been given to *opinio juris* than is given to State practice, with the International Court of Justice attributing "central normative significance to resolutions both of the United Nations General Assembly and of other international organizations."[261] Professor Meron's justifies this approach by reference to "the nature and goals of human rights, the lofty community values which … [human rights norms] give expres-

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256 See, for example, Lillich, note 253 above, and references cited by the author.

257 According to Professor Schachter "[w]hether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation" – note 120 above, 336. Compare Christian Tomuschat, Human Rights – Between Idealism and Realism, Oxford University Press, Oxford, 2003, 34-36.

258 Schachter, ibid, 338. Compare Rosalyn Higgins, Problems and Process – International Law and How We Use it, Clarendon Press, Oxford, 1994, 22-28 and 103. References to opposing views are collected by Higgins, ibid, 26-28.

259 Schachter, ibid, 338.

260 Meron, note 255 above, 44. See also Meron's discussion of the issue at 77-78 and 113 (relying on the International Court of Justice's decision in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 122 above).

261 Meron, ibid, 99-101, 113.

sion, and their focus on the protection of individuals within the state rather than on the reciprocal interests of states".[262]

Dame Rosalyn Higgins questions Professor Schachter's basis for adopting a distinctive approach to the establishment of customary human rights.[263] Instead she suggests that if a more liberal approach is to be taken to the establishment of certain rules of custom, it is to be justified by reference to more general differences between customary norms. The *opinio juris* required to establish a *proscriptive* rule of custom (such as the prohibition of genocide, but also, it seems, other proscriptive rules that are not related to human rights) may not be the same as that required to establish a customary rule setting out "mandatory techniques" governing the resolution, for example, of boundary delimitation disputes, or rules that establish "jurisdictional entitlements" (such as a State's entitlement to claim an exclusive economic zone).[264]

The particular approach that is taken to the requirements to establish rules of customary international law will have potential significance to the range of human rights that are recognised as having customary status. Catalogues of customary human rights will be considered below.

A second preliminary point on customary human rights relates to the relationship between customary international law and treaty obligations. Under international law States are generally free to enter treaties that vary the operation of rules of customary international law in so far as they affect treaty parties. A treaty, however, cannot affect the operation of customary law in relation to States that are not parties to the treaty. This is by virtue of the *pacta tertiis* rule, which is enshrined in Article 34 of the *Vienna Convention on the Law of Treaties*, 1969.

The general rule allowing for treaty restriction of customary obligations, however, appears to be inapplicable in relation to human rights protected under customary international law for at least three reasons. The first reason is that a number of human rights protected under customary international law are accepted and recognised by the international community of States as being peremptory norms (*jus cogens*) from which no form of treaty derogation is permitted.[265] Peremptory norms will be considered further in Chapter 4.

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262 Ibid, 131.

263 Higgins, note 258 above, 20-21.

264 Ibid, 30-31.

265 Peremptory norms are dealt with, *inter alia*, in Article 53 of the *Vienna Convention on the Law of Treaties*, note 62 above. Article 53 provides that:

> "[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 by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Secondly, treaties recognising human rights are said to reflect the rejection of the view held in former times that States were the only subjects of international law.[266] If the rejection of this view is accepted and individuals are now recognised as true subjects of international law,[267] then the question arises whether the *Pacta tertiis nec nocent nec prosunt* rule (or some variation of it) should not then operate to preclude States from varying the legal rights of individuals without their consent.[268] The general absence of procedural mechanisms for individuals to raise such a *pacta tertiis* claim does not appear to undermine the claim's existence.[269] Enforcement of human rights is addressed further below.

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266 Lauterpacht, note 147 above, 3-72; and Higgins, note 258 above, 48-55.

267 Whether as a result of positive recognition of international legal personhood by States in human rights treaties or in other forms of State practice, or by virtue of some form of natural law theory – see Lauterpacht, ibid, 69.

268 Compare the discussion of individuals as third parties in Chinkin, note 167 above, 13-15, 120-122 and 131-133; and the discussion of human rights by Michael Byers, Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules, 66 Nordic Journal of International Law 211, 235 (1997). Note also that the International Law Commission appeared to acknowledge the application of the *pacta tertiis* rule to international organisations in its draft articles on the law of treaties involving international organisations – see Yearbook of the International Law Commission 1982, Volume II, Part 2, 42-48. The *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, done at Vienna on 21 March 1986, UN Doc A/CONF.129/15, not yet in force, reprinted in 25 ILM 543 (1986), with the exception of one article, essentially reproduces the Commission's draft articles on "third organizations". Compare, International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, 59-60, 83 and 137, paras 109, 154 and 269; and International Law Commission, Tenth report on reservations to treaties by Mr Alain Pellet, Special Rapporteur, Addendum, UN Doc A/CN.4/558/Add.1, 14 June 2005, 27-34, paras 116, 122 and 123-130.

269 According to Sir Hersch Lauterpacht, writing in 1950:

> "[i]f States were to declare, solemnly and without equivocation, that they recognise certain inalienable rights of the individual – as they have done to some extent in the Charter of the United Nations – that declaration would amount to constituting individuals subjects of international law even if it were not accompanied by the concession to them of the faculty of independent action to enforce these rights. There is a clear distinction between procedural capacity and the quality of a subject of law" – Lauterpacht, note 147 above, 54.

Compare the similar but more general point made by the International Court of Justice on a number of occasions, including in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 27 February 2007, para 148. Contrast the observations of Joel P Trachtman, "Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier

Thirdly, to the extent that customary human rights obligations are not also peremptory norms, the *erga omnes* character of customary obligations appears to restrict the freedom of States to enter *inter se* agreements purporting to restrict these obligations. *Erga omnes* obligations will be considered in more detail below and in Chapter 4. For present purposes it is perhaps sufficient to note that they reflect the collective interest of States. As was noted above, the International Court of Justice recognised as early as 1951 that human rights treaty obligations did not simply involve standard synallagmatic obligations:

> "The [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d' être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspire the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[270]

According to Sir Gerald Fitzmaurice human rights obligations are of an "absolute rather than a reciprocal character".[271] Whilst Bruno Simma is correct to emphasise, following the European Court of Human Rights,[272] that human rights treaty

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(eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 357, 377.

270 *Reservations to the Convention on Genocide, Advisory Opinion*, note 215 above, 23.

271 See International Law Commission, Second Report on the Law of Treaties by Mr GG Fitzmaurice, Special Rapporteur, Yearbook of the International Law Commission 1957, Volume II, 16, 54, para 126. Sir Gerald also used the word "integral" to describe this characteristic of human rights obligations – ibid, 55, para 128. The International Law Commission used the word "integral" to describe such obligations in its 1966 commentary to the draft Vienna Convention – see, for example, Yearbook of the International Law Commission 1966, Volume II, 215-216, . For a detailed discussion of notions of reciprocal, integral and interdependent obligations see Joost Pauwelyn, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature? 14 European Journal of International Law 907 (2003).

272 Simma, note 219 above, 367-368, relies on the following passages from the decision of the Court in *Ireland v United Kingdom* (at para 239):

> "Unlike international treaties of the classic kind, the [European] Convention [on Human Rights] comprises *more than* mere reciprocal engagements between contracting States. It creates, *over and above* a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."

[Emphasis added by Professor Simma (as he then was).]

obligations retain a synallagmatic dimension,[273] their absolute or integral character is nonetheless formally reflected in, for example, the law of treaties. Thus under Article 60(5) of the *Vienna Convention on the Law of Treaties*, 1969, the violation by one treaty party of protective human rights obligations does not legally justify another party to suspend its protective obligations. A similar rule applies in relation to *inter se* modification of treaties under Article 41 of the *Vienna Convention*.[274] What applies in relation to treaty obligations that are *erga omnes partes*[275] appears to apply *a fortiori* to obligations owed *erga omnes* under general international law. Bruno Simma made the point explicitly in his Hague Academy lectures in 1994:

> "… obligations *erga omnes* flow from a certain class of norms the performance of which is owed to the international community as a whole … . If the international community as a whole considers observance of these rules essential, individual States cannot be allowed to contract out of them in their relations *inter se*, and the performance of such essential obligations for the common benefit is due to all members of this community, not just to one or more States engaged in a particular *quid pro quo*."[276]

To the extent that human rights obligations under customary international law are obligations owed *erga omnes* then *inter se* restriction by treaty is not permitted[277] under international law.

Another preliminary point in relation to the general character of customary obligations relates to the so-called "persistent objector" rule. According to this rule a State that persistently objects during and after the creation of a new rule of customary international law can thereby avoid obligation under the customary rule.[278] In relation to human rights obligations, the status of certain obligations as peremptory norms again appears relevant. It appears that many international scholars hold the view that the persistent objector rule has no application in relation to

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273 Simma, ibid, 368-373.

274 See Article 41(1)(b)(ii) of the Vienna Convention, note 62 above.

275 See Articles 42(b) and 48(1)(a) of the *Articles on the Responsibility of States for Internationally Wrongful Acts* ("*Articles on State Responsibility*") – see Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, General Assembly Official Records, 56th Session, Supplement Number 10, 54 and 56.

276 Simma, note 219 above, 300-301.

277 The legal consequences of entering into a treaty to restrict customary human rights obligations would appear to depend on whether those obligations are of a peremptory character. If so, then at the very least the conflicting treaty provision would be void. If the customary obligation is of an *erga omnes* character but is *not* a peremptory norm then the conflict may only give rise to State responsibility.

278 Jennings and Watts, note 140 above, Volume I, 29-30.

peremptory norms.[279] If this view is correct then all States (whether or not they are persistent objectors) will be bound by peremptory norms requiring the protection of human rights. Leaving these preliminary points, attention will now be turned to the question of which human rights appear to have customary law status.

Various attempts have been made to catalogue those human rights protected under customary international law. Such attempts have been the subject of controversy.[280] Controversy has also surrounded the precise content of those rights characterised as customary.[281]

The American Law Institute in its third Restatement of the Foreign Relations Law of the United States[282] under the heading "Customary International Law of Human Rights" characterises the customary law position as follows:

> "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or

279 See Jonathan I Charney, Universal International Law, 87 American Journal of International Law 529, 541 (1993); and Gennardy M Danilenko, International *Jus Cogens*: Issues of Law-Making, 2 European Journal of International Law 42, 50-51 and 64-65 (1991). For possible justifications for this position, see AJJ de Hoogh, The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective, 42 Austrian Journal of Public and International Law 183, 186-187 and 189 (1991).

280 See, for example, Simma and Alston, note 63 above, 85, 88-100; and Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law – A Feminist Analysis, Manchester University Press, Manchester, 2000, 70-77. For more general concerns in relation to customary law – see Luigi Condorelli, "The Role of General Assembly Resolutions", in Cassese and Weiler, note 204 above, 37, 44, who refers to customary law as being "in a state of crisis"; and Robert Y Jennings, "The Identification of International Law" in Bin Cheng (ed), International Law Teaching and Practice, Stevens and Sons, London, 1982, 3, 5 who complains that "most of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble customary law".

281 See for example Anthony D'Amato, The Significance and Determination of Customary International Human Rights Law: Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 25 Georgia Journal of International and Comparative Law 47, 48-49 (1995-96).

282 Restatement, note 242 above.

(g) a consistent pattern of gross violations of internationally recognized human rights."[283]

The Institute acknowledges that these may not be the only rights having satisfied the criteria for customary status. It is argued, however, that the rights in this list were "generally accepted" as customary and that their "scope and content" were also "generally agreed".[284]

The Restatement in §702(g) refers to a violation of customary international law where there has been "a consistent pattern of gross violations of internationally recognized human rights." Comment *m* to §702 explains clause (g) in the following terms:

> "The acts enumerated in clauses (a) to (f) [of §702] are violations of customary law even if the practice is not consistent, or not part of a 'pattern', and those acts are inherently 'gross' violations of human rights. Clause (g) includes other infringements of recognized human rights that are not violations of customary law when committed singly or sporadically (although they may be forbidden to states parties to the International Covenants or other particular agreements); they become violations of customary law if the state is guilty of a 'consistent pattern of gross violations' as state policy. … All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants … are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. Consistent patterns of violation of such rights as state policy may be deemed 'gross' *ipso facto*. These include, for example, systematic harassment, invasions of the privacy of the home, arbitrary arrest

283 Ibid, Volume 2, §702, 161. The Restatement links this list of customary obligations to those which are *erga omnes* – §702, Comment *o*, 167. *Jus cogens* status is also limited to the above list (excluding paragraph (g) of §702) – §702, Comment *n*, 167. A catalogue of customary human rights has also been effectively provided by the Human Rights Committee in General Comment 24 (52), note 218 above. The Committee suggests that the following rights have customary status:

> "… [protection from] slavery, … torture, … subject[ing] persons to cruel, inhuman or degrading treatment or punishment, … arbitrarily … [depriving] persons of their lives, … arbitrarily arrest[ing] and detain[ing] persons, … deny[ing] freedom of thought, conscience and religion, … [presuming] a person guilty unless he proves his innocence, … [executing] pregnant women or children, … [permitting] the advocacy of national, racial or religious hatred, … deny[ing] to persons of marriageable age the right to marry, or … deny[ing] to minorities the right to enjoy their own culture, profess their own religion, or use their own language" – paragraph 8. The Committee also suggests (in the same paragraph) that there exists a general customary right to a fair trial.

For a governmental response to the Committee's catalogue – see Lillich, note 253 above, 20, footnote 101. Compare Human Rights Committee, General Comment No 29, States of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 13.

284 Restatement, ibid, Volume 2, §702 Comment *a*, 161-162.

> and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave a country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination."[285]

The reporter's notes to §702 attempt to justify §702(g) by reference to practice within the UN under resolution 1503 of the Economic and Social Council,[286] from which the phrase "consistent pattern of gross violations" was drawn.[287] Professor Schachter, who adopts a similar approach,[288] refers to a "prudential justification" for such a customary threshold. He argues that "to cover all [human rights] violations, however isolated or sporadic, would open the way to international scrutiny and counter-charges on a wide scale. Perhaps this would deter some violations but it might also lead to political applications that would, in the end, have negative effects for human rights".[289]

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285 Ibid, Volume 2, §702, Comment *m*, 166-167.

286 Resolution 1503 (XLVIII) adopted by the Economic and Social Council on 27 May 1970 at its 48th session, Economic and Social Council – Official Records, Resumed 48th Session, 11-28 May 1970, Resolutions, Supplement Number 1A, 8-9. See also resolution 1235 (XLII) adopted by the Economic and Social Council on 6 June 1967 at its 42nd session, Economic and Social Council – Official Records, 42nd Session, 8 May – 6 June 1967, Resolutions, Supplement Number 1, 17-18. The procedures established by these resolutions have been subsequently modified. For a description of their operation, see Steiner and Alston, note 65 above, 611-641.

287 Comment *m* to §702 provides that a violation of a human right is "gross" if it "is particularly shocking because of the importance of the right or the gravity of the violation" – Restatement, note 242 above, Volume 2, §702, Comment *m*, 166.

288 According to Professor Schachter "[o]n the evidence of State practice to date, the customary law of human rights will generally limit international responsibility and remedies to cases of gross and systematic violations of human rights" – Schachter, note 120 above, 341. In the footnote to this passage Professor Schachter acknowledges that "[i]n some cases even a single act would be so grave and shocking as to constitute a customary law violation. A government that engaged in or encouraged genocidal conduct, slavery, mass murder or torture would violate customary law, whether or not such acts were part of a pattern or systematic practice. However, most other violations of human rights – even if treaty breaches – would probably not fall within customary law unless they occurred in a consistent pattern or on so substantial a scale as to shock international opinion." Contrast the views of Professor Meron, note 255 above, 103-106.

289 Schachter, ibid, 341. This form of threshold may have gender implications. Commenting on the human rights work of the Charter based institutions, Steiner and Alston comment that their "principal emphasis is not on what might be termed persistent, endemic, and commonplace violations that are often ignored by other states – including such serious violations as systematically entrenched discrimination against women or particular

As suggested in comment *m* quoted above, single violations of rights contained in human rights treaties may be the subject of individual or State complaints under particular treaty procedures.[290] In the view of the authors of the Restatement, however, violation of *customary* human rights obligations will generally require the crossing of the threshold of "consistent pattern of gross violations".[291]

Whilst not in the Institute's primary list, the following prohibitions are considered as possibly having attained customary status (if breaches occur as a matter of State policy):

– Systematic religious discrimination;[292]
– Gender discrimination;[293] and
– Denial of a core right to property.[294]

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minority groups, or control of the press" – Steiner and Alston, note 65 above, 602. For a discussion of possible reasons for the failure of States and international institutions to characterise violations of the human rights of women as "gross" violations – see Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law, 85 American Journal of International Law, 613, 621-634 (1991).

290 See, for example, the capacity to complain about isolated human rights violations under Articles 33 and 34 of the ECHR, note 32 above; and under Article 2 of the first optional protocol to the ICCPR, note 23 above.

291 This may not mean that States are unable to complain about individual breaches of human rights on the part of other States. There may be a distinction between State responsibility for violation of customary human rights and circumstances in which States are entitled to raise single human rights violations in other States. See the discussion of *droit de regard* in Simma and Alston, note 63 above, 99; and para 2 of the International Law Commission's commentary to Article 42 of the *Articles on State Responsibility*, note 275 above, 294-295. The entitlement to complain may instead be within the domestic jurisdiction of the State *concerned* about human rights – see Louis Henkin, "Human Rights and 'Domestic Jurisdiction'" in Thomas Buergenthal (ed), Human Rights, International Law and the Helsinki Accord, Allanheld, Osmun, Montclair, 1977, 21, 36.

292 Restatement, note 242 above, Volume 2, §702 Comment *j*, 165 – "… there is a strong case that systematic discrimination on grounds of religion as a matter of state policy is also a violation of customary law".

293 Ibid, Volume 2, §702 Comment *l*, 166 – "Gender-based discrimination is still practised in many states in varying degrees, but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law". Professor Louis Henkin, who was chief reporter for the American Law Institute, apparently commented in 1994 that if he were drafting §702 in 1994, he would have included, *inter alia*, freedom from gender discrimination – Lillich, note 253 above, 7, footnote 43.

294 Restatement, ibid, Volume 2, §702 Comment *k*, 165-166 – "All states have accepted a limited core of rights to private property, and violation of such rights as state policy, may already be a violation of customary law". The presence of debates about the right to property in the literature on linkage of trade and human rights – see, for example, Petersmann, note 186 above, 639-641; and Philip Alston, Resisting the

One controversial feature of the Restatement's catalogue of customary rights has

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Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 European Journal of International Law 815, 827-828 (2002) – appears to justify brief consideration of the customary status of a human right to property. The right to property appears to be a fundamental civil right in the Western Liberal tradition – see, for example, John Locke, Two Treatises of Government, edited by Peter Laslett, Cambridge University Press, Cambridge, 1960, Second Treatise, §124, 368-369; and the reference to the right to property in Article 2 of the French Declaration of the Rights of Man and of the Citizen (1789), note 18 above. The right finds expression in the Article 17 of the UDHR, note 4 above, but receives no express protection in the ICCPR. The preparatory work of the ICCPR apparently indicates that there was general support for the existence of a human right to property – controversy arose instead as to the permissible limitations on the right – see Catarina Krause, "The Right to Property", in Eide, Krause and Rosas, note 66 above, 191, 194. Note also Article 5(2) of the ICCPR, note 10 above, which provides that:

> "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

Article 15(1)(c) of the ICESCR, note 10 above, provides for the protection of "moral and material interests resulting from any scientific, literary or artistic productions…". Article 12(5) of the *Convention on the Rights of Persons with Disabilities*, note 28 above, provides that "… States parties … shall ensure that persons with disabilities are not arbitrarily deprived of their property". The right to property is protected by Article 1 of the first protocol to the ECHR, note 13 above (although the discretion to limit enjoyment of the right is more broadly drafted than other limitation clauses in the ECHR); by Article 21 of the American Convention, note 10 above; and by Article 21 of the African Charter, note 12 above. For various other treaty provisions that refer to rights in relation to property that appear to be relevant to the existence of a human right to property under customary international law, see Krause, ibid, 195-197. The rules of customary international law that have developed in relation to the protection of a State's nationals in cases of foreign nationalisation and expropriation of property owned abroad appear consistent with the existence of a human right to property and its corollary, a right to compensation for its infringement, although, as noted by Professor Brownlie, "[a] careful synthesis of human rights standards and the modern 'treatment of aliens' standards is called for" – Ian Brownlie, Principles of Public International Law, 6th ed, Oxford University Press, Oxford, 2003, 505. Developments since the end of the Cold War also support the existence of a customary human right to property – see, for example, the Charter of Paris for a New Europe adopted by representatives of 33 States at the Conference on Security and Cooperation in Europe held in Paris from 19-21 November 1990 which included under the heading "Human Rights, Democracy and the Rule of Law" reference to "the right … to own property alone or in association and to exercise individual enterprise". The Charter is reprinted in 30 ILM 190 (1991); see also resolution 45/98, adopted (without vote) by the UN General Assembly on 14 December 1990. The controversy in relation to property appears to focus less on whether there exists a human right to property protected under international law, and instead focuses on the content of the right.

been the rights that were not included.[295] Absent from the Restatement's list of customary law human rights are economic and social rights.[296] The close correlation between the Restatement's catalogue of customary rights and rights protected under the United States Constitution has been noted by others writing in the field.[297]

Professor Schachter endorses the Restatement's list of customary rights[298] but goes on to note that other rights may have acquired customary status. He refers to the advocacy of others in favour of the customary status of rights such as:

– The right to self-determination of peoples;[299]
– The individual right to leave and return to one's country; and
– The principle of *non-refoulement* for refugees threatened by persecution.[300]

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295 Professors Simma and Alston have offered the following observation on the Restatement's catalogue of customary human rights:

> "The end result of the *Restatement*'s analysis is, at best, suspiciously convenient. The great majority of rights considered important under U.S. law, as well as virtually every right which recent U.S. governments have been prepared to criticize other governments for violating, are held to be part of customary international law. By contrast, none of the rights which the U.S. fails to recognise in its domestic law, is included. In the final resort it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine" – Simma and Alston, note 63 above, 95.

296 The Reporter's Notes, which do not formally have the endorsement of the American Law Institute, do not rule out "basic" economic and social rights benefiting from the protection of customary law in cases of consistent patterns of gross violations, such as where some or all of a State's population are "purposefully starved or denied basic human needs" – Restatement, note 242 above, Volume 2, §702 Reporter's note 10, 174.

297 Simma and Alston, note 63 above, 94. It is noteworthy that in the Restatement's catalogue of customary rights, the rights have all been cast in negative terms, ibid, Volume 2, §702, 161. Note also how the right to life has been characterised in terms of a prohibition of murder. Compare the Human Rights Committee's General Comment on Article 6 of the ICCPR, discussed in Philip Alston, "International Law and the Human Right to Food", in P Alston and K Tomaševski (eds), The Right to Food, Martinus Nijhoff, Dordrecht, 1984, 9, 25. For a discussion of characterisations of rights as positive or negative and the view that all human rights give rise to positive duties, see Steiner and Alston, note 65 above, 180-186. For responses to the views expressed by Simma and Alston from a United States based academic – see Lillich, note 280 above. Lillich's article introduces a number articles dealing with human rights and customary international law.

298 Schachter, note 120 above, 338.

299 There is significant controversy surrounding the content and holders of this right – see generally A Cassese, Self Determination of Peoples, Cambridge University Press, Cambridge 1995; and Crawford, note 128 above.

300 Schachter, note 120 above, 339. See also Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion" in Erika Feller,

Professor Schachter reviews Theodore Meron's argument that due process rights are also customary.[301] Professor Schachter suggests that the failure in many municipal systems to accord due process rights undermines a claim for customary status.[302] In this context reference can also be made to comment *f* of §702 of the Restatement in relation to the customary prohibition of murder. In that comment, the customary rule is defined as killing individuals "other than as lawful punishment pursuant to conviction in accordance with due process of law".[303]

Professor Schachter suggests that certain economic and social rights may now be accepted as "general international law".[304] He lists:

– The right to basic sustenance;[305]
– The right to public assistance in matters of health, welfare and basic education; and
– The right to freedom of association in a labour context.[306]

Absent from this list are some of the economic and social rights listed in the UDHR and the ICESCR.[307] That there is additional difficulty in establishing customary status for economic and social rights is borne out by the case of a right to social security.[308] As already noted, the failure to provide social security benefits does not appear to elicit the same response from the international community as the commission of torture. Nor do all States that fail to provide social security benefits

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Volker Türk and Frances Nicholson (eds), Refugee Protection in International Law – UNHCR's Global Consultation on International Protection, Cambridge University Press, Cambridge, 2003, 87.

301 Meron, note 255 above, 96-97.

302 Schachter, note 120 above, 339.

303 Restatement, note 242 above, Volume 2, §702, 163. Compare Meron's discussion of the relationship between the non-derogable right to life in Article 6(1) of the ICCPR and the derogable due process rights in Article 14 of the same treaty – Theodor Meron, Human Rights Law-Making in the United Nations – A Critique of Instruments and Process, Clarendon Press Oxford, 1986, 93-100. The International Committee of the Red Cross commentary to Geneva Convention IV considers that certain due process rights reflect "universally recognized legal principles and fundamental notions of justice recognized by all civilized nations" – Meron, note 255, 50.

304 Schachter, note 120 above, 340. Professor Schachter's subsequent reference to general principles as an alternative legal foundation for human rights (342) suggests that his reference to "general international law" was intended as synonymous with customary law.

305 For a comparative analysis of international efforts to protect human rights and "basic needs" development strategies advocated principally in the 1970s see – Philip Alston, Human Rights and Basic Needs: A Critical Assessment, 12 Revue des Droits de l'Homme 19 (1979).

306 Schachter, note 120 above, 340.

307 Compare, for example, Article 23 of the UDHR, note 4 above.

308 See Article 22 of the UDHR, ibid, and Article 9 of the ICESCR, note 10 above.

display particular sensitivity when this is noted abroad.[309] Thus, even accepting a lower threshold for the establishment of human rights norms under customary international law, there appears to be greater difficulty in establishing customary status for certain economic and social rights.[310]

Notwithstanding this conclusion, core rights in relation to food,[311] health[312] and education[313] do appear to have customary status. Evidence in support of the assertion that core rights to food, health and education are customary includes:

– The presence of such rights in the UDHR and the level of State support for this instrument;[314]
– The presence of such rights in the ICESCR and the number of States party to this treaty;[315]
– The protection of such rights in other multilateral treaties both global and regional;[316]

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309 Denial or attempts to hide occurrence which is symptomatic of torture appear to be largely absent in this area. Even States party to the ICESCR have failed to take steps to implement the right to social security in Article 9. See, for example, Kuwait's reservation/interpretative declaration to 9 of the ICESCR (although note the various objections to the Kuwaiti position) – reservations, interpretative declarations and objections to reservations to the ICESCR are available at <http://www.ohchr.org/english/countries/ratification/3.htm>, visited on 3 May 2007. See also Yash Ghai, "Rights, Social Justice, and Globalisation in East Asia", in Joanne R Bauer and Daniel A Bell (eds), The East Asian Challenge for Human Rights, Cambridge University Press, Cambridge 1999, 241, 257-258.

310 The ambivalent State practice reflected in the terms and level of adherence to treaties such as the European Social Charter, note 12 above, should also be noted. Article 20 paragraph 1(b), for example, requires States parties to secure 5 of 7 listed rights.

311 According to Alston, note 297 above, 14, "[w]hether on the basis of treaty obligations, of customary international law principles, or of established practice, all states in the international community have recognized the existence of the right to adequate food". For a discussion of relevant treaty provisions, see Asbjørn Eide, "The Right to an Adequate Standard of Living Including the Right to Food" in Eide, Krause and Rosas, note 66 above, 133.

312 See generally Hunt, note 66 above, Chapter 3; and Brigit Toebes, "The Right to Health" in Eide, Krause and Rosas, ibid, 169.

313 See generally Manfred Nowak, "The Right to Education" in Eide, Krause and Rosas, ibid, 245. See also the Committee on Economic, Social and Cultural Rights' General Comment 11, Plans of action for primary education (Article 14), UN Doc E/C.12/1999/4 (1999); and General Comment 13, the right to education (Article 13), UN Doc E/C.12/1999/10 (1999).

314 See Articles 25 and 26 of the UDHR, note 4 above. For references relevant to the international legal significance of the UDHR, see note 9 above.

315 See Articles 11, 12 and 13 of the ICESCR, note 10 above.

316 See, for example, Articles 24, 28 and 29 of the *Convention on the Rights of the Child*, note 12 above; Articles 11 and 13 of the *European Social Charter*, note 12 above;

– The practice of and within international bodies. This includes the activities of bodies such as the World Health Organisation[317] and the Food and Agricultural Organisation.[318] Both organisations, however, do not appear to have emphasised the normative dimension of their activities.[319]

Establishing the *content* of core rights to food, health and education under customary international law poses significant difficulties. One possible approach is to rely on the jurisprudence of Committee on Economic, Social and Cultural Rights (which oversees compliance with the ICESCR). The Committee's general comments on the rights to health and education under the ICESCR recognise core aspects of each of these rights.[320] Thus it might be argued that there are at least customary rights to:

– sufficient food in order to ensure survival;
– basic primary health care especially for the most vulnerable; and
– access to primary education.

As noted above, a general right to welfare under customary international law is difficult to sustain. A core right to shelter, however, can be asserted using similar arguments to those employed in relation to food, health and education.[321]

Article 17 of the *European Social Charter (revised)*, note 89 above; and Articles 10 to 12 of the Protocol of San Salvador, note 71 above.

317 See the discussion of the role of the World Health Organization in Hunt, note 66 above, 123-137. See also Brigit Toebes, Towards an Improved Understanding of the International Human Right to Health, 21 Human Rights Quarterly 661 (1999).

318 Alston, note 297 above, 13-14.

319 Alston has observed that "[b]y and large, international law dealing with food issues has succeeded in remaining hermetically sealed from human rights issues" – ibid, 14; and Hunt, note 66 above, 108.

320 Food – see General Comment 12, Right to adequate food (Article 11), UN Doc E/C.12/1999/5 (1999) paragraphs 6 and 8. See also the Limburg Principles, UN Document E/CN4/1987/17, Annex, Principle 25; compare Alston, note 297 above, 33-34, who identifies problems with a minimalist approach to the right to adequate food. For criticisms of the view that there are core rights obligations arising out of the ICESCR, see Dennis and Stewart, Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health, note 70 above.
Education – See General Comments 11 and 13, note 313 above, in particular paragraph 57 of General Comment 13.

321 See, for example, Article 25 of the UDHR, note 4 above; and Article 11 of the ICESCR, note 10 above. See also the Committee on Economic, Social and Cultural Rights, General Comment 4, the right to adequate housing (Article 11 (1) of the Covenant) (Sixth session, 1991), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Document HRI\GEN\1\Rev.8, 8 May 2006, 19, although note the Committee's view (in paragraph

One advantage in seeking to establish core customary economic and social rights is that obligations in respect of these rights can be seen to apply to States regardless of levels of development. Variable obligations under the ICESCR dependent on levels of development appear to be provided for in the text of Article 2(1) of the treaty and are further regulated by the specific human right standards set down in subsequent articles of the treaty. Variable operation of the ICESCR does not necessarily render the treaty ineffectual. Variable customary obligations, however, would pose practical difficulties.[322]

A strong case in favour of customary status for economic and social rights can be made in respect of certain rights recognised by certain ILO conventions. A core of rights set out in ILO conventions with near universal adherence are likely candidates for customary status.[323]

In addition and as already noted, a variant of the authoritative interpretation argument[324] deployed in relation to the UN Charter has been used in relation to core labour rights the subject of ILO treaties. In 1950 the ILO recognised that membership of the organisation required a commitment to freedom of association regardless of whether particular State members had bound themselves to the relevant conventions addressing freedom of association.[325] A similar approach was followed in 1998 when the International Labour Conference[326] adopted the

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7) that "... the right to housing [under the ICESCR] should not be interpreted in a narrow or restricted sense which equates it with, for example, the shelter provided by merely having a roof over one's head. ... Rather it should be seen as the right to live somewhere in security, peace and dignity." See also Scott Leckie, "The Human Right to Adequate Housing" in Eide, Krause and Rosas, note 66 above, 149.

322 Such difficulties may not be insurmountable. If the International Court of Justice, for example, were to elaborate concrete criteria for imposing variable standards then the position would be little different to that under the ICESCR. The major difficulty is finding evidence in support of a concrete customary rule.

323 See the *Convention concerning Freedom of Association and Protection of the Right to Organise* (Number 87) and the *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (Number 98), note 76 above; the *Convention concerning Forced or Compulsory Labour* (Number 29), note 85 above; the *Convention concerning the Abolition of Forced Labour* (Number 105), note 40 above; and the *Discrimination (Employment and Occupation) Convention* (Number 111), note 76 above. Note also the *Convention concerning Minimum Age for Admission to Employment* (Number 138), note 85 above; the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (Number 182), note 76 above; and Articles 20 and 23 of the UDHR, note 4 above.

324 See the discussion in the text accompanying note 235 above.

325 See Valticos and von Potobsky, note 71 above, 295-296.

326 The main decision-making body of the International Labour Organization – described in Valticos and von Potobsky, ibid, 40-41.

ILO "Declaration on Fundamental Principles and Rights at Work".[327] Again, the justification offered for the Declaration was that commitment to these principles and rights[328] was "an obligation arising from the very fact of membership" of the ILO.[329] Four rights are set out in the Declaration:

> "(a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation."[330]

The 1998 Declaration differs significantly from the 1950 Freedom of Association procedure in that the 1998 mechanism does not provide a complaints-based procedure.[331] Developing State concerns over disguised protectionism and attempts to undermine their comparative advantage[332] appear to have ensured that the 1998 Declaration remained "strictly promotional".[333] Nonetheless, a commitment by the ILO (which has over 170 State members) to these rights is important evidence in support of these rights having customary status.[334]

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327 The Declaration on Fundamental Principles and Rights at Work, note 241 above.

328 Paragraph 2 of the Declaration, ibid, refers to both "principles" and "rights".

329 Ibid, paragraph 2.

330 Ibid.

331 Hilary Kellerson, The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future, 137 International Labour Review 223 (1998). On the effectiveness of the 1998 declaration and wider implications of the approach adopted in 1998 see the exchange between Alston, Languille and Maupain in the European Journal of International Law, note 241 above.

332 Paragraph 5 of the Declaration, note 241 above, expressly refers to both concerns.

333 Ibid, Annex – Follow-up to the Declaration, paragraph 1.

334 For a discussion of other State practice in support of customary labour norms, see Organisation for Economic Co-operation and Development, Trade, Employment and Labour Standards, OECD, Paris 1996. See also Organisation for Economic Co-operation and Development, International Trade and Core Labour Standards, OECD, Paris 2000, 19 and 81 where it is reported that though there were no votes opposing the adoption of the Declaration in the International Labour Conference, there were 43 abstentions. Given that the Conference is made up of States and associations of employees and employers, it is not clear how many States abstained. The same OECD report (at 83) notes that 15 States that abstained from the vote on the 1998 declaration have subsequently submitted reports in accordance with the declaration. For a discussion of unilateral United States action in relation to labour rights, see Philip Alston, "Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism?'" in Lance A Compa and Stephen F Diamond (eds), Human Rights, Labor Rights, and International Trade, University of Pennsylvania Press, Philadelphia, 1996, 71. For Dutch proposals, see Recommendation on Minimum Labour Standards, National

Examining more closely the four rights identified in the 1998 Declaration, it can be noted that freedom of association appears in both the ICCPR[335] and ICESCR[336] and has both individual and collective aspects.[337] The right to collectively bargain is a collective right. ILO jurisprudence on the right links it with the right to strike.[338] Some uncertainty exists in relation to this right, particularly in the context of non-governmental employees.[339]

Claims that there exists a customary prohibition in respect of child labour appear to be vulnerable to assertions that any prohibition must be dependent on levels of development and poverty.[340] There are a number of ILO conventions which set down minimum ages for employment in maritime, industrial and non-industrial sectors.[341] Essentially the basic minimum age is either 14 or 15 years depending on the convention and the industry. In the case of the worst forms of

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Advisory Council for Development Cooperation, The Netherlands Ministry of Foreign Affairs, The Hague, 1984. See also Regulation No 980/2005, 27 June 2005, of the European Union Council "applying a scheme of generalised tariff preferences", Official Journal of the European Union L 169/1, 30 June 2005. Note in particular its reference to the 1998 ILO declaration (preambular paragraph 7) and the provision for temporary withdrawal of preferences where there have been "serious and systematic violations of the principles laid down in" specified ILO treaties in beneficiary States (Article 16 and Annex III).

335 Article 22 of the ICCPR, note 10 above.

336 Article 8 of the ICESCR, note 10 above. For a discussion of the interpretation of the Article 22 of the ICCPR in light of Article 8, see Rosalyn Higgins, The United Nations: Still a Force for Peace, 52 Modern Law Review 1, 6-7 (1989).

337 Article 8 of the ICESCR, ibid, protects the right of unions to establish or join larger organisations.

338 See generally Lee Swepson, Human rights law and freedom of association: Development through ILO supervision, 137 International Labour Review 169, 186-190 (1998); and Valticos and von Potobsky, note 71 above, 98.

339 Whilst ILO jurisprudence recognises the right to strike for government employees (with exceptions for essential services), the ICESCR requires that the right be "exercised in conformity with the laws of the particular country" – Article 8(1)(d). Controversy over the scope of any right to strike was referred to in the OECD Secretariat Report, Trade, Employment and Labour Standards, note 334 above, 35.

340 Valticos and von Potobsky, note 71 above, 220, assert that "[t]he minimum age for admission to employment, which depends to a great extent on the state of economic development, greatly varies from one country to another."

341 Ibid, 216-220. The most recent treaty is the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (Number 182), note 76 above. Note also Article 32 of the *Convention on the Rights of the Child*, note 12 above

child labour (such as prostitution and the making of pornography) the minimum age is set at 18 years.[342]

The conventions dealing with employment in maritime, industrial and non-industrial sectors include exceptions that allow, *inter alia*, for variations in minimum age based on levels of development.[343] As is usually the case in the area of human rights, the issue of municipal enforcement of such treaty standards is also problematic.[344]

Whilst variations in treaty standards in relation to child labour suggest additional difficulties in determining what customary standards may require, ILO jurisprudence provides evidence of specific, albeit complex customary norms. At least 157 States are bound by one of the three conventions which set either 14 or 15 years as the minimum age for admission to employment in industry.[345] This coupled with the 1998 Declaration and the absence of objection to minimum age limits points to the existence of a customary rule. Complexity in the content of customary labour norms should not be mistaken for an absence of legal standards.[346]

As already noted, a serious difficulty in establishing obligations to respect human rights under customary international law is the considerable distance between the apparent support for international human rights instruments *and* more tangible State practice in relation to human rights. The apparent hypocrisy of States that commit themselves on the international plane to respect human rights and then violate those same rights appears to have prompted Professors Schachter and Meron to offer their justifications for the existence of custom in the light of such schizophrenic State practice.[347] This State schizophrenia appears to have led other international lawyers to turn their attention away from customary international law and to consider whether human rights obligations might be treated as general principles of law, the third source of international obligation referred to in Article

342 See Article 2 of the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (Number 182), ibid.

343 Valticos and von Potobsky, note 71 above, 220.

344 Ibid, 220-221.

345 The three ILO conventions are *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment* (Number 5), adopted at Washington on 28 October 1919, entered into force on 13 June 1921, 38 UNTS 81 (1949), 6 parties as at 15 March 2007; the *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment* (Number 59), adopted at Geneva on 22 June 1937, entered into force on 21 February 1941, 40 UNTS 217 (1949), 11 parties as at 3 January 2003; and the *Convention concerning Minimum Age for Admission to Employment* (Number 138), note 85 above.

346 Compare *North Sea Continental Shelf, Judgment*, note 63 above, 41-42, para 72; and Final Report of the Committee on Formation of Customary (General) International Law, in International Law Association, Report of the Sixty-Ninth Conference, London, 25-29 July 2000, International Law Association, London, 2000, 712, 763-764.

347 See text accompanying note 257 above.

38(1)(c) of the Statute of the International Court of Justice.[348] Human rights obligations as general principles of international law will now be addressed.

(c) General Principles of Law

In an article in the early 1990s Bruno Simma and Philip Alston argued that human rights obligations could be derived from general principles of law.[349] Whilst some commentators have expressed misgivings as to the expansion of general principles of law into areas of substantive principle,[350] the jurisprudence of the International Court of Justice, as noted by Simma and Alston, offers some support for this approach in relation to human rights.[351] The Court, when it has referred to human rights, has done so by reference to "principles", suggesting that obligations in relation to human rights may derive from general principles of law rather than custom.[352]

By focusing on expressions of consent rather than more tangible practice, the approach seeks to avoid the difficulties created by inconsistent State practice in relation to human rights.[353] The focus is instead on what States have generally "accepted and recognised".[354]

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348 See generally Simma and Alston, note 63 above. Compare the Restatement, note 242 above, Volume 2, §702, Reporter's note 1, 167-168; Meron, note 255 above, 88-89; and Schachter, note 120 above, 54-55.

349 Simma and Alston, note 63 above, 101-108.

350 See, for example, Sir Humphrey Waldock, General Course on Public International Law, 106 Recueil des cours 1, 55-62 (1962, II); Antonio Cassese, "General Round-Up" in Cassese and Weiler, note 204 above, 165, 170-171; and Lillich, note 280 above, 15-18.

351 Simma and Alston, note 63 above, 105-106.

352 Ibid. Judge Tanaka in his dissent in the *South West Africa, Second Phase*, ICJ Reports 1966, 4, 298, made this link explicit. Note, however, that the Court referred to "fundamental rules" of humanitarian law that "… constitute intransgressible principles of international customary law" in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, note 121 above, 257, para 79. [Underlining added.]

353 Note the difference in the terminology used in Article 38(1)(c) of the *Statute of the International Court of Justice*, with its reference to "recognition", and in Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*, note 62 above, which refers to "agreement". Note also, however, the drafting history of what became Article 31(3) of the Vienna Convention – see note 250 above.

354 Simma and Alston explain their approach in the following terms:

> "… the recourse to general principles suggested here remains grounded in a consensualist conception of international law. Consequently, what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition that Schachter asks for – and finds – in order to arrive at customary law. However, this material is not equated with

Whilst Simma and Alston do not attempt to catalogue the specific rights which can be characterised as "general principles" they appear to support the inclusion of basic economic and social rights together with certain civil and political rights.[355] If it is accepted that obligations to ensure respect for civil and political rights *and* economic and social rights derive from general principles of law, one question that then arises is: Which rights (if any) beyond those catalogued by Professor Schachter *et al* as customary human rights would qualify as general principles?

The notion of consent may still work to exclude some of the rights included in the UDHR and other human rights instruments.[356] Whilst all economic and social rights contained in the UDHR might be said to be *recognised*, it is open to argue that the degree of *acceptance* of such rights (for example, within municipal laws) justifies some form of differentiation between different rights. A right not to be starved to death could therefore be regarded as a general principle of law whereas a right to periodic holidays with pay (as set out in Article 24 of the UDHR) could not be so characterised.[357] Fidelity to the consensual nature of the "general principles" approach appears to justify such differentiation.

State practice but is rather seen as a variety of ways in which in which moral and humanitarian considerations find a more direct and spontaneous 'expression in legal form'"

– [footnotes not reproduced] – note 63 above, 105.

355 Simma and Alston, ibid, 94-95.

356 Such as Article 24 of the UDHR, note 4 above.

357 A distinction between "acceptance" and "recognition" might be justified by reference to language of paragraphs (b) and (c) of Article 38(1) of the Statute of the International Court of Justice. Such a distinction would suggest a less onerous standard for establishing general principles of law (ie Article 38(1)(c) of the Statute only requires that the general principles be "*recognized* by civilised nations" [emphasis added]. Contrast Article 53 of the *Vienna Convention on the Law of Treaties*, note 62 above, that requires that peremptory norms be "accepted *and* recognized" by the international community. The form of words used in Article 53 of the *Vienna Convention* was apparently intended to reflect the language of paragraphs (b) and (c) of Article 38(1) of the *Statute of the International Court of Justice* – see the United Nations Conference on the Law of Treaties, Official Records, first session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and the meetings of the Committee of the Whole, UN Doc A/CONF.39/11, 471, paragraph 4 (Mr Yasseen, Chairman of the Drafting Committee of the conference). A restrictive interpretation of the term "recognized" in Article 38(1)(c) of the Statute of the Court that does not require practical acceptance by States of a principle, does not, however, accord with the views expressed as to the scope of what became article 38(1)(c) during the drafting of the Statute of the Permanent Court of International Justice in 1920. Raoul Fernandez, a Brazilian member of the committee established in 1920 to draft the statute, linked this source to "certain incontrovertible accepted principles of law" – Permanent Court of International Justice, Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, 345; Lord Phillimore pointed out that general principles of law were those "… which were accepted by all nations *in foro domestico*" – ibid, 335.

Having reached this conclusion, it might be suspected that in terms of a catalogue of rights, once the Restatement's apparent bias against economic and social rights is addressed, the "general principles" approach and Professor Schachter's modified custom approach will produce similar results. What appears certain is that the "general principles" approach will not produce a narrower catalogue of rights.

6. The Human Right to Development

Reference has already been made to the human right to development.[358] The right has had prominence in debates over trade and international economic relations.[359] The existence of international obligations in relation to the right could potentially (and controversially) be defended using the authoritative interpretation argument, customary law and general principles of law.[360]

The right to development has for a number of years been the subject of study by UN bodies.[361] The African Charter appears to be the only human rights treaty to expressly address the right.[362] The right was, however, solemnly declared by the General Assembly in 1986, albeit without unanimity.[363] The 1986 General Assem-

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358 See text accompanying note 112 above.

359 See note 114 above.

360 See, for example, Rosas, note 115 above, 123 and 126.

361 The Commission on Human Rights established four working groups that have considered the right – see resolution 36 (XXXVIII) of 11 March 1981; resolution 1993/22 of 4 March 1993; 1996/15 of 11 April 1996, 52nd session; and 1998/72 of 22 April 1998, 54th session. Resolution 1998/72 established an open-ended working group. See also General Assembly resolution 53/155, adopted on 9 December 1998. For developments up to 2001, see Alston, "Peoples' Rights: Their Rise and Fall", note 111 above, 284-286. The Commission on Human Rights also established a "High-Level Task Force on the Implementation of the Right to Development" by resolution 2004/7 adopted on 13 April 2004, 60th session. The Human Rights Council renewed the mandate of the open-ended working group in resolution 1/4, adopted on 30 June 2006.

362 See Article 22 of the African Charter, note 12 above, which provides:

> "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

363 Resolution 41/128, note 112 above, to which the Declaration was annexed, was passed by vote – 146 States voted for the resolution. One State voted against the resolution (the United States) and eight States abstained (Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom – most being significant providers of development assistance). A number of developed States voted in favour of the resolution. The United States has voted for at least one resolution referring to the right – see resolution 1994/21 of the UN Commission on Human Rights, 50th Session of the Commission, which includes a reference to the 1986 Declaration

bly declaration refers to a right which is at once both individual and collective.[364] The 1993 Vienna Declaration and Programme of Action "reaffirmed" the right to development[365] and the right was effectively reaffirmed by the General Assembly in resolution 60/1, which adopted the 2005 World Summit Outcome.[366]

Certain consequences potentially flow from the existence of a human right to development under international law. These include:

– The existence of a qualified obligation on developed States[367] to provide development assistance to developing States/peoples/individuals;[368]
– The existence of an entitlement for individuals and groups in developing States to participate in the determination of development priorities;[369] and
– An obligation on States to ensure that development assistance provided actually benefits individuals most in need.[370]

Two contentious features of the right to development relate to the scope of the right and who are the effective beneficiaries of the right. Difficulties associated with the scope of peoples' rights include the asserted "right and … duty" of States

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and the right to development. In explaining its vote the United States representative stated that "[the United States] Government had, a year previously, decided for the first time to accept references to the right to development and to seek a serious dialogue with other Governments on its content and meaning" – cited in Rosas, note 115 above, 125. The Declaration is referred to in European Union Council Regulation 980/2005 of 27 June 2005, note 334 above, preambular paragraph 7.

364 Article 1(1) of the Declaration, ibid, provides that:

> "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

365 Vienna Declaration and Programme of Action, note 19 above, Part I, paragraph 10, which provides that "[t]he World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights".

366 General Assembly resolution 60/1 of 16 September 2005, adopted without vote, paras 24(b) and 123.

367 In some formulations the international community collectively – see for example Katarina Tomaševski, Development Aid and Human Rights Revisited, 2nd ed, Pinter Publishers, London, 1993, 48.

368 See the discussion by Professor James Crawford, "The Rights of Peoples: Some Conclusions", in Crawford, note 70 above, 159, 172-173.

369 See the discussion in Orford, note 111 above, 138-139.

370 Crawford, note 368 above, 173. For a detailed analysis of the elements of the right, see also Brownlie, note 109 above, 7-18.

"to formulate appropriate national development policies…".[371] Professor David Makinson noted in 1988 that if a right includes freedom to choose the way in which the right is to be secured, then the prospect of conflict with other recognised human rights increases:

> "… [P]ermission to choose one's manner of doing something, even when hedged around with exceptive clauses, is radically more powerful than simple permission to do it. For it not only permits that it be done in some manner or other, but also permits whatever manner is in fact chosen, within the limits of whatever exceptive clauses are given or understood. For this reason, a conflict between the result of any such choice and the requirements of another norm constitutes an inconsistency between the norms themselves."[372]

Whether or not the right to development includes permission to choose the manner of development raises squarely the issue of the interrelation of human rights. This will be examined in Chapter 4. It suffices to note at this juncture that the 1986 Declaration expressly affirms both the indivisibility and interdependence of human rights.[373]

Identifying the beneficiaries of the right to development is also a controversial issue. During the 1980s, when the assertion of the right was at its peak, the beneficiaries of the right were denoted interchangeably as States and peoples. The

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371 See Article 3(2) of the Declaration on the Right to Development, note 112 above. The "right" and "duty" to formulate appropriate national development policies is qualified by Article 2 of the Declaration as these policies are to "aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

372 David Makinson, "The Rights of People: Point of View of a Logician" in Crawford, note 70 above, 69, 85. Makinson considers this concern in the context of the right to development at 87-89.

373 Article 9 of the Declaration, note 112 above, provides:

> "1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
> 2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights."

See also Article 6(3) of the Declaration which appears to treat failure to observe civil and political rights and economic, social and cultural rights as "obstacles to development".

distinction between these two beneficiaries has been emphasised by critics of the right.[374]

Whilst the existence of a legal obligation to provide development assistance is not inconceivable,[375] international law does not yet appear to have reached that point.[376] Developed States still conceive of themselves as "donors". The existence of an obligation to cooperate internationally appears more likely to secure international acceptance.[377]

Despite the persisting uncertainty as to the nature of any legal obligation to respect the right to development[378] it is still important to consider the right in this work. As already noted, the right to development has figured prominently in debates over the future of the international trading system and these debates will be considered further in Chapter 7. The right is also relevant to concerns as to the interrelation of human rights. These issues will be considered further in Chapter 4.

7. General Human Rights Obligations – A Recapitulation

The above analysis suggests that whether based on the Charter of the United Nations, customary international law or general principles of law, general obligations to respect the following human rights can reasonably be asserted. Uncertainty still exists as to the content of certain of these human rights. Such uncertainty does not, however, appear to undermine the claims that the following rights are generally protected under international law. All States appear to have obligations in

374 Professor Brownlie refers to concerns of certain governments expressed in the Third Committee of the General Assembly – see Brownlie, note 109 above, 16-17, paragraphs 33 and 34.

375 Note that a number of developed States supported the 1986 declaration and that States present at the 1993 World Conference and at the 2005 World Summit also endorsed the right – see notes 361, 363 and 366 above.

376 See, for example, Professor James Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?", in Crawford, note 70 above, 55, 66; Tomaševski, note 367 above, 49; and Louis Henkin, Human Rights and State "Sovereignty", 25 Georgia Journal of International and Comparative Law 31, 35 (1995-6). For references in support of the existence of such an obligation, see Isabella D Bunn, The Right to Development: Implications for International Economic Law, 15 American University International Law Review 1425, 1450-1451 (2000). Contrast *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 122 above, 138, para 276.

377 Allan Rosas discusses the potential for such an obligation in Rosas, note 115 above, 128-129.

378 Controversy continues in relation to many issues including precisely what type of development is to be secured. See note 364 above for the terms of Article 1(1) of the Declaration which sets out the content of the right. Professor Charlesworth discusses the objection that the "model of development on which … [the Declaration] is built exacerbates the inequality of Third World women" – Charlesworth, note 115 above, 196.

relation to these rights and the rights can therefore reasonably be considered when assessing the trade measures taken for human rights purposes.

General obligations under international law appear to exist in relation to:

- Rights relating to the prohibition[379] of:
  - Genocide;
  - Slavery and the slave trade;
  - Murder or causing the disappearance of individuals (including necessary due process guarantees);
  - Torture or other cruel, inhuman, or degrading treatment or punishment;
  - Prolonged arbitrary detention;
  - Retroactive penal measures;
  - Systematic racial discrimination;
  - Consistent gross violations of internationally recognized human rights;
  - Systematic religious discrimination;
  - Systematic gender discrimination;
- A core right to property;
- The right to basic sustenance;
- The right to public assistance in matters of health, basic education and shelter;
- Freedom of association and the effective recognition of the right to collective bargaining;
- Rights in relation to:
  - The elimination of all forms of forced or compulsory labour;
  - The effective abolition of child labour; and
  - The elimination of discrimination in respect of employment and occupation.
- The right to self-determination of peoples;
- The individual right to leave and return to one's country; and
- The principle of *non-refoulement* for refugees threatened by persecution.[380]

379 See note 297 above which notes the "negative" formulation of these rights and alternative positions.

380 As noted in Chapter 1, rules of international humanitarian law will not be considered in detail in this book. For a comprehensive analysis of customary humanitarian law obligations in times of armed conflict, see Henckaerts and Doswald-Beck, Customary International Humanitarian Law, note 167 above. For an analysis of efforts to identify international obligations of a humanitarian character applicable at all times, see Theodor Meron and Allan Rosas, Current Developments: A Declaration on Minimum Humanitarian Standards, 85 American Journal of International Law 375 (1991); and Jean-Daniel Vigny and Cecilia Thompson, Fundamental Standards of Humanity: What Future? 20 Netherlands Quarterly of Human Rights 185 (2002).

8. Enforcement of Human Rights Obligation under International Law

Having reviewed the sources of obligations under international law to respect human rights and having considered those rights in respect of which all States appear to owe obligations, attention will now be turned to the mechanisms that have been established for the enforcement of international obligations to ensure respect for human rights. International enforcement of *treaty* obligations to ensure respect for human rights potentially involves a variety of different mechanisms and rules. International enforcement of human rights obligations under *general international law*[381] involves the application of principles of State responsibility[382] and depends, in practice, on various factors including State consent to international adjudication.

Whilst human rights treaties often contain specific enforcement provisions,[383] these provisions generally operate in conjunction with customary rules and principles of State responsibility.[384] Treaty obligations to respect human rights may be the subject of claims based on rules of general international law.[385] Notwith-

381 As noted in Chapter 1, the term "general international law" is used in this book to denote international rules deriving from customary international law and general principles of law.

382 As will be seen below, rules of State responsibility also generally apply to the enforcement of international human rights obligations under treaties.

383 See, for example, Article 41 of the ICCPR, note 10 above, and the first optional protocol to the ICCPR, note 23 above.

384 See, for example, Article 48 of the International Law Commission's *Articles on State Responsibility*, see Report of the International Law Commission on the work of its fifty-third session, note 275 above, 56.

385 Thus a State party to a human rights treaty appears entitled to go beyond the enforcement mechanisms provided for in the treaty. See, for example, the Democratic Republic of Congo's claims against Uganda and the findings of violation of human rights treaties such as the ICCPR and the *Convention on the Rights of the Child* made by the International Court of Justice – *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, paras 205-221. The ICCPR has its own dispute resolution procedure and does not expressly refer to jurisdiction being exercised by the International Court of Justice. Congo's claims appear to have fallen within the terms of Article 42(a) of the *Articles on State Responsibility*, ibid, 54. Though the beneficiaries of the human rights obligations under the treaties are individuals as opposed to States, injury to a State's nationals has generally been treated as injury to the State – see generally, Jennings and Watts, note 140 above, Volume I, Part 1, 512. In any event Congo would have had no difficulty in meeting the requirements of Article 42(b)(i) of the *Articles on State Responsibility* – *ie* obligations owed to a group of States (the other parties to the human rights treaties – obligations *erga omnes partes* in the language used by the International Law Commission – see paragraph 6 to the Commission's commentary to Article 48, note 275 above, 320) and to the international community as a whole (obligations *erga omnes*) were breached and Congo was specially affected by those breaches. See in

standing the distinct sources of legal obligation to ensure respect for human rights, enforcement of those obligations will generally involve a complex interplay of human rights treaty provisions, general rules such as those set out in the *Vienna Convention on the Law of Treaties*, customary rules of State responsibility[386] and general principles of law. This complex interplay will be briefly described and assessed below.

(a) Enforcement of Treaty Obligations to Ensure Respect for Human Rights

As has already been noted,[387] most human rights treaties impose obligations on States parties to ensure respect for human rights through the enactment of municipal legislation that enshrines human rights treaty standards and through executive and/or judicial implementation and enforcement of those standards. Human rights treaties generally provide international mechanisms to supervise the municipal implementation of human rights obligations and (less often) to scrutinise claims of alleged violations of a State's human rights obligations.[388]

Procedures for international supervision and scrutiny of compliance with treaty obligations to respect human rights vary as between different human rights treaties. International judicial and quasi-judicial scrutiny, for example, is more commonly provided for in treaties that address civil and political rights.[389] Such treaties also generally require States parties to provide *national* judicial or administrative remedies for human rights violations.[390] *International* judicial or quasi-judicial scrutiny is not generally provided in relation to economic, social and cultural human rights.[391]

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particular the separate opinion of Judge Simma in *Armed Activities on the Territory of the Congo*, ibid, paras 16-41. Contrast Article 55 of the ECHR, note 32 above.

386 To an extent now codified in the International Law Commissions *Articles on State Responsibility*, note 275 above, 43-59.

387 See the text accompanying note 60 above.

388 See, for example, Articles 28 to 45 of the ICCPR, note 10 above; and Articles 8 to 16 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above. Note also the Statute of the International Criminal Court, note 151 above, which can be characterised as a treaty concerned with the enforcement of human rights obligations.

389 Quasi-judicial scrutiny by the Human Rights Committee of alleged violations of the ICCPR is provided for under Article 41 (State complaints) of the ICCPR, ibid; and the first optional protocol to the ICCPR (individual complaints), note 23 above. Judicial scrutiny is provided under the ECHR, note 32 above, and the American Convention, note 10 above.

390 See, for example, Article 2 of the ICCPR, ibid; Articles 1 and 13 of the ECHR, ibid; and Articles 1 and 2 of the American Convention, ibid.

391 Contrast Article 2 of the ICCPR with paragraphs 1 and 3 of Article 2 of the ICESCR, note 10 above. The Committee on Economic Social and Cultural Rights, established by the UN's Economic and Social Council, is not formally empowered to hear

Treaties setting out civil and political rights are also often expressed in terms of what may *not* be done to the holder of a human right. Thus, for example, Article 6 of the ICCPR provides that "[n]o one shall be arbitrarily deprived of his [or her] life".[392] The formulation of human rights as *restrictions* on what may be done to the holder of a right has sometimes been referred to as a basis upon which to distinguish civil and political rights from economic and social rights.[393] In relation to human rights treaties, however, the distinction does not appear to be particularly useful. *All* treaty based human rights obligations appear to involve some form of positive obligation on States to ensure respect for human rights, for example, through the provision of remedies in the case of violation.[394]

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individual complaints of violations of rights set out in the ICESCR. A proposal for the establishment of such a procedure remains on the international agenda – see Resolution 1/3 of the Human Rights Council, 29 June 2006 (adopted without a vote). Note, however, that an individual complaints procedure involving quasi-judicial scrutiny is provided in relation to economic, social and cultural rights under the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, note 25 above. See also the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, note 71 above; and the Protocol of San Salvador, note 71 above. For an assessment of the European Social Charter mechanisms, see Alston, "Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System", note 71 above. Violations of the right to education can be the subject of individual complaints to the European Court of Human Rights *via* the first protocol to the ECHR, note 13 above. The International Labour Organization has also established complaints procedures for alleged violations of the right to freedom of association – see, for example, Geraldo von Potobsky, Freedom of association: The impact of Convention No. 87 and ILO action, 137 International Labour Review 195, 212-215 (1998).

392 The formulation "no one shall …" appears 19 times in the ICCPR, note 10 above.

393 See note 297 above for the references that discuss the characterisation of human rights as negative or positive.

394 See, for example, Article 2(3)(a) of the ICCPR, note 10 above, and Article 13 of the ECHR, note 32 above. Positive obligations arising under Article 2 of the ICCPR are considered by the Human Rights Committee in General Comment No 31, note 142 above, para 8. Note also the existence of more onerous duties to prevent certain human rights violations, for example, the obligation to "prevent" genocide contained in Article 1 of the Genocide Convention. In 1980 Henry Shue identified three duties (with negative *and* positive qualities) correlative to human rights – Shue, Basic Rights – Subsistence, Affluence and U.S. Foreign Policy, Princeton University Press, Princeton, 1980, 35-64. This approach appears to have influenced the Human Rights Committee and appears to be reflected, for example, in General Comment No 31 referred to above. See also Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998), paragraphs 9 to 11. Compare also the jurisprudence of the Inter-American Court of Human Rights that has developed following the Court's decision in the *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, Number 4, 1988, reprinted in 28 ILM 294 (1989), para 164 to

The supervision procedures under the major human rights treaties follow a common pattern. The global treaties[395] generally require the preparation of periodic reports by States parties which are scrutinised and commented upon by the committees established to oversee compliance with the treaties.[396]

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167 – see generally Dinah Shelton, Remedies in International Human Rights Law, 2nd ed, Oxford University Press, Oxford, 2005, 394-399. On alleged differences between civil and political rights and economic and social rights, see generally EW Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, 9 Netherlands Yearbook of International Law 69 (1978); and GJH van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views" in Alston and Tomaševski, note 297 above, 97. It has been asserted that it is impossible or inappropriate for economic and social rights to be vindicated judicially or quasi-judicially – see the discussion of such claims in Hunt, note 66 above, 24-31 and 64-69. The impossibility claim appears untenable given that certain municipal systems already incorporate justiciable economic and social rights – see, for example, the Finnish Constitution, referred to in Hunt, 30; Section 27 of the South African Constitution, extracted in Steiner and Alston, note 65 above, 293; and the general discussion of this issue in Steiner and Alston, 275-300. Claims that it is inappropriate for members of the judiciary to adjudicate upon economic and social rights normally involve concerns over the degree of policy discretion accorded to judges and the fiscal implications of judicial decisions on economic and social rights. One response to such concerns has been to point out that similar issues arise when traditional civil and political rights are the objects of judicially attention – see, for example, Committee on Economic, Social and Cultural Rights, General Comment 9, ibid, paragraph 10; and Hunt, 64-68. As to whether positive obligations to ensure respect for human rights exist under customary international law, note that according to the Restatement a State may violate international law if it condones violations of human rights – note 242 above, Volume 2, §702, 161. In it dictum in the *Barcelona Traction Case*, note 140 above, the International Court of Justice included amongst its catalogue of *erga omnes* obligations "*protection from* slavery and racial discrimination" – 32, paragraph 34 (emphasis added).

395 See the ICCPR and ICESCR, note 10 above; the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above; the *Convention on the Elimination of All Forms of Discrimination against Women*, note 12 above; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, note 26 above; and the *Convention on the Rights of the Child*, note 12 above. These treaties are referred to the remainder of this section as the "main treaties".

396 See Articles 28 to 45 of the ICCPR, ibid; Articles 8 to 16 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ibid; Articles 17 to 22 of the *Convention on the Elimination of All Forms of Discrimination against Women*, ibid; Articles 17 to 24 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ibid; and Articles 43 to 45 of the *Convention on the Rights of the Child*, ibid. The Committee on Economic, Social and Cultural rights which oversees compliance with the ICESCR, ibid, was established by the Economic and Social Council of the UN – on the establishment and role of the committee, see

All bar two of these committees are now empowered to hear individual complaints of violations of human rights enshrined in the main treaties.[397] These complaints procedures do not, however, automatically apply in relation to States parties to the treaties. Additional State consent must be given before individuals or other States have the right to complain of violations of the human rights obligations contained in the main treaties.[398]

The committees are not courts and the views expressed by the committees as to the violation of human rights obligations set out in the main treaties do not, in and of themselves, appear to give rise to additional obligations on the part of a respondent State.[399] The regional human rights treaties negotiated for Europe and the Americas do establish human rights courts with the power to make binding determinations of violations of the regional treaties.[400]

Global and regional complaints procedures are subject to various technical requirements. For example, before a claim can be made by or on behalf of an injured individual, that individual must exhaust all reasonably available local rem-

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Philip Alston, "The Committee on Economic, Social and Cultural Rights", in Alston, note 65 above, 473. For appraisals of monitoring of compliance with the main treaties, see Philip Alston and James Crawford (eds), The Future of UN Human Rights Treaty Monitoring, Cambridge University Press, Cambridge, 2000. Note also the inquiry procedures established by a number of the main treaties – see Article 20 of *Convention against Torture*; and Articles 8 to 10 of the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, note 25 above. The treaties negotiated in 2006 include similar provisions – see Articles 6-8 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, note 28 above; and Articles 30, 33 and 34 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, note 29 above.

397 The Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child do not currently have formal procedures for hearing individual complaints of violations of ICESCR, ibid, or the *Convention on the Rights of the Child*, ibid. For State views on the establishment of such procedures under the ICESCR, see the references set out in note 96 above. The committees to be established under the *Convention on the Rights of Persons with Disabilities*, note 28 above, and *International Convention for the Protection of All Persons from Enforced Disappearance*, ibid, will have the capacity to hear complaints.

398 See the first optional protocol to the ICCPR, note 23 above; Article 14 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, note 24 above; the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, note 25 above; and Article 22 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, note 26 above.

399 This issue is discussed in the context of the Human Rights Committee in Henry J Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in Alston and Crawford, note 396 above, 15, 27-30 and 37.

400 See Article 46 of the ECHR, note 32 above; and Article 68 of the American Convention, note 10 above.

edies.[401] The obligation to exhaust local remedies, however, does not appear to apply in cases of systematic violations of human rights.[402]

Although the occurrence of systematic violations may be *procedurally* important, individual complaints can still be initiated under the global and regional treaties in relation to one-off violations.[403] There is no requirement that human rights violations be systematic or widespread before an individual can avail herself or himself of these global and regional complaints procedures.

(b) Reliance on Rules of General International Law to Enforce Human Rights Treaties

One issue that generated academic debate in the past was the question of whether violation by one State of a multilateral human rights treaty entitled other parties to the treaty to complain of that violation before the International Court of Justice or some other international body. It was been suggested, for example, that the specific procedures for addressing violations set out within human rights treaties implicitly precluded reliance on more general remedies.[404]

It seems clear that a human rights treaty could be negotiated as a "self-contained" or "special regime" excluding more general procedures and remedies, as appears to be the case for the ECHR.[405] In the absence of an express provision such

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401 See, for example, Article 5(2)(b) of the first optional protocol to the ICCPR, note 23 above; Article 35 to the ECHR, note 32 above; and Article 46 to the American Convention, note 10 above. See also Article 44(b) of the *Articles on State Responsibility*, note 275 above, 55.

402 See *Ireland v United Kingdom*, 2 European Human Rights Reports 25, paragraph 159 (1978).

403 One off violations of the ICCPR or the ECHR are potentially admissible under Article 1 of the first optional protocol to the ICCPR, note 23 above; and Article 34 of the ECHR, note 32 above.

404 See, for example, Jochen Abr. Frowein, "The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights" in Buergenthal, note 291 above, 71, 79-80; and Frowein, Reactions by Not Directly Affected States to Breaches of Public International Law, 248 Recueil des cours 349, 398-401 (1994, IV) – compare Jose E Alvarez, How *Not* to Link: Institutional Conundrums of an Expanded Trade Regime, 7 Widener Law Symposium Journal 1, 9 (2001). For opposing views, see Henkin, note 291 above, 29-33; and Bruno Simma, Self-Contained Regimes, 16 Netherlands Yearbook of International Law 111, 129-135 (1985). Compare the position taken by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 122 above, 137-138, para 274 with its more recent decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, paras 205-221.

405 See Article 55 of the ECHR, note 32 above. See also Article 55 of the *Articles on State Responsibility* and the International Law Commission's commentary to the Article, note 275 above, 356-359. The International Court of Justice referred to self contained

as Article 55 of the ECHR, however, remedies under general international law are not excluded simply by the inclusion of treaty mechanisms to address alleged violations.[406] This conclusion was confirmed by the International Court of Justice in its 2005 decision in the *Case Concerning Armed Activities on the Territory of the Congo*,[407] where the Court found Uganda in violation of its obligations under various human rights treaties including the ICCPR,[408] even though this treaty includes (in Article 41) an inter-State complaints procedure.

The International Law Commission also appears to have endorsed this conclusion in Article 48 of its *Articles on State Responsibility*. Article 48 recognises the entitlement of a party to a multilateral treaty to invoke the responsibility of another treaty party that has allegedly breached an obligation under the treaty where the obligation has been established "for the protection of a collective interest". The International Law Commission's commentary to Article 48 suggests that such an obligation could arise under "a regional system for the protection of human rights".[409] The commentary indicates that in this respect Article 48 is a "deliberate departure" from the "much criticized" decision of the International Court of Justice in the *South West Africa Case (Second Phase)*.[410] Thus, according to the Commission, where States, "attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities" there will be an entitlement on those States to bring a general international claim for breach of those obligations.[411]

Claims of this kind are not regularly made. There appear to be at least two reasons for this. The first is that the consent of the respondent State is still required before judicial remedies can be sought under general international law. Only a relatively small number of States, for example, have unconditionally accepted the jurisdiction of the International Court of Justice under Article 36(2) of the Statute of the Court.[412]

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regimes in its decision in *United States Diplomatic and Consular Staff in Tehran, Judgment*, note 238 above, 40, paragraph 86.

406 In his third report on State Responsibility, the International Law Commission's Special Rapporteur, Professor James Crawford, observed that "…the mere existence of conventional frameworks including monitoring mechanisms (e.g. in the field of human rights) has not been treated as excluding recourse to countermeasures" – UN Document A/CN.4/507/Add.4, 18, paragraph 398.

407 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005.

408 Ibid, paras 205-221 and 345(3).

409 See the commentary to Article 48 of the *Articles on State Responsibility*, note 275 above, 320-321, paragraph 7.

410 Ibid, 321, footnote 766.

411 Ibid, 321, paragraph 7.

412 As at 31 July 2002 sixty-three States accepted the jurisdiction of the Court under Article 36(2) of the Statute of the Court. Only 26 of those States accepted that jurisdiction

A second likely reason for the scarcity of such claims is a phenomenon discussed by Professor Henkin. According to Professor Henkin:

> "… states remain unwilling to expend political capital and to jeopardize their friendly relations by complaining of human rights violations by other states; states are unwilling to invite such complaints against themselves."[413]

This unwillingness appears to be reflected in the failure by any State to rely on the procedure contained in Article 41 of the ICCPR that allows States to complain of violations of the ICCPR. The equivalent procedure under the European Convention on Human Rights has only been invoked on a relatively small number of occasions.[414]

The scarcity of such claims to date, however, does not appear to undermine the potential future significance of this issue when considering the legality of trade measures taken for human rights purposes. If a State that is a party to a human rights treaty that has been violated by another State is entitled to invoke the responsibility of that State, then it seems a short step to recognise the entitlement to impose trade measures against the violating State. A major obstacle to resort to such trade measures is the discipline imposed on trade measures by the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement").[415] Parties to the WTO Agreement that impose trade measures in order to ensure respect for human rights may breach their obligations under the WTO Agreement. This issue will be discussed in detail in Chapter 6.

The rules of State responsibility potentially offer a means by which a State party to the WTO Agreement that takes trade measures for human rights purposes can avoid responsibility for violating the WTO Agreement. A State may avoid responsibility for actions that are inconsistent with its obligations under international law where those actions are proportionate countermeasures to a prior

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without significant conditions. Declarations made unde Article 36(2) of the Statute of the Court can be accessed at <http://www.icj-cij.org/jurisdiction/>, visited on 4 May 2007.

413 Louis Henkin, International Law: Politics and Values, Martinus Nijhoff, Dordrecht, 1995, 213-214.

414 Steiner and Alston report that "[b]etween 1980 and 1997, the annual number of [individual] applications received by the [European] Commission [of Human Rights, which ceased to exist in 1999] rose from 2,000 to over 12,000, while the number accepted rose from below 500 to almost 5,000" – note 65 above, 798. By contrast, Steiner and Alston report that "[a]s of February 2000, thirteen interstate applications had been lodged" – ibid, 804.

415 *Marrakesh Agreement Establishing the World Trade Organization*, done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994). There were 150 parties to this treaty as at 11 January 2007.

violation of international law by another State and where the State taking the countermeasures has been injured by the prior violation.[416] The law in relation to countermeasures has been addressed by the International Law Commission in its *Articles on State Responsibility*.[417]

There are, however, a number of factors that appear to limit the prospects of enforcement of treaty obligations to ensure respect for human rights through resort to trade related countermeasures. One initial factor is that the entitlement to have recourse to countermeasures may be limited to States that are *injured* by the initial violation of international law. The *Articles on State Responsibility* address the question of injured States in Article 42. In accordance with this provision it appears that a State that is party to a multilateral human rights treaty will not be injured by another State's violation of that treaty unless the first State's nationals are harmed or the State is specially affected by the breach.[418]

The International Law Commission expressly left open the question whether a non-injured State is entitled to take countermeasures in order to protect a collective interest under a treaty.[419] In its commentary to Article 54, the Commission described the practice in support of such an entitlement as being "limited and rather embryonic"[420] and concluded that:

> "… the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number

416 See, for example, the *Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, 18 Reports of International Arbitral Awards 417, 443-447, paras 81-99 (1978). See generally Omer Yousif Elagab, The Legality of Non-Forcible Counter-Measures in International Law, Clarendon Press, Oxford, 1988.

417 See Articles 49 to 53 of the *Articles on State Responsibility*, note 275 above, 56-58. The International Law Commission expressly rejected any requirement that the obligation breached by the countermeasure be in some way related to the original breach – see the introductory commentary to Chapter II of Part 3, ibid, 326, paragraph 5.

418 Perhaps where the State seeking to take countermeasures is a neighbour of the State violating human rights and victims of human rights violations seek refuge in the State contemplating countermeasures.

419 See Article 54 of the *Articles on State Responsibility*, note 275 above, 58. It is apparent that the International Law Commission has not accepted the view that countermeasures cannot be taken by parties to a treaty in response to violations of a treaty. Concerns, for example, have been raised about the operation of rules set out in the *Vienna Convention on the Law of Treaties*, note 62 above, in particular Articles 42 and 60. See, for example, Professor Meron, note 255 above, 240-245, who appears to support the position subsequently taken by the Commission. Professor Crawford addresses the issue in his third report, UN Doc A/CN.4/507/Add.3, 12-20, paras 324-325.

420 See the commentary to Article 54 of the *Articles on State Responsibility*, ibid, 351, paragraph 3.

> of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest."[421]

Even if a non-injured State is entitled to take countermeasures to respond to violation of a multilateral human rights treaty, other factors may limit the effectiveness of countermeasures as an enforcement mechanism. It is not clear, for example, whether countermeasures could be invoked in respect of isolated treaty violations. In his third report on State responsibility, Professor Crawford suggested that countermeasures by non-injured States would not extend beyond cases of "severe violations of collective obligations".[422] In any event, the requirements that countermeasures be proportionate to the original violation[423] and that the countermeasures be "necessary to induce the responsible State to comply with its obligations"[424] would appear to restrict reliance on countermeasures as a response to isolated violations of human rights.

Finally, for non-injured States that are parties to the WTO Agreement, any entitlement to take countermeasures may be practically undermined by the effect of Article XXIII:1(b) of the *General Agreement on Tariffs and Trade 1994*, which is an "integral" part of the WTO Agreement.[425] Article XXIII will be considered in detail in Chapter 6.

(c) Enforcement of Customary Obligations to Respect Human Rights

The requirements for the development of customary human rights obligations have already been discussed,[426] as has what may be required in order to establish the violation of a customary human rights obligation. The views expressed by Professor

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421 Ibid, 355, paragraph 6. Article 48 of the *Articles on State Responsibility* addresses the entitlement to invoke State responsibility "by a State other than an injured State", ibid, 56.

422 At paragraphs 391-392 of his third report on State Responsibility, Professor Crawford reviewed the State practice in support of an entitlement on the part of non-injured States to resort to countermeasures. He concluded, at para 399, that "… none of the instances [of countermeasures by non-injured States] concerns isolated or minor violations of collective obligations. If States have resorted to countermeasures in response to violations of collective obligations, the violation had been seen to have reached a certain threshold. Indeed the examples referred to involve some of the major political crises of recent times. With all due caution, it seems possible to say that reactions were only taken in response to severe violations of collective obligations" [footnote not reproduced] – note 406 above, 18.

423 See Article 51 of the *Articles on State Responsibility*, note 275 above, 57.

424 See the International Law Commission's commentary to Article 51, ibid, 344, para 7, where the requirements of Article 49 were so described.

425 See Article II paragraph 2 of the WTO Agreement, note 415 above.

426 See the text accompanying note 252 above.

Schachter and by the American Law Institute in its third Restatement have been noted.[427] It will be recalled that, according to Professor Schachter:

> "… [o]n the evidence of State practice to date, the customary law of human rights will generally limit international responsibility and remedies to cases of gross and systematic violations of human rights."[428]

Reliance on rules of general international law in order to enforce customary human rights obligations faces at least two additional difficulties. The first relates to the issue of invocation discussed above. States that are not "injured" by a violation of customary human rights appear to have an additional hurdle to surmount before they may bring an inter-State claim. According to the International Court of Justice in the *Barcelona Traction Case* they must also show that there has been a breach of an obligation owed *erga omnes*. According to the Court:

> "… 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 the corresponding rights of protection have entered into the body of general international law (Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 23); others are conferred by international instruments of a universal or quasi-universal character."[429]

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427 See notes 283 and 298 above and accompanying text.

428 Schachter, note 120 above, 341.

429 *Barcelona Traction Case*, note 140 above, 32, paras 33 and 34. The Court revisited human rights obligations in para 91 of its judgment where it makes the following observations:

> "With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim" – ibid, 47.

The Court's dictum has been endorsed by the International Law Commission in its *Articles on State Responsibility*. The notion of obligations owed *erga omnes* is enshrined in Article 48(1)(b). The existence of human rights obligations owed *erga omnes* has been confirmed in subsequent decisions of the International Court of Justice[430] and the International Criminal Tribunal for the former Yugoslavia.[431] Obligations owed *erga omnes* will be considered further in Chapter 4.

Countermeasures may also be taken in response to violations of customary human rights. The entitlement of a non-injured State to take countermeasures is again an important issue.[432] The difficulties that confront counter-measures taken in response to treaty violations that are discussed above[433] also appear relevant in this context. The only difference may relate to the need to establish "gross and systematic violations" before customary obligations can be invoked and resort may be had to countermeasures.[434]

The second more practical difficulty facing reliance on rules of general international law in order to enforce customary human rights obligations is the reluctance of States to consent to the jurisdiction of the International Court of Justice or other international judicial bodies. This reluctance combines with the general unwillingness of States to bring international claims in response to violations of human rights to create a significant practical obstacle to the enforcement of customary human rights obligations.

(d) Enforcement of Human Rights Obligations through Organs of the United Nations other than the International Court of Justice

Various organs of the UN are entitled to take measures to secure or encourage compliance with human rights obligations. These bodies have not generally concerned themselves with the particular sources of legal obligation to respect human rights.[435] States that are implicated in the violation of human rights are subjects

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At the time of the decision of the Court the ICCPR, note 10 above, had not yet entered into force. The ICCPR does contain a provision (Article 41) roughly equivalent to Article 33 of the ECHR, note 32 above.

430 *East Timor (Portugal v Australia), Judgment*, ICJ Reports 1995, 90, 102, para 29; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, note 184 above, 199, paras 155-157.

431 *Prosecutor v Furundzija*, Trial Chamber, Case Number IT-95-17/1-T, judgment of 10 December 1998, reprinted in 38 ILM 317, 348, paragraph 151 (1999).

432 See the text accompanying note 419 above.

433 See the text accompanying note 422 above.

434 If customary human rights obligations incorporate such a threshold then the requirement that local remedies be exhausted may not have any relevant application to allegations of breach of customary human rights obligations – see *Ireland v United Kingdom*, note 402 above.

435 Steiner and Alston, note 65 above, 601-602.

of criticism and (occasionally) sanctions by and within UN organs regardless of the treaties that the States are party to.[436] In some cases measures have been taken against States that are not parties to the UN Charter.[437]

The Security Council, which is conferred executive powers by the UN Charter to maintain and restore international peace and security, has used its coercive powers in certain cases that have involved gross and systematic violations of human rights.[438] The Security Council's establishment of *ad hoc* criminal tribunals to try individuals for genocide, war crimes and crimes against humanity in the former Yugoslavia and Rwanda has also enhanced enforcement of human rights obligations.

The Security Council has, however, failed to act consistently to protect human rights. The Council's coercive powers are tied to the identification of a "threat to peace, breach of the peace, or act of aggression". Human rights violations may not be treated as meeting any of these conditions.[439] The political character of the Security Council is also a significant impediment to a consistent response to human rights violations. According to the non-governmental organisation Human Rights Watch in 2000:

> "[as the Security Council] … functions today, with the five permanent members free to exercise their vetoes for the most parochial reasons, the council cannot be counted on to authorize intervention even in dire circumstances. China and Russia seem preoccupied by perceived analogies to Tibet and Chechnya. The United States is sometimes paralyzed by an isolationist Congress and a risk-averse Pentagon. Britain and France have let commercial or cultural ties stand in the way."[440]

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436 The UN General Assembly has adopted resolutions regarding human rights violations in Burma notwithstanding that Burma is a party to few human rights treaties, see note 237 above.

437 Following the dissolution of the Socialist Federal Republic of Yugoslavia and prior to its admission to the UN in 2000, the Federal Republic of Yugoslavia does not appear to have been a member of the UN. Notwithstanding this, the Federal Republic of Yugoslavia was the subject of resolutions condemning human rights violations within its territory – see, for example, resolution 54/183, adopted by the General Assembly on 17 December 1999.

438 See, for example, Security Council resolutions in relation to Southern Rhodesia, such as resolution 202 of 6 May 1965 and resolutions 216 and 217 of 12 and 20 November 1965; and South Africa, such as resolution 392 of 19 June 1976 and resolution 418 of 4 November 1977.

439 See Steiner and Alston, note 65 above, 652. See, for example, China's position in the Security Council in defending its veto of a resolution condemning Burma (Myanmar) – record of the 5619th meeting of the Security Council, 12 January 2007, UN Doc S/PV.5619, 3.

440 Extracted in Steiner and Alston, ibid, 652-653. Available at <http://www.hrw.org/wr2k/Front.htm#TopOfPage/>, visited on 4 May 2007.

Human rights concerns have also been raised about the consequences of Security Council economic sanctions. During the 1990s the Security Council imposed economic sanctions on a number of States.[441] In some cases, such as Iraq, these sanctions, though designed to change the policies of ruling elites, had serious adverse effects on the enjoyment of economic and social rights of the most vulnerable in target States.[442] The human rights obligations of international organisations and of their member States acting within them have already been discussed.[443]

The General Assembly is another UN organ with competence to address human rights violations. Unlike the Security Council, the General Assembly lacks coercive powers. It has, however, passed numerous resolutions condemning particular States for violating human rights.[444] As a political body, the General Assembly has not always acted consistently when confronted with human rights violations. Bloc politics within the Assembly sometimes results in States escaping criticism notwithstanding gross human rights violations.[445]

As the discussion above of the formation of customary human rights obligations indicates,[446] the General Assembly is an important source of evidence relevant to the establishment of customary human rights obligations. In relation to trade measures for human rights purposes, the General Assembly has passed a number of resolutions addressing unilateral coercive measures.[447] These resolutions will be addressed further in Chapter 5.

The UN Commission on Human Rights was established in 1946 by the Economic and Social Council and was abolished in 2006, with its work being taken over by the Human Rights Council, a body established by the General Assembly.[448]

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441 "During the 1990s the Security Council has imposed sanctions of varying kind and duration in relation to South Africa, Iraq/Kuwait, parts of the former Yugoslavia, Somalia, the Libyan Arab Jamahiriya, Liberia, Haiti, Angola, Rwanda and the Sudan" – Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8, 12 December 1997, para 2.

442 Ibid, paragraphs 3-5.

443 See the text accompanying note 172 above.

444 See, for example, the resolutions adopted by the General Assembly in 2002 that addresses human rights referred to in note 245 above.

445 See, for example, John Quinn, "The General Assembly into the 1990s" in Alston, note 65 above, 55, 80-82.

446 See the text accompanying note 254 above.

447 See General Assembly resolutions 51/103 adopted on 12 December 1996, 52/120 adopted on 12 December 1997, 53/141 adopted on 9 December 1998, 54/172 adopted on 17 December 1999, 55/110 adopted on 4 December 2000, 57/222 adopted on 18 December 2002, 58/171 adopted on 22 December 2003; 59/188 adopted on 20 December 2004; and 60/155 adopted on 16 December 2005.

448 See General Assembly resolution 60/251 of 15 March 2006 (170 States voting for the resolution, 4 against, with 3 abstentions). For a comprehensive analysis of the

The Commission was a representative body made up of 53 elected member States. As a representative body, the Commission was not able to avoid the bloc politics that have afflicted the human rights work of the General Assembly, although Professor Henkin has observed that government representatives within the Commission were "… able to be somewhat less 'political', more evenhanded, as well as more activist in the cause of human rights" than the larger UN bodies.[449] The work of the Commission of Human Rights was supported by an expert body, the Sub-Commission on the Promotion and Protection of Human Rights.[450] Claims of increasing politicisation and selectivity in the work of the Commission[451] and efforts by States to use Commission membership as a means by which to *avoid*, rather than enhance, scrutiny of compliance with human rights obligations[452] preceded the decision to abolish the Commission.

Commission and Sub-Commission oversaw private[453] and public[454] complaints procedures that investigated "situations" that appeared to reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."[455] These procedures have been cited as providing evidence of the nature of customary obligations to respect human rights.[456] The Commission and Sub-Commission also undertook human rights monitoring through the initiation of thematic

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background to the abolition of the Commission, the establishment of the Council and the challenges facing the Human Rights Council – see Philip Alston, Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council, 7 Melbourne Journal of International Law 185 (2006).

449 Henkin, note 413 above, 218.

450 The Sub-Commission was established in 1947 as the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. It was renamed in 1999. For a description of its work see Steiner and Alston, note 65 above, 601. The Sub-Commission was also abolished in 2006.

451 See, for example, In larger freedom: towards development, security and human rights for all – Report of the Secretary-General, Addendum, Human Rights Council – Explanatory note by the Secretary-General, UN Doc A/59/2005/Add.1, 23 May 2005, 1-2, para2.

452 See, for example, criticism from Human Rights Watch in 2003, <http://hrw.org/english/docs/2003/04/25/global5796.htm>, visited 4 May 2007.

453 Originally provided for under resolution 1503, note 286 above.

454 Originally provided for under resolution 1235, note 286 above.

455 See paragraph 2 of resolution 2000/3 adopted by the UN Economic and Social Council on 16 June 2000, UN Doc E/2000/INF/2/Add.1, 20-23. This resolution modifies the procedure originally established by resolution 1503. For an assessment of the procedures that were established by resolutions 1503 and 1235, see Steiner and Alston, note 65 above, 611-641.

456 See, for example, the Restatement, note 242 above, Volume 2, §702, Reporter's note 10, 173; and the *Articles on State Responsibility*, note 275 above, commentary to Article 40, 285, paragraph 7, footnote 686.

studies undertaken by independent experts.[457] The issue of unilateral coercive measures was also the subject of a number of resolutions of the Commission on Human Rights.[458]

The Human Rights Council has assumed responsibility for supervising these various procedures and the work of independent experts.[459] The Council is slightly smaller than the Commission,[460] Council membership is to be subject to more formalised human rights scrutiny than was the case for members of the Commission[461] and the Council is to meet more regularly than the Commission.[462] The Human Rights Council has not avoided criticisms of politicisation.[463]

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457 Described and assessed in Steiner and Alston, note 65 above, 641-648. See also Gutter, note 237 above.

458 See, for example, resolution 2000/11 of 17 April 2000, 56th session; resolution 2001/26 of 20 April 2001, 57th session; resolution 2002/22 of 22 April 2002, 58th session; and resolution 2003/17 of 22 April 2003, 59th session.

459 According to General Assembly resolution 60/251, note 448 above, the General Assembly decided:

> "… that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session" – para 5.

Concerns have been raised by non-governmental organisations such as Amnesty International that some States had proposed changes that would undermine rather than enhance the existing system – see Amnesty International Press Release, Human Rights Council: UN Reform at Risk, AI Index: IOR 41/006/2007 (Public) News Service No: 051, 15 March 2007.

460 The Human Rights Council is made up of 47 States elected by members of the General Assembly (by a majority of members of the Assembly – Council members apparently require 96 States to support their election – see Alston , note 448 above, 199). States seeking election have been encouraged to provide pledges regarding their commitment to the promotion and protection of human rights. States serve on the council for 3 year terms and are eligible for re-election but are unable to be members of the Council for three consecutive terms.

461 Various modes of formal scrutiny have been agreed to – see General Assembly resolution 60/251, note 448 above. These include periodic review of the human rights record of all States with a particular focus on members of the Council – see para 5(e) of resolution 60/251. The resolution establishing the Council also provides for the potential for suspension of membership of the Council (by a two-thirds majority of members of the General Assembly present and voting in the Assembly) – see para 8 of the resolution.

462 The Council is to hold regular sessions (no fewer than three each year) and there remains the capacity to hold special sessions.

463 See, for example, the criticisms of Human Rights Watch and Amnesty International regarding the Council's lack of balance regarding its response to the conflict between Israel and forces in Lebanon in 2006 – Amnesty International, UN Human Rights

In 1993, following a recommendation issued by the World Conference on Human Rights,[464] the General Assembly established the office of High Commissioner for Human Rights. The High Commissioner has performed important functions including the initiation of monitoring procedures[465] and coordinating United Nations human rights activities.[466]

The General Assembly, the Human Rights Council and the High Commissioner for Human Rights do not have coercive powers and their findings do not carry formal legal consequences. They are, nonetheless, legally significant.

One feature of their legal significance has been their role in the establishment of what has been described as a customary *droit de regard*.[467] States are entitled to *complain* about human rights violations in other States. These violations do not have to rise to the level of gross or systematic violations in order for other States to protest.[468] Nor do protesting States have to be injured by the human rights violation in order to protest. Thus a distinction has been drawn between this *droit de regard* and the entitlement of States to invoke, for example, through international litigation, the responsibility of another State.[469] Practice within these United Nations

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Council, Second session, Compilation of statements by Amnesty International, including joint statements, AI Index: IOR 41/017/2006, 1 November 2006, 12.

464 Vienna Declaration and Programme of Action, note 19 above, Part II, paragraphs 17 and 18.

465 The High Commissioner has, for example, established field operations, see Steiner and Alston, note 65 above, 599; and has appointed regional advisors who have undertaken investigations, see, for example, the report of Justice PN Bhagwati, Human Rights and Immigration Detention in Australia, released in July 2002, available at: <http://www.unhchr.ch/huricane/huricane.nsf/view01/BC4C8230F96684C8C1256C070032F5F1?opendocument>, visited on 4 May 2007.

466 The High Commissioner's website, <http://www.ohchr.org/english/>, is one example of the High Commissioner's coordination activities.

467 Simma and Alston, note 63 above, 98-99.

468 Henkin, note 291 above, 29-35; and the International Law Commission's commentary to the *Articles on State Responsibility*, note 275 above, commentary to Article 42, 294-295, paragraph 2. Compare Meron, note 255 above, 103-106.

469 See, for example, the commentary of the International Law Commission to Article 42, ibid, where the following observation is made:

> "[Chapter I of Part 3 of the Articles on State Responsibility] … is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these Articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in

bodies appears to have confirmed the contraction of the concept of domestic jurisdiction so that all States can complain, for example, of violation of any of the rights enshrined in the UDHR regardless of whether the State criticised is party to any relevant human rights treaty or whether the right concerned has attained customary status.[470]

(e) Enforcement of Human Rights Obligation through Municipal Litigation in Other States

Municipal courts appear to be increasingly exercising jurisdiction over human rights violations that have occurred in other States. Many States appear prepared to exercise universal criminal jurisdiction in respect of genocide, war crimes and crimes against humanity.[471] Such exercises of jurisdiction have the potential to support the efforts of the *ad hoc* international criminal tribunals established by the Security Council for Rwanda and the former Yugoslavia and the International Criminal Court. Prosecutions before municipal courts may thus assist in the enforcement of human rights obligations.

A number of States also assert universal civil jurisdiction in relation to human rights violations.[472] Claims under the United States *Alien Torts Claims Act*[473] are a prominent example of such jurisdiction.

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respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, … or even the taking of countermeasures."

470 Professors Simma and Alston, note 63 above, 99, argue that the *droit de regard* "takes full account of customary norms, norms based on authentic interpretation [of the UN Charter], and general principles and extends also to soft law norms".

471 For a discussion of relevant municipal legislation and practice, see International Secretariat, Amnesty International, Universal Jurisdiction: The duty of states to enact and implement legislation, September 2001, available at <http://web.amnesty.org/web/web.nsf/pages/legal_memorandum>, visited on 4 May 2007.

472 See, for example, Michael Byers, "English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment" in Kamminga and Zia-Zarifi, note 161 above, 241; Gerrit Betlem, "Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts" in Kamminga and Zia-Zarifi, ibid, 283; and Shelton, note 394 above, 172-173. Compare the notion of international civil responsibility of individuals, referred to briefly in the International Law Commission's commentary to the *Articles on State Responsibility*, note 275 above, commentary to Article 58, 364, paragraph 2, which refers to Article 14 of *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, note 26 above.

473 See, for example, Shelton, ibid, 160-172; Vázquez, note 160 above; Joseph, Corporations and Transnational Human Rights Litigation, note 160 above; Beth Stephens and Michael Ratner, International Human Rights Litigation in U.S. Courts, Transnational Publishers, New York, 1996; and Ralph G Steinhardt and Anthony

9. Conclusion

This chapter has introduced international legal rules, procedures and institutions that are relevant to the protection of human rights. These have relevance to the assessment of the legality of trade measures taken for human rights purposes. A comprehensive assessment of such legality also requires a careful consideration of the legal rules, procedures and institutions involved in the regulation of international trade. Such a consideration will be begin with an introductory survey of international trade regulation in Chapter 3. Chapter 3 focuses on trade regulation in the context of the World Trade Organization. Consideration of human rights related trade measures that are not subject to, or are subject to limited, discipline under World Trade Organization rules will be deferred to Chapter 5.

D'Amato (eds), The Alien Tort Claims Act: An Analytical Anthology, Transnational Publishers, New York, 1999.

Chapter 3

International Legal Regulation of Interstate Trade

1. Introduction

A study[1] undertaken on behalf of the Organisation for Economic Co-operation and Development ("OECD") in 1996 identified six aspects of the current global system regulating international trade which might, with no or minor adjustment, be used to legally justify trade measures taken for human rights purposes (or would be relevant to the justification of such measures).[2] The six areas identified were:

a. Dumping rules and the treatment of "social dumping";
b. Rules relating to subsidies and the question of "social subsidies";
c. The exception provisions found in the *General Agreement on Tariffs and Trade 1994*[3] ("GATT 1994"), in particular Article XX;
d. The dispute resolution system based on Article XXIII of GATT 1994;

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1 Organisation for Economic Co-operation and Development, Trade, Employment and Labour Standards, OECD, Paris 1996 ("1996 OECD Report"). The OECD produced an additional report in 2000, International Trade and Core Labour Standards, OECD, Paris 2000 ("2000 OECD Report"), which sought to update the 1996 OECD Report. See also Elissa Alben, Note – GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link, 101 Columbia Law Review 1410, 1416-1423 (2001).

2 Ibid, 169-176. The 1996 OECD Report focussed on labour standards but there appears no reason why similar points cannot be made in relation to a broader range of human rights. Compare the study prepared in 2005 by the Office of the High Commissioner for Human Rights, Human Rights and World Trade Agreements – Using general exception clauses to protect human rights, United Nations, Geneva, 2005.

3 This agreement is an annexure to and an integral part of the *Marrakesh Agreement Establishing the World Trade Organization*, done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994).

e. Objections and conditions under Article XXXV of the original *General Agreement on Tariffs and Trade*[4] ("GATT 1947") which are now regulated under Article XIII of the *Marrakesh Agreement Establishing the World Trade Organization*[5] ("the WTO Agreement"); and
f. The trade policy review mechanism established under the WTO Agreement.

To this list might be added waivers issued under Article IX of the WTO Agreement, safeguard measures and technical barriers to trade (such as product standards) which could also be used to defend trade measures taken for human rights purposes.

In addition to considering the possibility that existing provisions of the WTO Agreement might be used to justify trade measures designed to secure protection of human rights, the 1996 OECD Report also noted more ambitious proposals for the inclusion of a "social clause" allowing attempts to protect certain human rights through trade measures.[6] Such a clause was indeed drafted for the 1948 Charter of the ill-fated International Trade Organization ("ITO"). Article 7 of ITO Charter, entitled "Fair Labour Standards", provided:

> "1. The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
> 2. Members which are also members of the International Labour Organization shall co-operate with that organization in giving effect to this undertaking.
> 3. In all matters relating to labour standards that may be referred to the [International Trade] Organization in accordance with the provisions of Article [94 or

4 Entered into force on 1 January 1948 through the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, done at Geneva, 30 October 1947, 55 UNTS 308 (1950); reprinted (with subsequent amendments) in World Trade Organization, The Legal Texts, ibid, 423. The *Protocol of Provisional Application* and subsequent accession protocols were superseded by the WTO Agreement, although the terms of the *General Agreement on Tariffs and Trade* were incorporated into GATT 1994 set out in Annex 1A of the WTO Agreement.

5 *Marrakesh Agreement Establishing the World Trade Organization*, note 3 above, 3.

6 The 1996 OECD Report, note 1 above, 170.

> 95],[7] it shall consult and co-operate with the International Labour Organization."[8]

Regional trade arrangements already link human rights and trade. The *North American Agreement on Labor Cooperation*,[9] for example, addresses the non-enforcement of labour related human rights standards in Canada, Mexico and the United States. Complaints of non-enforcement of municipal labour laws can be brought before an arbitral body established under the agreement and sanctions can be authorised in response to the non-enforcement of a limited class of labour related human rights standards.[10]

The purpose of this chapter is to offer a general account of the main features of the international legal system's regulation of global trade. Special emphasis will be given to those features of the system which are particularly relevant to an assessment of current and potential justifications of human rights related trade measures. Particular attention will therefore be devoted to the features of the trading system identified above.

Limited observations will be made as to policy assumptions that appear to underlie the current system regulating international trade. Policy assumptions in relation to global trade regulation appear to be significant in the identification of the objects and purposes[11] of the treaties regulating global trade. The interpretation of provisions of trade treaties requires an awareness of the objects and purposes of

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7 Articles 94 and 95 were dispute resolution provisions of the ITO Charter and were roughly equivalent to Article XXIII of GATT 1994. [Footnote not in original.]

8 United Nations Conference on Trade and Employment Held at Havana, Cuba from November 21, 1947, to March 24, 1948, Final Act and Related Documents, Havana, 1948, 7.

9 Done on 14 September 1993, entered into force on 1 January 1994, reprinted in 32 ILM 1499 (1993). This agreement supplements the *North American Free Trade Agreement* ("NAFTA"), done 17 December 1992, entered into force on 1 January 1994, reprinted in 32 ILM 289 and 605 (1993).

10 The NAFTA labour side agreement is discussed further in Chapter 5. For a consideration of regional and bilateral trade agreements with human rights clauses – see, for example, Lorand Bartels, Human Rights Conditionality in the EU's International Agreements, Oxford University Press, Oxford, 2005; and Frank J Garcia, "Integrating Trade and Human Rights in the Americas" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 329.

11 It appears that for the purposes of interpretation a treaty is taken to have a unitary "object and purpose" that consists of the "essential provisions of the treaty, which constitute its *raison d'être*" – Alain Pellet, Addendum to the tenth report of the International Law Commission's Special Rapporteur on reservations to treaties, UN Doc A/CN.4/558/Add.1, 14 June 2005, 14, paras 88-89; and Jan Klabbers, Some Problems Regarding the Object and Purpose of Treaties, 8 Finnish Yearbook of International Law 138, 152-153 and 156 (1997). On the identification of the object and purpose of a treaty see

those treaties. These observations are relevant to the assessment of provisions of the WTO Agreement in Chapter 6.

This chapter will not consider human rights related trade measures that have been imposed unilaterally or by regional organisations. Opportunities to impose such measures still exist notwithstanding multilateral agreements regulating global trade. Municipal and regional rules on the use of human rights related trade measures have been in place for a number of years.[12] An assessment of these rules, and the measures they authorise, will be undertaken in Chapter 5.

Finally, this chapter will provide a brief overview of the legal regulation of international trade under the WTO Agreement. An account of the development of GATT 1947 leads into a specific consideration of the legal rules and principles operating in relation to GATT 1994 and other WTO agreements. Each of the trade treaty provisions having potential relevance to the protection of human rights through trade measures will be considered as a prelude to more detailed consideration in subsequent chapters.

2. Objects, Purposes and Policies Relevant to the International Legal Regulation of Global Trade

The international legal rules governing treaty interpretation are enshrined in Articles 31, 32 and 33 of the *Vienna Convention on the Law of Treaties*, 1969.[13] Paragraph 1 of Article 31 provides that:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The explicitly textual approach set out in this article limits the extent to which general policy objectives are determinative of the interpretation of existing treaty

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generally Isabelle Buffard and Karl Zemanek, The 'Object and Purpose' of a Treaty: An Enigma? 3 Austrian Review of International and European Law 311 (1998).

12 See, for example, the United States *Trade Act 1974*, Title 19 United States Code §2411 and §2462; and the regulations adopted by the Council of the European Union, the most recent being No 980/2005, Official Journal of the European Union, L 169/1, 30 June 2005.

13 Done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969), 108 parties as at 27 April 2007. The rules set out in Articles 31 to 33 have been recognised as reflecting rules of general international law on the topic – see, for example, *Kasikili/Sedudu Island (Botswana v Namibia), Judgment*, ICJ Reports 1999, 1045, 1059, para 18; WTO Appellate Body report, – *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/AB/R, 14 December 1999, adopted by the WTO Dispute Settlement Body on 12 January 2000, para 80; and *Golder v United Kingdom*, European Court of Human Rights, Series A, Number 18, 1 European Human Rights Reports 524, para 29 (1975).

provisions.[14] However, as the reference to "object and purpose" makes plain, even when interpreting existing provisions, policy considerations can be significant. The "object and purpose" of the treaty establishing the World Trade Organization ("WTO") are given additional significance in those provisions of GATT 1994 that refer to the "objectives" of the agreement.[15] Article XXIII:1 of GATT 1994, for example, allows resort to the WTO dispute resolution system when "the attainment of any objective under the agreement is being impeded".

Paragraph 2 of Article 31 of the *Vienna Convention* goes on to provide that the "context" of a treaty includes its preamble. Thus an attempt to interpret the existing terms of a treaty requires a consideration of its preamble which also often sheds light on the treaty's object and purpose.[16]

An insight into the objectives of those States which agreed to abide by the terms of GATT 1947 can be seen in the second preambular paragraph of the treaty where those States recognised:

> "… that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a

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14 In its 1966 commentary to what became Article 31 of the *Vienna Convention*, the International Law Commission observed that "[t]he article … is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. … [T]he jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain" – reprinted in Yearbook of the International Law Commission 1966, Volume II, 220-221, para 11. There appears to be, however, no hierarchy as between text, context and object and purpose or the other elements of the rule enshrined in Article 31 – see the Commission's Yearbook, ibid, 219-220, paragraphs 8 and 9. Contrast Julius Stone, Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process, 1 Sydney Law Review 344 (1955). See generally on treaty interpretation, Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd edition, Manchester University Press, Manchester, 1984, 114-158.

15 A catalogue of the other provisions of the GATT which refer to "objectives" of the agreement can be found in GATT, Analytical Index: Guide to GATT Law and Practice, 6th ed, Geneva, 1995, Volume 2, 654.

16 See, for example, the consideration of the preamble to the WTO Agreement in the Appellate Body's report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (the "*Shrimp Turtle Case*"), WT/DS58/AB/R, 12 October 1998, adopted by the Dispute Settlement Body on 6 November 1998, reprinted in 38 ILM 121 (1999), paragraph 129. On the apparent "tautology" of using the rules of treaty interpretation to determine the "object and purpose" of a treaty, when the "object and purpose" are themselves relevant to the process of interpretation – see Pellet, note 11 above, 13-15, paragraphs 86-92.

> large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods … ".[17]

The third preambular paragraph records the desire of the States parties to contribute to these objectives "… by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce …".[18]

The commitment to raise living standards and foster economic development found in the preamble was further elaborated upon in Part IV of GATT 1947.[19] Part IV was added to GATT 1947 in 1966 in an apparent attempt to assist developing States expand and diversify their economies and raise living standards.

The preamble to the WTO Agreement appears to reflect the same policy objectives found in GATT 1947. The general objectives of reducing barriers to trade and discriminatory treatment are there set out. The acknowledgement of the needs of developing States reflected in Part IV of GATT 1947 also finds specific

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17 GATT 1947, note 4 above.

18 Ibid. Various panel reports under GATT 1947 addressed the objects and purposes of these treaties. See, for example, *United States – Manufacturing Clause*, BISD, 31st Supplement, 74, adopted on 16 May 1984, paragraph 36, where "[t]he panel … noted that one of the basic purposes of the provisional application of Part II of the GATT [*via* the Protocol of Provisional Application] had been to ensure that the value of tariff concessions was not undermined by new protective legislation"; *United States – Customs User Fee*, BISD, 35th Supplement, 245, adopted on 2 February 1988, paragraph 84, where the panel referred to "… the central importance assigned by the General Agreement to protecting the commercial value of tariff bindings …"; and *United States – Restrictions on Imports of Sugar*, BISD, 36th Supplement, 331, adopted 22 June 1989, paragraph 5.3, where the panel observed "… that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.'" The WTO panel in *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, adopted by the Dispute Settlement Body on 27 January 2000, paras 7.71 and 7.73-7.75, considered the objects and purposes of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, which is an annexure to (see Annex 2) and is an integral part of the WTO Agreement, note 3 above, and the objects and purposes of "the WTO more generally". According to the panel, the objects and purposes "most relevant" to the construction of Article 23 of the *Dispute Settlement Understanding* "… are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system" – para 7.71.

19 Note also Article XVIII of GATT 1947, note 4 above.

articulation in the second preambular paragraph of the WTO Agreement, where the parties to the WTO Agreement recognise that:

> "… there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."

Concern for the environment explicitly joins the policy of improving World welfare in the first preambular paragraph. Whereas in the preamble to GATT 1947 there was a reference to the "full use of resources of the world", the WTO Agreement now refers to:

> "… the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development …".[20]

These policy objectives in relation to environmental protection and assistance to developing States are significant for a number of reasons. The developing international trade law jurisprudence on the consistency with WTO rules of municipal environmental regulation, particularly regulation that targets production and processing methods outside of the regulating State, will be a principal focus of Chapter 6. The relationship between trade treaty endorsement of "special and differential" status for developing States and the protection of human rights will be assessed in Chapter 7.

3. Other Policy Considerations

The textual indications of the objectives of parties to the WTO Agreement raise the issue of the underlying theoretical foundations of these objectives. Offering a brief catalogue of some of the major assumptions upon which the preambular paragraphs appear to be based may help to better contextualise these objectives. These underlying theoretical assumptions are not, however, directly relevant to the process of treaty interpretation.

The commitment contained in the WTO Agreement to improving living standards has already been noted. The theory of comparative advantage is said to provide theoretical support for the welfare benefits that the legal regulation

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20 Note also the Decision on Trade and the Environment, which is reprinted in World Trade Organization, The Legal Texts, note 3 above, 411-413. On the potential link between "sustainable development" and the "human right to development" considered in Chapter 2, see, for example, Philippe Sands, International Law in the Field of Sustainable Development, 65 British Year Book of International Law 303, 323-324 (1994). The significance of this potential link will be considered in Chapters 6 and 7.

of international trade seeks to provide.[21] There exists considerable literature on the theory and other economic justifications of free or freer international trade.[22] These theoretical justifications have been subjected to criticism on various grounds including that they are based on assumptions which lack empirical justification.[23] Given that the legal analysis currently being undertaken does not also require an analysis of economic theory, it is intended at this stage to simply note the apparent

21 The theory seeks to explain why trade between two States is mutually beneficial even where producers in one State are able that produce goods more efficiently than producers in the other. It is in the interests of the more efficient State for its industry to concentrate on production of goods in which it has the greatest comparative advantage (*ie* compared, it seems, both to *other* goods produced within the State and to the *same* goods produced by its trading partner) and to import from its trading partner goods in relation to which its industries suffer from a comparative disadvantage. Industries in developing States often enjoy comparative advantage in relation to goods the production of which is labour intensive and which does not require skilled labour. See generally John H Jackson, William J Davey and Alan O Sykes Jr, Legal Problems of International Economic Relations, 4th edition, West Group, St Paul, 2002, 7-14 ("Jackson *et al*"); and Michael J Trebilcock and Robert Howse, The Regulation of International Trade, 3rd ed, Routledge, London, 2005, 3-6. For the view that assumptions associated with the theory distinguish international trade regulation from other areas of international legal regulation, see Donald M McRae, The WTO in International Law: Tradition Continued or New Frontier, 3 Journal of International Economic Law 27, 29-30 (2000); and Jeffrey L Dunoff, The WTO in Transition: Of Constituents, Competence and Coherence, 33 George Washington International Law Review 979, 1009-1010 (2001).

22 According to Paul Samuelson "there is essentially only one argument for free trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe" – quoted in Jackson *et al*, ibid, 14-15. Jackson *et al* later observe that Samuelson's argument for free trade "is actually a trivial corollary of a well-known proposition in price theory often termed the first theorem of welfare economics: competitive markets, without externalities, are efficient, and interference with them is inefficient" – Jackson *et al*, ibid, 16. Various theoretical and empirical concerns have been raised in relation to these propositions – see for example, Jackson *et al*, 14-39; and Trebilcock and Howse, ibid, 6-20.

23 In the context of increasing global economic interdependence the mobility of capital (and the relative immobility of labour) is one factor which is said to challenge assumptions upon which the theory is based – see Herman E Daley, From Adjustment to Sustainable Development: The Obstacle of Free Trade, 15 Loyola of Los Angeles International and Comparative Law Review, 33, 36-42 (1992). See also Bob Hepple, Labour Laws and Global Trade, Hart Publishing, Oxford, 2005, 23-24. For a more general discussion, see, for example, Dani Rodrik, Has Globalisation Gone Too Far? Institute for International Economics, Washington, 1997. See also John H Jackson, The World Trading System – Law and Policy of International Economic Relations, 2nd edition, MIT Press, Cambridge, Massachusetts, 1997, 18-19 ("Jackson, The World Trading System").

significance of the theory of comparative advantage to the development of international trade rules. The concept of comparative advantage has been expressly invoked in the context of labour related human rights standards when States assert that a legitimate source of their comparative advantage is the availability of relatively cheap labour.[24]

A second economic policy consideration relates to the economic effect of international rules regulating global trade. The extent to which rules meet the needs and expectations of those engaged in international trade is fundamental to an assessment of the utility of those rules.[25] In addition to the substantive content of trade rules, their very existence appears to serve an important policy function.[26] Writers such as Ronald Coase[27] and Douglas North[28] have suggested that predictability and certainty, which arise from the consistent application of clear legal rules, are economically significant.

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24 See, for example, the WTO Ministerial Declaration adopted on 13 December 1996, WT/MIN(96)/DEC, which included the following statement in paragraph IV of the Declaration:

> "We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."

See also the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session Geneva, June 1998. The Declaration is reprinted in 137 International Labour Review 253 (1998). The declaration includes the following paragraph:

> "[the International Labour Conference] … [s]tresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up" – paragraph 5.

25 For example, the original GATT safeguard provisions and those dealing with customs unions and free trade areas did not meet the needs and expectations of certain members of the international community and in some respects these provisions were ignored – see Jackson, The World Trading System, note 23 above, 166 (customs unions and free trade areas) and 195-199 (safeguard measures).

26 Compare the panel report in *United States – Sections 301-310 of the Trade Act of 1974*, note 18 above, paragraph 7.75, where the panel observed that "[p]roviding security and predictability to the multilateral trading system is [a] … central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble [of the WTO Agreement]".

27 RH Coase, The Firm, the Market and the Law, University of Chicago Press, Chicago, 1988, 10.

28 Douglass C North, Institutions, Institutional Change and Economic Performance, Cambridge University Press, Cambridge, 1990, 3-10.

Clarity as to content and the prospects for consistent application of rules are also values associated with the rule of law.[29] Rule of law criteria, including in relation to certainty and consistent application of rules, will be considered in Chapter 4.

Other economic policy objectives can, no doubt, be identified as having significance to the global trading system.[30] Having noted two important economic policy issues, attention will now turn to a particular non-economic policy which also appears to have influenced the regulation of international trade under international law. The non-economic policy in question is the geo-political value which might be referred to as the maintenance of international peace.[31] Richard Cooper has argued that trade policies prior to the Second World War contributed to the deterioration of international relations prior to the commencement of armed conflict.[32] In his view "the seeds of World War II, in both the Far East and in Europe were sowed by [US President] Hoover's signing of the Smoot-Hawley tariff". Whilst more general surveys of the causes of the war suggest many other important factors,[33] United States trade policy-makers since the Second World War appear to have acknowledged the connection asserted by Cooper.[34]

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29 According the Joseph Raz, the "… basic intuition from which the doctrine of the rule of law derives [is]: the law must be capable of guiding the behaviour of its subjects" – Raz, The Rule of Law and its Virtue, 93 Law Quarterly Review 195, 198 (1977).

30 Including economic justifications for transparency in municipal restrictions on international trade and "tariffication" (the replacement of different types of barriers to trade with tariffs) – see, for example, Jackson, The World Trading System, note 23 above, 140. Another apparently significant economic assumption apparent in GATT rules relates to the implicit support for Kaldor-Hicks efficiency over Pareto optimality in GATT provisions such as the rules governing safeguard measures. Such measures are to be temporary under Article XIX of GATT 1994, note 3 above, and structural adjustment policies are encouraged under the *Agreement on Safeguards*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 3 above. For a discussion of the place of Kaldor-Hicks efficiency in a trade context, see Robert Howse, From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime, 96 American Journal of International Law 94, 99-100 (2002).

31 See, for example, Jackson, The World Trading System, ibid, 13.

32 Richard N Cooper, "Trade Policy as Foreign Policy" in Robert M Stern (ed), U.S. Trade Policies in a Changing World Economy, MIT Press, Cambridge Massachusetts, 1987, 291, 291-292.

33 AJP Taylor refers to pre-war German economic concerns as to the rise in Soviet economic power but does not appear to place any significance on trade relations as a cause of war in Europe – see Taylor, The Origins of the Second World War, Hamish Hamilton, London, 1963, 218-219. It might therefore be doubted whether German plans to wage a war of aggression were significantly influenced by the Smoot Hawley Tariff.

34 Stephen D Krasner, "Comment on 'Trade Policy as Foreign Policy', in Stern, note 32 above, 327, 331-334. Compare the following observations made by the United States

The desire for peaceful coexistence was a basic value motivating the establishment of the United Nations and the entire post-1945 international legal order.[35] A fundamental feature of the GATT system as established in the 1940s was its discipline in relation to the discriminatory imposition of barriers to trade.[36] The maintenance of friendly international relations would appear to be enhanced by this principle of non-discrimination.

This global objective appears to have been combined with a corresponding municipal objective. It has been argued that GATT 1947 provided a means by which governments could better resist protectionist constituencies within their own political systems. According to Daniel Esty:

> "By enshrining the principles of liberal trade in an international regime, the creators of the GATT not only built a mechanism for reducing friction among nations, they also elevated the commitment to freer trade to a nearly 'constitutional' level, thereby limiting the power of governments around the world (and legislatures in particular) to give in to the pleadings of domestic interests – both producers and labor groups – seeking shelter from the rigours of global competition … . In moving free trade principles to a higher plane of authority and providing a buffer against protectionist pressures, the GATT provides a mechanism for addressing the collective-action problem that plagues

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representative (Mr Winant) in Economic and Social Council of the United Nations on 11 February 1946 while introducing a draft resolution calling for the convening of an international conference on trade and employment:

> "There is no need to dwell upon the disastrous consequences of Allied disunity following 11 November 1918; but because of the subject matter that is before us it might be well to remember that blindly nationalistic and selfish trade policies eventually retarded all free exchange of goods across frontiers. This situation was intensified because migration from one country to another was practically stopped. These external factors, in combination with internal economic dislocation and unemployment in many countries, forced Governments to experiments that were frequently not profitable and also brought into control minorities that took on dictatorial powers. The world laboratory of that time taught even a casual observer that economic distress is followed by political disturbances and that both destroy security" – Economic and Social Council – Official Records, First Session, 7th meeting, 11 February 1946, 64.

35 See, for example, Article 1, paragraph one, of the United Nations Charter.

36 See, for example, Articles I and III of GATT 1947, note 4 above.

> domestic trade policymaking[37] and thereby enhances society's overall economic well-being, promotes international stability, and serves the long-term public interest."[38]

Whilst the extent to which international treaty obligations actually limit governments within their own national legal systems depends on the particular constitutional rules in each system,[39] the objective of enhancing the position of those supportive of freer trade within municipal political systems appears implicit in the negotiation of GATT 1947 and the WTO Agreement.[40] The presence in trade treaties of provisions allowing retaliation against dumping and subsidies may also

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37 Esty describes this collective action problem in the following terms – "[t]he benefits of … trade liberalization are diffused so widely across society that individuals do not see their value, and relatively few groups are organized or motivated to systematically defend … [them]. The short term costs of trade liberalization (e.g., dislocation of uncompetitive producers and their workers) … are often concentrated in well-organized groups (e.g., companies or unions) with political power" – Esty, Greening the GATT: Trade, Environment and the Future, Institute for International Economics, Washington 1994, 73-74. [Footnote not in original.]

38 Ibid, 76. Compare the assessment of the development of the GATT system offered by Professor Howse, note 30 above, 94-98. The use of international legal standards as a source of stability can also be characterised as a source of weakness. Export industries may be given disproportionate influence and secrecy in trade negotiations (designed perhaps to avoid protectionist interests mobilising against trade liberalisation) raise questions about the democratic legitimacy of the WTO and international standards – see, for example, Ernst-Ulrich Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 European Journal of International Law 621, 646-647 (2002); Petersmann, "Human Rights and International Trade Law: Defining and Connecting the Two Fields" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 29, 87-88; and the consideration of these issues in note 41 below.

39 Esty's observations apply with greater force to monist municipal systems.

40 For a discussion of the attitude of export industries to the negotiation of the GATT 1947 and ITO Charters, see Richard N Gardner, Sterling-Dollar Diplomacy – The Origins and the Prospects of Our International Economic Order, McGraw-Hill Book Company, New York, 1969, 371-378. John Croome offers the following summary of the 1985 Leutwiler report (commissioned by the Director-General of GATT and apparently influential on the decision to commence the Uruguay Round of trade negotiations):

> "Open international trade was a key to sustained growth – but the world market was being choked by a growing accumulation of restrictive measures, and the GATT … [rules] were 'increasingly ignored or evaded'. Protectionism was not the answer. Trade restrictions acted as brakes on each economy's ability to take advantage of new technology, and to grow. A new commitment to open trade was needed – but growth would also require the wise use of monetary and fiscal policies, and of debt and development policies" – Croome, Reshaping the World Trading System: A History of the Uruguay Round, 2nd edition, Kluwer, The Hague, 1999, 13.

be linked to the objective of assisting governments to resist their own protectionist constituencies.[41] The international trade rules allowing anti-dumping and countervailing duties provide a means by which to defend local producers against mercantilist policies[42] of trading partners.

Having identified economic and non-economic policy objectives furthered by the establishment of the international trading system after the Second World War, an additional point can be made. The pursuit of economic policies underpinning the regulation of international trade appears to inevitably result in clashes between such policies and *non-economic* policies. Explicit acknowledgement of the potential for such clashes can be found in trade treaties. Acknowledgment of possibility of clashes between competing *global* policies is apparent in Article XXI:c of GATT 1994 which provides that nothing in the agreement prevents "… any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

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41 Jackson *et al*, note 21 above, observe that "[a]mong the reasons which [anti-dumping] laws seem likely to persist are first, on the part of [the United States] Congress, members find it convenient to deflect complaints about import competition by referring constituents to the [anti-dumping] procedures, and second, many people, particularly in import sensitive industries, feel strongly that dumping is unfair" – ibid, 691. To the extent that the processes of negotiation and the provisions of trade treaties are designed to minimise the influence of certain constituencies within States, the trading system appears to expose itself to legitimacy and transparency critiques. Secrecy in GATT negotiations and the allegedly closed nature of the GATT bureaucracy have been criticised as undermining the political legitimacy of the international trading system – see, for example, Eric Stein, International Integration and Democracy: No Love at First Sight, 95 American Journal of International Law 489 (2001) – on broader issues of political legitimacy; and Howse, note 30 above, 98-101 – on GATT "insiders", *cf* Debra C Steger, Afterword: the "Trade and …" Conundrum – A Commentary, 96 American Journal of International Law 135, 139 (2002). Compare Jackson, The World Trading System, note 23 above, 111; and Remarks by Frederick M Abbott, Human Rights, Terrorism and Trade, American Society of International Law, Proceedings of the 96th Annual Meeting, 96 ASIL PROC, 121-128 (2002). It is arguable that transparency critiques should be addressed primarily at the policies of national governments when constituting their delegations for trade negotiations and at their policies on providing their populations with information on negotiating positions likely to be taken. There is also the danger that secrecy designed to minimise the influence of protectionist constituencies enhances the relative position of free trade constituencies, potentially at the expense of other, non-protectionist constituencies.

42 According to Professors Trebilcock and Howse, note 21 above, European mercantilists of the seventeenth and eighteenth centuries "argued for close regulation of international trade for two principal reasons: (1) to maintain a favourable balance of trade, which argued for aggressive export but restrictive import policies … and (2) to promote the processing or manufacturing of raw materials at home, rather than importing manufactured goods, which would displace domestic production and employment …" – ibid, 2.

The reference to "international peace and security" links this provision to Chapter VII of the United Nations Charter and the powers of the Security Council.

The achievement of non-economic policy objectives of particular States often conflicts with the operation of the legal rules regulating international trade. Such conflict is illustrated by the GATT and WTO panel and Appellate Body reports scrutinising United States environmental regulation and European controls relating to the use of hormones in beef production.[43]

Clashes between economic and non-economic policies were anticipated in the GATT in Articles XIX, XX and XXI. Each of these Articles provides exceptions in relation to the operation of GATT principles which cannot be justified on exclusively economic grounds.[44] As noted in the introduction, a critical question is the extent to which the exceptions contained in these provisions can be relied on to justify trade measures designed to secure respect for human rights.

Having identified some of the policy issues underlying the development of the international legal framework regulating global trade, basic observations will now be made as to features of that framework.

4. The Development of the Multilateral Trading System

The historical development of the multilateral trading system will now be briefly examined in order to place in context the international regulation of trade measures taken for human rights purposes.

(a) Protocol of Provisional Application of GATT 1947 and the Failure to Establish the International Trade Organization

In 1944, the finance ministers of major allied nations gathered at Bretton Woods, New Hampshire, in the United States.[45] From this meeting, the International Mon-

43 In relation to the scrutiny of United States environmental regulations, see the discussion of the two *Tuna Dolphin* cases in Chapter 6. In relation to European regulation of hormones in beef, see the Appellate Body's reports in *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, adopted by the Dispute Settlement Body on 13 February 1998; and in relation to European responses to genetic modification and food, see the panel report in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, adopted by the Dispute Settlement Body on 21 November 2006.

44 Trebilcock and Howse, note 21 above, 312-314, discuss economic and non-economic justifications for safeguard measures. Professor WM Corden's "conservative social welfare function" appears to reflect economic and non-economic justifications for the imposition of restrictions on international trade – see Corden, Trade Policy and Economic Welfare, Oxford University Press, Oxford, 1974, 107-112.

45 For a brief introduction to the Bretton Woods system, see Jackson *et al*, note 21 above, 199-207.

etary Fund ("IMF")[46] and the International Bank for Reconstruction and Development[47] ("the World Bank") were established.

In 1946, the United Nations Economic and Social Council ("ECOSOC"), at its first session, began preparations for a comprehensive United Nations Conference on Trade and Employment.[48] As part of these preparations, trade delegations began meeting in order to negotiate terms of a multilateral treaty regulating tariffs and international trade issues. These negotiations produced GATT 1947.[49] It was intended that an international trade organisation would be established *via* a separate treaty to oversee the regulation of international trade. The treaty establishing this organisation was, in many respects, to supersede GATT 1947.[50]

GATT 1947 set out specific tariff bindings which had been secretly agreed upon at the early meetings of trade delegations prior to the Trade and Employment Conference.[51] In order to ensure that the untimely disclosure of the secret tariff

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46 Established under Articles adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 22 July, 1944. The IMF Articles of Agreement entered into force 27 December 1945 and have been amended on a number of occasions.

47 Established by the *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 27 December 1945, 2 UNTS 134. The International Finance Corporation was set up by the World Bank in 1956 for the purpose of making loans which the World Bank was precluded from making under its Articles. The International Development Association was established in 1960 to make loans on more generous terms than the World Bank – see John H Jackson, William J Davey and Alan O Sykes Jr, Legal Problems of International Economic Relations, 3rd edition, West Group, St Paul, 1995, 276-277 ("Jackson *et al*, 3rd edition").

48 The Economic and Social Council adopted resolution 1/13 on 16 February 1946 during its 1st session in which it called for the convening of an international conference for the "purpose of promoting the expansion of production, exchange and consumption of goods". In the preamble to the resolution the Economic and Social Council considered "it essential that the co-operative economic measures already taken [an apparent reference to the establishment of the IMF and the International Bank for Reconstruction and Development] be supplemented by further international measures dealing directly with trade barriers and discriminations which stand in the way of an expansion of multilateral trade and by an undertaking on the part of nations to seek full employment" – United Nations Economic and Social Council, Official Records, First Session, London, 1946, 173-174. See also Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the First Session, London, 1946, 3 and 42.

49 John H Jackson, World Trade and the Law of GATT, Bobbs-Merrill, Indianapolis, 1969, 42-45 ("Jackson, World Trade and the Law of GATT").

50 Although not entirely, Parts I and III of GATT 1947 were to continue to operate after the Establishment of the ITO.

51 Jackson, The World Trading System, note 23 above, 39.

agreements did not lead to distortion in trade patterns, the GATT was implemented through a protocol of provisional application entered into in 1947.[52]

The Conference on Trade and Employment was held at Havana, Cuba from 21 November 1947 to 24 March 1948. A Charter for the proposed International Trade Organization ("ITO") was negotiated at the Conference ("the Havana Charter"). As already noted,[53] the Havana Charter included provisions on fair labour standards and provided for cooperation between the ITO and the International Labour Organization. Non-governmental organisations ("NGOs") accredited with ECOSOC were given consultative status in the preparations for the Conference. International labour federations were included amongst these NGOs.[54]

The protocol provisionally applying GATT 1947 was also entered into in 1947 in order to allow the United States to rely on a congressional authorisation to enter trade treaties. This authorisation was due to expire in 1948.[55]

Though the protocol was designed to apply GATT 1947 for what was expected to be a short period up to when the ITO came into existence, the protocol[56] effectively operated for just under 50 years. United States domestic politics ensured that the United States Congress did not endorse the treaty establishing the ITO.[57] Without United States support the Havana Charter never came into force. Additionally, the protocol of provisional application did not bring GATT 1947 into force in its entirety. Part II[58] of GATT 1947 was only implemented *via* the protocol to the "extent not inconsistent with existing [municipal] legislation."[59] So-called "grandfather" rights (*ie* arising from existing inconsistent municipal legislation) were

52 *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, note 4 above; Jackson, The World Trading System, ibid.

53 See the text accompanying note 8 above.

54 GATT, Analytical Index, note 15 above, Volume 1, 4, footnote 1.

55 Jackson, The World Trading System, note 23 above, 39. See also Andreas F Lowenfeld, International Economic Law, Oxford University Press, Oxford, 2002, 24-25.

56 There were also numerous accession protocols. For a discussion of the procedures for accession, see GATT, Analytical Index, note 15 above, Volume 2, 1018-1020.

57 The United States Department of State issued a statement on 6 December 1950 that United States congressional approval for the Havana Charter would no longer to be sought – see GATT, Analytical Index, ibid, Volume 2, 998. For an account of the United States debate leading to the decision not to seek congressional approval of the Havana Charter, see Gardner, note 40 above, 371-378.

58 Articles III to XXIII.

59 Article 1(b) of *Protocol of Provisional Application*, note 4 above. "Grandfather" rights no longer formally apply in the WTO context although at least one set of national rules "grandfathered" under the *Protocol of Provisional Application* appear to have specific protection under the WTO Agreement – see Article 3 of GATT 1994. This article appears to justify United States rules regarding foreign built ships operating within national waters. These rules were formerly "grandfathered" – see Jackson, The World Trading System, note 23 above, 49.

preserved. Part II of the GATT 1947 contained, *inter alia*, a national treatment obligation[60] and a general prohibition on quantitative restrictions.[61]

Thus the GATT was brought into effect in 1947 with a number of peculiar features reflecting the absence of agreement on the establishment of the ITO. Trade in goods was regulated by GATT 1947 without a treaty-based secretariat.[62] All essential decision-making was vested in the parties to the Protocol.[63] The GATT explicitly refers to "contracting parties" and not to "members" of any international trade organisation.[64]

(b) Tariff and Non-Tariff Barriers to Trade and the Tokyo Round 'Side' Agreements

Parties to GATT 1947 initially negotiated modest tariff reductions.[65] Under Article XXVIII of GATT 1947 parties were able to enter negotiations to make adjustments in tariff schedules in order "to maintain a general level of reciprocal and mutually advantageous concessions" under the agreement. National delegations also entered into general rounds of trade negotiations.[66] By the 1970s, substantial reductions of tariffs had been negotiated in relation to certain industries (conspicuously not including agriculture or textiles).[67]

As tariffs fell, the political pressure increased on many governments to protect local industries by various non-tariff measures.[68] Whilst GATT 1947, in Arti-

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60 Article III of GATT 1947, note 4 above. This essentially involves treating imports that have entered a State in the same way as nationally produced goods.

61 Article XI GATT 1947, ibid. National treatment obligations and the prohibition on quantitative restrictions (for example, quotas on the volume of imports that will be allowed) will be discussed further below.

62 For an account of the development of the GATT Secretariat, see Jackson, World Trade and the Law of GATT, note 49 above, 145-151.

63 The parties to *Protocol of Provisional Application* (and accession protocols) are generally referred to as the "contracting parties" to the GATT 1947.

64 See Jackson, World Trade and the Law of GATT, note 49 above, 119-121.

65 According to Professor Jackson, the 1947 Geneva Round of trade negotiations produced tariff reduction commitments covering US$10 billion worth of trade compared to US$3,700 billion covered by the Uruguay Round negotiations (1986-1994) – Jackson, The World Trading System, note 23 above, 74.

66 Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), the "Dillon Round" (1960-1961), the "Kennedy Round" (1962-1967), the "Tokyo Round" (1973-1979) and the "Uruguay Round" (1986-1994) – ibid.

67 According to Professors Trebilcock and Howse and the multilateral trade rounds were "extremely successful and have led to the reduction of average world tariffs on manufactured goods from 40% in 1947 to 5% [in 2005]" – Trebilcock and Howse, note 21 above, 24. For contrasts in relation to agriculture and textiles, see Trebilcock and Howse, ibid, Chapter 11, and Jackson *et al*, 3rd ed, note 47 above, Chapter 26.

68 See, for example, John H Jackson, The World Trade Organization – Constitution and Jurisprudence, Royal Institute of International Affairs, London, 1998, 102 ("Jackson,

cle XI, included a prohibition of quantitative restrictions, Article XI and similar provisions were not considered by many contracting parties to provide sufficient discipline on the use of such measures. The "Kennedy" (1962-1967) and "Tokyo" (1973-1979) Rounds of multilateral trade negotiations sought to impose additional disciplines on non-tariff barriers to trade.[69] The Tokyo Round, in particular, produced a number of important special agreements or "codes"[70] which dealt with problems in the trading system without attempting to amend GATT 1947, which was extremely difficult to amend.[71] Not all GATT parties were parties to the side agreements. The existence of these side agreements raised questions as to their effect on legal obligations assumed under GATT 1947. For example, parties to the side agreements sometimes differentiated between other GATT members on the basis of whether or not they were parties to the side agreements. Such differentiation potentially violated the "most favoured nation" rule contained in the GATT.[72]

(c) GATT and Developing States

At the same time that the various GATT negotiation rounds were being held in the 1950s through to the 1970s, numerous ex-colonies were gaining independence and seeking GATT accession. Existing GATT parties would normally only allow a State to accede to the GATT if the acceding State offered specific trade concessions.[73] Newly independent States could avoid this process if they could secure sponsorship from the former administering State.[74]

During the 1950s, concern was expressed as to the difficulties faced by developing States in the world trading system.[75] In 1964, the first United Nations Conference on Trade and Development ("UNCTAD") was convened.[76] UNCTAD was

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World Trade Organization"), 20.

69 Ibid, 20-22.

70 For a list of the various Tokyo Round agreements and "understandings" and a brief discussion of their significance, see John H Jackson, Restructuring the GATT System, Pinter Publishers Ltd, London, 1990, 26-30.

71 Article XXX of GATT 1947, note 4 above, dealt with amendment. For a discussion of the amendment procedures followed, see Jackson, World Trade and the Law of GATT, note 49 above, 73-82.

72 See, for example, Jackson, The World Trading System, note 23 above, 77 and 290.

73 The process under GATT 1947 is discussed in Jackson, World Trade and the Law of GATT, note 49 above, 92-96.

74 See Article XXVI:5(c) of GATT 1947, note 4 above; and Jackson, ibid, 96-100.

75 See the report of the panel of experts retained by GATT which was delivered in 1958 (the "Habeler Report") – GATT, Trends in International Trade, GATT Geneva, 1958. The Habeler Report is discussed in Jackson, ibid, 240-248.

76 The conference took place in Geneva from 23 March to 16 June 1964. UNCTAD was established as an organ of the United Nations General Assembly by General Assembly resolution 1995 (XIX), adopted on 13 December 1964, United Nations General Assembly, Official Records, 19th Session, Supplement 15, 1-5.

established as a permanent body addressing the needs of developing States.[77] The demands made on behalf of developing States through UNCTAD were reflected in changes to GATT 1947.[78] The limited provisions in the GATT favouring developing States[79] were supplemented by the adoption of Part IV of the GATT in 1966. This Part, which failed to impose significant concrete obligations on developed States, sought to encourage the granting of *special and differential* status to developing States.[80]

Temporary waivers of GATT discipline, particularly in relation to the "most favoured nation" obligation under Article I of GATT 1947, were granted by the contracting parties in favour of developing States[81] and the so-called "enabling clause" in 1979[82] continued this authorisation of preferential access to developed State markets for goods produced by developing States on a more permanent basis.

The Tokyo Round attempts to accommodate concerns of developing States within the GATT roughly coincided with the push for a "new international economic order".[83] This movement by developing States for a fundamental readjustment in international economic relations began to falter in the 1980s.[84] Through the 1990s heavy debt burdens and continuing deterioration in the terms of trade for commodities exported by developing States appear to have further diminished their capacity to influence the agenda of international trade negotiations.[85]

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77 For a brief discussion of UNCTAD from a trade perspective, see Jackson, World Trade and the Law of GATT, note 49 above, 645; Trebilcock and Howse, note 21 above, 483-484; and Professor Kevin Ryan, "International Trade Law Revisited", in Gabriël A Moens (ed), Constitutional and International Law Perspectives, University of Queensland Press, Brisbane, 2000, 182, 187-192.

78 Professor Jackson refers to the "psychological impact" of the establishment of UNCTAD on "national representatives to GATT", ibid, 645. An agreement to insert Part IV (entitled "Trade and Development") into GATT 1947 was opened for signature on 8 February 1965.

79 See Article XVIII of GATT 1947, note 4 above. This article was amended in 1948 and then again in 1957 – GATT, Analytical Index, note 15 above, Volume 1, 512.

80 Part IV is discussed further in Chapter 7.

81 Waivers – Generalized System of Preferences, decision of 25 June 1971, BISD, 18th Supplement, 24.

82 See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, decision of 28 November 1979, BISD, 26th Supplement, 203. This GATT decision continues in force under the WTO Agreement pursuant to Article 1(b)(iv) of GATT 1994, note 3 above.

83 See Jackson *et al*, note 21 above, 1194-1196.

84 See, for example, Trebilcock and Howse, note 21 above, 471-472.

85 See generally Lori F Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit (eds), International Law Cases and Materials, 4th edition, West Group, St Paul, 2001, 1574-1575, where the editors offer the following discussion of the influence of the so-called "Group of 77" developing States:

The relative success of more open developing State economies in East Asia (the so-called "newly industrialised countries") led to questions as to the wisdom of import substitution policies that had been followed by many developing States.[86] Rather than focussing on the protection of local industries from imports, some developing States began to embrace more open trade policies.[87]

The WTO Agreement, which was the product of the Uruguay Round of trade negotiations, included numerous provisions directed at the concerns of developing States.[88] There have remained significant concerns, however, amongst developing States, that the WTO system does not adequately address the development needs of these States. The initiation of the Doha Round of trade negotiations included an express commitment to address the needs of developing States.[89]

With the general reduction of tariffs worldwide, the relative advantage given to developing States exports *via* preferential tariff arrangements has continued to diminish. As has already been noted, it has been in the context of these preferential tariff arrangements that mechanisms have been developed to link respect for human rights. Chapter 7 looks in more detail at the relationship between trade, development and human rights.

(d) The Uruguay Round of Trade Negotiations and the WTO

The Uruguay Round of trade negotiations commenced in 1986.[90] The conclusion of the Round saw a number of significant changes to the regulation of international trade. The absence of a firm institutional foundation for GATT was finally addressed. The Uruguay Round negotiations produced an agreement on the cre-

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> "[t]he influence of the Group of 77, which was relatively powerful in the 1960s and 1970s, has waned in recent years. Severe economic problems in the developing countries, including the Third World debt crisis, declines in commodity prices and the economic crises in a number of Asian and Latin American countries have diminished the collective impact of the Group's efforts to foster reform of the world's economic arrangements in favor of the developing world. Competition for capital generated by Eastern European countries and the republics of the former Soviet Union has also eroded the capacity of the developing countries to achieve enhancement of their economic development through collective action."

Professors Trebilcock and Howse have observed that "… the Uruguay Round result reflects, in large measure, a rejection of the view that developing countries should not be required to make reciprocal commitments to trade liberalisation" – The Regulation of International Trade, 2nd ed, Routledge, London, 1999, 388.

86 Jackson *et al*, note 21 above, 1181-1182.

87 Ibid, 1182.

88 A number of these provisions are addressed in Chapter 7.

89 Most of the paragraphs of the Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001, deal in one way or another with concerns expressed on behalf of developing States.

90 For a general account of the Uruguay Round negotiations, see Croome, note 40 above.

ation of the WTO.[91] The WTO became the umbrella organisation overseeing not simply international trade in goods but also agreements relating to trade in services,[92] the protection of intellectual property rights[93] and trade-related investment measures.[94] Steps were taken to ensure greater transparency in the international trading system and a trade policy review mechanism was instituted as part of the WTO structure.[95]

The decision making provisions within the WTO Agreement attempt to retain the consensus approach which developed under GATT 1947.[96] A weighted voting system, such as those employed in the IMF[97] and World Bank,[98] was not adopted.

An explicit power to interpret the WTO Agreement, including its annexes, is conferred on the Ministerial Conference[99] and General Council[100] of the WTO by Article IX:2 of the WTO Agreement. Changes to the original GATT rules which

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91 The WTO Agreement, note 3 above.

92 The *General Agreement on Trade in Services*, an annexure to (see Annex 1B) and an integral part of the WTO Agreement, ibid.

93 The *Agreement on Trade-Related Aspects of Intellectual Property Rights*, an annexure to (see Annex 1C) and an integral part of the WTO Agreement, ibid.

94 The *Agreement on Trade-Related Investment Measures*, an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid.

95 There are various WTO agreements that require transparency in technical standards. See, for example, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, the *Agreement on Technical Barriers to Trade* and the *Trade Policy Review Mechanism*, which are integral parts of the WTO Agreement, ibid, and are set out in Annexes 1A and 3, respectively.

96 Although, as was the case under GATT 1947, voting is formally provided for. See, for example, Article IX:1 of the WTO Agreement, note 3 above. Note the reverse consensus required to avoid adoption of reports made under the dispute resolution system discussed in the text accompanying note 218 below.

97 For a brief introduction to the IMF, see Damrosch *et al*, note 85 above, 1597-1613. For a more detailed discussion see Lowenfeld, note 55 above, Chapters 16-18.

98 For a brief introduction to the World Bank, see Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit (eds), International Law – Cases and Materials, 3rd edition, West Group, St Paul, 1993, 1437-1444.

99 According to Article IV paragraph 1 of the WTO Agreement, note 3 above:

> "There shall be a Ministerial Conference composed of representatives of all the Members [of the WTO], which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement."

100 According to Article IV paragraph 2 of the WTO Agreement, ibid:

> "There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial

regulated amendments to the treaty regime and waivers from discipline have been made in the WTO Agreement.[101]

Reference has been made to the difficulty in amending the GATT and the consequent entry into side agreements principally during the Tokyo Round of multilateral trade negotiations. The Uruguay Round endorsed an all-or-nothing approach to these side agreements. With only two notable exceptions (civil aircraft and government procurement),[102] the practice of allowing important "side" agreements was abandoned, with members of the WTO being effectively compelled to become parties to each of the former side agreements. The GATT was re-implemented as "GATT 1994", thus avoiding the need to follow the original GATT's amendment procedures.[103]

(e) Trade in Services

The regime for trade in goods inherited by the WTO reflected the degree of sophistication reached during the near 50 years of operation of the original GATT. The introduction of GATT-type discipline in the field of services has marked the beginning of a similar process of development which Professor John Jackson has suggested may take a further 50 years to reach a comparable level of sophistication.[104]

The inclusion of trade in services into GATT-style discipline reflected concerns that service sectors in which service-providers in developed States enjoyed considerable comparative advantage and which accounted for an increasing proportion of developed State exports should benefit from a liberalisation process similar to that prevailing in relation to trade in goods.[105]

The *General Agreement on Trade in Services* ("GATS") utilises concepts used generally in international trade regulation, such as a "most favoured nation"

Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. … ."

101 For example, note the change in the special majorities required in Articles X and IX:3 of the WTO Agreement, ibid.

102 See the *Agreement on Trade in Civil Aircraft*, done at Geneva on 12 April 1979 (with subsequent variations); and the *Agreement on Government Procurement*, done at Marrakesh on 15 April 1994. Both agreements are annexed (see Annex 4) to the WTO Agreement, note 3 above. There were initially four agreements the subject of negotiations during the Uruguay Round which were not subject to this all-or-nothing approach. The two other Plurilateral Agreements were the *International Dairy Agreement* and the *International Bovine Meat Agreement*. Both of these agreements were terminated at the end of 1997. See also Article II paragraph 3 of the WTO Agreement.

103 Amendment was governed by Article XXX of GATT 1947, note 4 above.

104 Jackson, The World Trading System, note 23 above, 307-308.

105 Ibid, 306.

rule[106] and national treatment obligations.[107] GATS also includes provisions allowing exceptions from GATS discipline that are designed to address similar issues to those addressed in GATT 1994.[108]

Given that services in many respects are not comparable to goods, GATS and future negotiations based on this WTO agreement face many challenges, not least relating to:

– Financial services and prudential concerns;[109]
– Establishment rights[110] and the movement of labour; and
– Audiovisual services and the protection of cultural identity.

(f) Intellectual Property Protection

The inclusion of an agreement protecting intellectual property rights under the WTO umbrella also raises a number of important questions. The rights recognised in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS Agreement")[111] largely reflect those addressed in treaties administered by the World Intellectual Property Organization ("WIPO").[112] Dissatisfaction from within developed States as to the implementation of these treaties contributed to the push for the inclusion of intellectual property rights protection under the WTO umbrella.[113]

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106 See Article II of GATS, note 92 above.

107 See Article XVII of GATS, ibid.

108 See Articles X, XII, XIV and XIV *bis* of GATS, ibid.

109 See the Annexes to GATS, ibid, that address financial services.

110 The entitlement to establish a physical presence, for example, by the placement of staff, in another State in order to provide a service – see the definitions in GATS, ibid, of "trade in services" in Article I and "measures by Members affecting trade in services" and "service supplier" in Article XXVIII; and the "Annex on Movement of Natural Persons Supplying Services under the Agreement".

111 Note 93 above.

112 The TRIPS Agreement specifically refers to the 1967 revision of the *Paris Convention for the Protection of Industrial Property*, revised in Stockholm by agreement on 14 July 1967; the 1971 revision of the *Berne Convention for the Protection of Literary and Artistic Works*, revised in Paris by agreement on 24 July 1971; the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, adopted at Rome on 26 October 1961; and the *Treaty on Intellectual Property in respect of Integrated Circuits*, adopted at Washington on 26 May 1989 – see, for example, Article 1 paragraph 3 of the TRIPS Agreement and footnote 2 to the paragraph.

113 Jackson *et al*, note 21 above, 961-962. The TRIPS Agreement anticipates cooperation between WIPO and the TRIPS Council – see Article 68 of the TRIPS Agreement, note 93 above. An agreement on cooperation between the WTO and WIPO came into effect on 1 January 1996 [for text of this agreement see <http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm> – visited on 5 May 2007]. In cases of conflict between WIPO sponsored treaties and the TRIPS Agreement, the principles in the

Disputes concerning the TRIPS Agreement are to be dealt with using the integrated dispute settlement mechanisms set up under the WTO Agreement.[114] WTO remedies for breach of intellectual property rights are not quarantined to the goods implicated in the violation of such rights and other sectors of trade can be targeted in retaliation for breach of intellectual property rights.[115] The WTO dispute settlement system will be discussed further below.

The capacity for WTO members to rely on WTO dispute settlement procedures in order to secure the protection of intellectual property rights reflects a fundamental shift in orientation of the WTO compared to the original GATT.[116] Those concerned with the protection of human rights have asked why the WTO protection of intellectual property rights should not be supplemented by provisions designed to ensure protection of labour related human rights.[117] Those opposed to the expansion of linkage of trade and non-trade issues within the WTO have also expressed concerns about the TRIPS Agreement. Professor Jagdish Bhagwati has argued that the TRIPS Agreement:

> "… facilitates, even enforces with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich (which produce it). By putting TRIPS into the WTO, in essence we legitimated the use of the WTO to extract royalty payments. We also demonstrated to the next set of northern lobbies that they could do the same. Thus, the unions now say: you did it for 'capital,' so do it for 'labor'… . And the poor countries that have no lobbies anywhere like the

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Vienna Convention on the Law of Treaties, note 13 above, dealing with inconsistent treaties would appear to apply – see Article 30. Where the parties to a dispute are bound by both the TRIPS Agreement and a non-WTO treaty, the later (*ie* the TRIPS Agreement) treaty normally prevails – see Article 30 paragraphs 3 and 4 of the Vienna Convention. Note, however, the potential operation of the *lex specialis* principle. On such issues of treaty interpretation in the context of the WTO Agreement, see Joost Pauwelyn, Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law, Cambridge University Press, Cambridge, 2003. On the *lex specialis* principle and its interaction with other principles, see International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, 30-166.

114 See Article 64 of the TRIPS Agreement, note 93 above.

115 See Article 22 paragraph 3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, note 18 above.

116 Note that the original GATT did refer to such matters as counterfeit goods and patent protection – Article XX(d) of GATT 1947, note 4 above.

117 Virginia A Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2 Legal Analysis, 177, 200-201.

> sumptuous ones such as … the [American Federation of Labor – Congress of Industrial Organizations] now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede, cynically realizing that the bone thrown to these lobbies in their own political space is actually a bone down the gullets of the poor countries."[118]

The TRIPS Agreement and its potential impact on developing States will be considered in Chapter 7.

(g) Trade Policy Review

A trade policy review mechanism is established *via* Annex 3 of the WTO Agreement.[119] The objectives of the mechanism are set out in paragraph A of the annex which includes the following provision:

> "The purpose of the Trade Policy Review Mechanism ('TPRM') is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements,[120] and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."

The 1996 OECD Report referred to at the outset of this chapter discusses the potential for the TPRM to allow review in relation to the maintenance of core labour standards.[121] In particular, the mechanism may allow for review of deliberate policies to reduce core labour standards in certain export sectors and export processing zones. The OECD report observes that such a "… TPRM option would

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118 Jagdish Bhagwati, Afterword: The Question of Linkage, 96 American Journal of International Law, 126, 127-128 (2002). [Footnotes not reproduced.] According to George Soros "[t]he the WTO opened up a Pandora's box when it became involved in intellectual property rights. If intellectual property rights are a fit subject for the WTO, why not labor rights, or human rights" – quoted in Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 European Journal of International Law 815, 818 (2002).

119 The *Trade Policy Review Mechanism* is an annexure to (see Annex 3) and an integral part of the WTO Agreement, note 3 above.

120 See note 102 above [footnote not in original].

121 1996 OECD Report, note 1 above, 175-176.

provide a peer review process that would not be substantially different from existing procedures in the ILO".[122]

Article A(ii) of the TPRM annex provides that the function of the TPRM is to "examine the impact of a Member's trade policies and practices on the multilateral trading system." The 1996 OECD Report observes that:

> "[a]ny proposals to deal with core labour standards issues would need to be consistent with, *inter alia*, Articles A(i) and (ii) of the TPRM annex, whereby the subject matter of review is to be a background for better understanding and assessment of the country's trade policies and practices, and cannot in any case be used as a basis either for dispute-settlement procedures or for imposing new policy commitments on Members."[123]

The 1996 OECD Report concludes its discussion of the TPRM by noting that developing States have strongly opposed the review of labour policies within the TPRM.[124]

5. The Legal Framework of GATT 1994

As noted above, GATT 1994 is, in almost every respect, a re-implementation of the original GATT. Principles enshrined in GATT 1947 have been endorsed and enhanced.[125] Their application has also been expanded into other areas such as services and intellectual property rights by agreements which stand along side GATT 1994.[126]

The original GATT was built on three basic rules:

1. the entitlement of GATT parties to "most favoured nation" status in their trade relations with all other GATT parties;
2. the entitlement that exports enjoy "national treatment", *ie* exports from GATT parties be treated by an importing GATT party in the same way as comparable locally produced goods; and

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122 Ibid, 175.

123 Ibid, 176.

124 Ibid. See also the 2000 OECD Report, note 1 above, 61.

125 GATT 1994 gives formal status to various GATT declarations through the operation of Article 1(b)(iv) of GATT 1994, note 3 above. GATT 1994 is supplemented by various understandings and agreements contained in Annex 1A of the WTO Agreement, note 3 above. The "[g]eneral interpretative note to Annex 1A" of the WTO Agreement provides that:

> "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization … the provision of the other agreement shall prevail to the extent of the conflict."

126 See GATS, note 92 above; and the TRIPS Agreement, note 93 above. These are, of course, parts of a single treaty – see Article II:2 of the WTO Agreement, ibid.

3. The obligation on GATT parties to honour their tariff reduction commitments made in the GATT protocol of provisional application, in accession protocols or by subsequent agreement.

These rules remain the foundations of GATT 1994.

(a) The Principle of Non-Discrimination in Trade and Linkages between Trade and Human Rights

The first two basic rules of GATT 1947 are linked to a principle of non-discrimination in trade relations.[127] This principle provides an important basis for GATT restrictions on trade measures for human rights purposes.

(b) Most Favoured Nation Rule

Article I of GATT 1947 required each party to the GATT to grant "most-favoured nation" ("MFN") status to every other party to the GATT. Any trade concessions (whether in relation to imports or exports) offered by a GATT party to any State had to be granted to all other GATT parties. Thus GATT party A, granting trade concessions to State B (for example, by agreeing to reduce tariffs on certain products), was required to give the same concessions to GATT party C regardless of whether C had agreed to a similar level of trade liberalisation.

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127 The centrality of a concept of non-discrimination in the WTO Agreement can be contrasted with the human right to freedom from discrimination, for example, referred to in Articles 1(3) and 55(c) of the United Nations Charter. Ernst-Ulrich Petersmann appears to link non-discrimination as a concept found in trade treaties with the right to freedom from discrimination referred to in human rights instruments – see, for example, Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 European Journal of International Law 621, 622 (2002). I am indebted to Mr Peter Prove for emphasising this feature of Professor Petersmann's work. Such an attempt to link non-discrimination as a trade concept with the human right to be free from discrimination faces a number of difficulties. For example, non-discrimination in the trade context only applies in relation to parties to the relevant trade treaty, *ie* it has no universal operation. In the national treatment context it only applies to "like products". Discrimination appears permissible in respect of products that are unlike. In the human rights context, discrimination in support of affirmative action policies is permitted. The closest approximation to this in a trade context appears to be the generalised system of preferences (a point made to me by Mr Peter Prove). A similar point is made by Christine Breining-Kaufmann, "The Right to Food and Trade in Agriculture" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 38 above, 341, 374-375. For other concerns regarding attempts to link the concepts, see Breining-Kaufmann, "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, ibid, 95, 103-104.

In 1952 a GATT "Panel on Complaints" was of the opinion that Belgian laws were inconsistent with Article I of GATT 1947 when the laws differentiated between imported products from various GATT parties based on differences between social security systems in these GATT parties.[128] The MFN rule therefore appears to be an obstacle for trade measures that seek to differentiate between products based on whether the products are somehow linked to human rights violations. The MFN rule's relevance to the legality of human rights related trade measures will be considered in Chapter 6.

The MFN rule created the potential for "free riding" by GATT parties that offered few or no tariff concessions and yet received the benefit of all the concessions offered by other parties via the MFN rule. To avoid free riding, States wishing to accede to GATT 1947 were required to offer trade concessions in return for which existing GATT parties consented to the acceding State becoming a party to the GATT.[129] These concessions were incorporated into the acceding State's protocol accepting GATT rights and obligations.[130]

As noted above,[131] former colonies (normally also developing States) avoided the requirement to "negotiate their ticket" when the State that administered the former colony sponsored the newly independent State's accession to GATT. The WTO Agreement changed this situation by requiring all WTO members to have schedules of tariff bindings.[132] Tensions in relation to free riding have nonetheless arisen, for example, in the context of the negotiations on trade in services.[133]

(c) National Treatment

The other manifestation of the principle of non-discrimination in trade relations was in the national treatment rule.[134] Once products from another GATT party had surmounted the importing State's tariff barriers, the importing State was required to treat the imported products no less favourably than "like products" produced within the importing State. Thus internal taxes, charges, laws, regulations and requirements which afforded protection to local production[135] or which were less favourable to imported products were prohibited.[136]

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128 *Belgian Family Allowances (Allocations Familiales)*, adopted on 7 November 1952, BISD, First Supplement, 59.

129 See Jackson, World Trade and the Law of GATT, note 49 above, 92-96.

130 See article XXXIII of GATT 1947, note 4 above.

131 See text accompanying note 74 above.

132 See Jackson, The World Trade Organization, note 68 above, 48.

133 See, for example, Trebilcock and Howse, note 21 above, 358.

134 Article III of GATT 1947, note 4 above. As noted above, there are national treatment obligations in GATS (Article XVII) and the TRIPS Agreement (Article 3).

135 Article III:1 of GATT 1947, ibid.

136 See Article III paragraphs 2 and 4 of GATT 1947, ibid.

The scope of the national treatment obligation depends, in part, on the meaning ascribed to the term "like product". GATT jurisprudence generally precluded the consideration of production or processing methods in determining whether products were "like".[137] The physical characteristics of the product were seen as important relevant factors. This still appears to be the basic approach taken in relation to Article III of GATT 1994.[138]

This issue is of significance to the current analysis as it offers a potential means by which municipal regulations might differentiate between products traded internationally by taking into account respect for human rights standards in relation to the products. If an imported product is *not* "like" a product produced locally because of the circumstances surrounding the production of the imported product, rather than the finished product's physical qualities, then these production circumstances might include the extent to which human rights standards have been respected. Once products are identified as being unlike, the imported product can be treated less favourably than the locally produced product provided that this is not so as to afford protection to domestic production.[139] GATT and WTO panels and the Appellate Body appear to have rejected this approach to the national treat-

137 See the panel report in *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, not adopted, reprinted in 33 ILM 1397 (1994), para 5.54. This ruling follows similar rulings in the two unadopted Tuna Dolphin panel reports – *United States – Restrictions on Imports of Tuna*, BISD, 39th Supplement, 155, reprinted in 30 ILM 1597 (1991) and 33 ILM 842 (1994); and was effectively endorsed in the panel report in *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supplement, 206.

138 The ruling on this point in *Malt Beverages Case*, ibid, was cited with approval in the WTO panel report in *Indonesian Autos – Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, adopted by the Dispute Settlement Body on 23 July 1998. See the discussion of these earlier cases in Robert E Hudec, "The Product-Process Doctrine in GATT/WTO Jurisprudence" in Marco Bronckers and Reinhard Quick (eds), New Directions in International Economic Law: Essays in Honour of John H Jackson, Kluwer, The Hague, 2000, 187. The Appellate Body addressed the issue in relation to Article III:4 of GATT 1994 in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 16 February 2001, adopted by the Dispute Settlement Body on 5 April 2001, paras 84-154. For consideration of the impact of the approach taken by the Appellate Body in the context of human rights related measures see, for example, Gabrielle Marceau, "The WTO Dispute Settlement and Human Rights" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 10 above, 181, 217-219; and Breining-Kaufmann, "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations", note 127 above, 95, 108-109.

139 Article III:1 of GATT 1994, note 3 above.

ment obligation.[140] The focus instead appears to have moved to the exceptions contained in Article XX, which are discussed further below.

(d) Binding Tariff Commitments

The third basic rule of the original GATT was the rule creating binding tariff commitments.[141] The original parties to the GATT (*via* the protocol of provisional application) agreed to certain tariff levels that they would not exceed.[142]

To avoid having such commitments undermined indirectly, parties undertook to dismantle and disavowed the future use of certain non-tariff barriers which included quantitative restrictions on the import of goods.[143] According to Professor Jackson:

> "[t]he diplomats who wrote the GATT and the ITO charter had broadly in mind a regulatory system that would essentially inhibit the use of restrictions on imports other than tariffs, and then provide for negotiation of reduced tariff levels."[144]

The requirement of non-discrimination between domestically produced and imported products also serves to avoid the undermining of tariff commitments indirectly.[145]

Trade measures designed to secure respect for human rights may result in nullification or impairment of tariff commitments protected under GATT Article II. Such measures will also generally be caught by the Article XI prohibition of non-tariff quantitative restrictions.

(e) Exceptions to GATT Discipline

As noted above, tariff bindings were agreed to and the use of quantitative restrictions were disciplined under GATT 1947. However, the realities and complexities of the international trading system and the importance of non-trade policies (both

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140 See the references contained in notes 137 and 138 above.

141 Article II of GATT 1947, note 4 above. Note the equivalent provision in GATS (Article XVI) and Article VII of GATT 1994, note 3 above, which deals with valuation for customs purposes.

142 These tariff commitments were the subject of constant negotiations under Article XXVIII of GATT 1947, note 4 above. See Jackson, World Trade and the Law of GATT, note 49 above, 229-238.

143 Article XI of GATT 1947, ibid. Note also Article XIII of GATT 1994, note 3 above, which requires MFN treatment in relation to lawful quotas.

144 Jackson, The World Trading System, note 23 above, 139.

145 See the 1958 Panel Report on *Italian Discrimination against Imported Agricultural Machinery*, L/833, adopted on 23 October 1958, BISD, 7th Supplement, 60, 63-64, para 11. See also the 1992 Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD, 39th Supplement, 206, 276, para 5.25.

internationally and within States) ensured that exceptions to these basic trade principles were built into the original GATT. Countries having balance of payments difficulties were entitled to take measures including the imposition of quantitative restrictions on imports in order to ease these difficulties.[146] Similarly, if the level of imports surged in such a way as to seriously injure, or risk such injury to, local industries, GATT 1947 allowed the safeguard measures to be taken to protect local industries.[147] The initial intention was that these measures be temporary.[148] The WTO *Agreement on Safeguards* provides a specific time frame for removal of safeguard measures.[149]

In addition, as already noted,[150] GATT 1947 included security exceptions and exceptions built on a recognition that States could legitimately act in defence of non-trade values or policies despite the impact of such action on international trade.[151] Balance of payment, safeguard, security and other exceptions in the original GATT continue and, in certain instances, have been enhanced under the WTO Agreement.[152] Similar exceptions are built into regional trade agreements.[153]

(i) General Exceptions

An important provision when assessing the potential for taking human rights related trade measures is Article XX of GATT 1994 which provides, *inter alia*, that:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> ...

146 Articles XII and XVIII of GATT 1994, note 3 above. See also Articles XIII and XIV. Certain exceptions to Article XI of GATT 1994 are built into Article XI itself, see para 2.

147 Article XIX of GATT 1947, note 4 above.

148 GATT, Analytical Index, note 15 above, Volume 1, 522.

149 Articles 7 and 9 of the *Agreement on Safeguards*, note 30 above.

150 See text accompanying note 44 above.

151 Articles XX and XXI of GATT 1947, note 4 above.

152 See, for example, the *Agreement on Safeguards*, note 30 above.

153 Compare, for example, Articles XX and XXI of GATT 1994, note 3 above, with Articles 2101 and 2102 of NAFTA, note 9 above, and Articles 30 and 296 of the *Treaty Establishing the European Community*, done at Rome on 25 March 1957, entered into force on 1 January 1958. The treaty has been subsequently amended and the consolidated text is reprinted in the Official Journal of the European Communities, C 325/33, (2002).

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved; ... ."

Reference has already been made to the potential relevance of production and processing methods in assessing the GATT consistency of municipal restrictions on trade. Article XX(e) explicitly focuses on the method of production, *ie* utilising prison labour. It has been asserted that the 1998 Appellate Body decision in the *Shrimp Turtle Case*[154] which interpreted Article XX also "signals a tolerance" for trade restrictions based on production or processing methods.[155]

This is significant to the defence of human rights related trade measures under Article XX. It may be possible to argue, for example, that municipal restrictions on trade involving products produced in breach of human rights standards fall within the exceptions contained in paragraphs (a) and (b) of Article XX, *ie* measures "necessary to protect public morals" or "necessary to protect human … life or health". The Appellate Body's decision in the *Shrimp Turtle Case* will be examined further in Chapter 6.

Another important issue that arises under Article XX that has specific relevance to current analysis is the extent to which the exceptions contained in the Article are available to justify "outwardly directed" trade measures.[156] To what

154 See note 16 above.

155 Nancy L Perkins, Introductory Note to the Report of the Appellate Body in the *Shrimp Turtle Case*, 38 ILM 118, 119 (1999). See also Francesco Francioni, "Environment, Human Rights and the Limits of Free Trade" in Francesco Francioni (ed), Environment, Human Rights and International Trade, Hart Publishing, Oxford, 2001, 1, 17-20.

156 The words "outwardly directed" are used by Steve Charnovitz. Charnovitz contrasts other expressions, such as "externally directed" [a term employed by Professor Hudec – see Hudec, "GATT Legal Constraints on the Use of Trade Measures against Foreign Environmental Practices" in Bhagwati and Hudec, note 117 above, Volume 2, 95, 96] and "extrajurisdictional" [the panel established in 1990 to hear the dispute between Mexico and the United States over whether United States Dolphin conservation

extent do the provisions of Article XX justify municipal restrictions on international trade in response to conditions prevailing in another State? Article XX(e) appears to explicitly justify outwardly directed measures.[157] The example of United States and European Union regulations seeking to protect core labour standards in other countries illustrates the potential significance of the question posed above. This is also considered in Chapter 6.

Article XX(h) justifies trade measures taken in support of intergovernmental commodity agreements. Such agreements are generally sponsored by UNCTAD and are of particular interest to developing States due to their heavy dependence on the export of primary commodities.[158] A number of these commodity agreements have provisions on "fair labour standards".[159] These agreements will be considered briefly in Chapter 6.

(ii) Technical Barriers to Trade

Technical requirements imposed by measures such as product standards and safety regulations in the context of industrial and agricultural products can create barriers to trade.[160] The use of technical and other product standards was also subjected to greater discipline under the WTO Agreement.[161] The relevant agreements annexed to the WTO Agreement recognise the legitimacy of such barriers to trade and allow States some flexibility in the implementation of technical standards.[162]

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measures violated obligations under the General Agreement on Tariffs and Trade ("GATT") used the expression "extrajurisdictional" in its report – see *United States – Restrictions on Imports of Tuna*, note 137 above, para 5.28] and "extraterritorial" [Mexico, in its submissions to the GATT panel in *United States – Restrictions on Imports of Tuna*, ibid, appears to have used the term "extraterritorial" – paragraph 3.47] – see Charnovitz, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law 689, 695 (1998). The terms "extrajurisdictional" and "extraterritorial" appear unhelpful as they imply the application of international rules governing permissible exercises of jurisdiction. As discussed in Chapters 5 and 6, outwardly directed trade measures do not generally involve extraterritorial exercises of jurisdiction.

157 Article XX(e) of GATT 1994, note 3 above, justifies trade measures directed at the goods produced by prisoners in other States. As discussed in Chapter 6, it does not appear to matter that when initially drafted Article XX(e) may not have been intended to justify humanitarian measures, but instead was designed to provide economic protection for local industries competing with the products of prison labour. See the discussion in Chapter 6, text accompanying note 432 in Chapter 6.

158 See Jackson, World Trade and the Law of GATT, note 49 above, Chapter 27.

159 See the 1996 OECD Report, note 2 above, 173-174.

160 Jackson, The World Trading System, note 23 above, 221-223.

161 See the *Agreement on Technical Barriers to Trade* and the *Agreement on the Application of Sanitary and Phytosanitary Measures*, note 95 above.

162 See, for example, Article 2.4 of the *Agreement on Technical Barriers to Trade*, ibid. The attempt to balance the needs for regulatory harmonisation with regulatory autonomy appears similar to efforts to balance commitments to universal human

These agreements, however, commit States to establish greater transparency and increase harmonisation of technical barriers to trade.[163] At least two aspects of the rules regulating technical barriers to trade are of importance to the current analysis. The first relates to whether these technical standards can be applied to the production process as opposed to the finished product of that process. Secondly, can these technical standards be "outward" in their operation or must they be directed at the protection of interests within the State imposing the standards? The regulation of technical barriers to trade thus raises issues which are similar to those which arise in the context of the consideration of Article XX. These will also be briefly examined in Chapter 6.

(iii) Safeguard Measures

Article XIX of GATT 1947 authorised the taking of safeguard measures to protect "domestic producers" from threatened or actual "serious injury" resulting from "unforeseen developments" and an increase in imports due to the operation of the GATT. For a variety of reasons safeguard measures under GATT 1947 were not attractive to governments seeking to protect domestic industry and other mechanisms were employed to protect domestic industry against imports.[164] Most notably, agreements on so-called "voluntary export restraints" were sought from particular exporting States.[165]

The WTO Agreement sought both to make the safeguard provisions more effective and to prohibit the use of measures such as voluntary export restraints.[166] The safeguard provisions of GATT 1994 and the *Agreement on Safeguards* annexed to the WTO Agreement have significance to the debate over "social dumping" which is discussed further below. It appears that safeguard measures under Article XIX of GATT 1947 could have been used by States as a short term response to "social dumping", *ie* the violation of labour related human rights in order to reduce the price of exported goods.[167]

(iv) Dumping and Subsidies

The safeguard, security and certain of the Article XX exceptions contained in GATT 1994 are potentially available against what can be described as "fair trade",

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rights standards while allowing States some measure of autonomy in implementation through the application of a "margin of appreciation". See, for example, *Handyside v United Kingdom*, European Court of Human Rights, 1976 Series A, Number 24, 1 European Human Rights Reports 737, 753-755, paras 48-50.

163 See, for example, Articles 2.5 and 2.6 of the *Agreement on Technical Barriers to Trade*, note 95 above.

164 See, for example, Trebilcock and Howse, note 21 above, 301-303; and Croome, note 40 above, 53-57.

165 See, for example, Jackson, The World Trading System, note 23 above, 203-209.

166 See the *Agreement on Safeguards*, note 30 above.

167 See the text accompanying note 183 below.

ie the imports being restricted need not have been produced in some economically or morally "wrongful" fashion.[168] Additional exceptions, however, were built into GATT 1947 in order to deal specifically with circumstances which (not uncontroversially) were seen as involving *unfair* trade.[169]

The *unfairness* addressed by GATT could be the result of the conduct of either non-governmental or governmental bodies. The *non-governmental* conduct dealt with by GATT 1947 was dumping.[170] Article VI:1 of GATT 1947 provided, in part, that:

> "[t]he contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. ..."

Article VI:2 authorised the imposition of anti-dumping duty on dumped products in order to "offset or prevent dumping". The amount of this duty is normally calculated as the difference between price of the exported product and the "comparable price, in the ordinary course of trade, for the like product when destined for the consumption in the exporting country".[171] Where it was not possible to make such a calculation, for example, where there were no sales in the domestic market of the exporting country, GATT 1947 provided two alternative reference points for the calculation of the "dumping margin":

– "the highest comparable price for the like product for export to any third country in the ordinary course of trade"; or
– the actual "cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit".[172]

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168 According to Professors Jackson, Davey and Sykes:

> "'[s]afeguards' measures are available under certain conditions to respond to *fairly* traded imports, while more extensive counter-measures are permitted to respond to imports that are 'dumped', subsidised or *otherwise considered to be in violation of international rules of conduct*" – Jackson, *et al*, note 21 above, 604 [emphasis added].

See also the Appellate Body report in *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, adopted by the Dispute Settlement Body on 12 January 2000, para 94. On the concept of "fairness" in international trade, see generally, Bhagwati and Hudec, note 117 above, Volumes 1 and 2.`

169 For a brief discussion of economic and non-economic arguments deployed to justify anti-dumping measures, see Trebilcock and Howse, note 21 above, 250-260.

170 See generally Article VI of GATT 1947, note 4 above.

171 See Article VI:1 of GATT 1947, ibid. This is known as the "dumping margin".

172 Article VI:1(b)(ii) of GATT 1947, ibid.

Article VI of GATT 1947 was supplemented by Kennedy Round and Tokyo Round side agreements.[173] Article VI of GATT 1994 was supplemented by an annexure to the WTO Agreement that addresses dumping[174] and a number of WTO decisions and declarations.[175]

The *governmental unfairness* addressed by GATT 1947 was the giving of subsidies by government, in particular in order to improve export performance.[176] Though giving of subsidies was not "condemned" by Article VI (in contrast to dumping), paragraph 3 of the article allowed the imposition of countervailing duties in response to certain types of subsidies.[177]

Article VI:6(a) of GATT 1947 provided that:

> "[n]o contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

The provisions in Article VI regulating subsidies were supplemented by Article XVI which imposed additional discipline on the use of subsidies, including a prohibition of certain types of subsidies designed to increase exports from the subsidising State.[178] These provisions were supplemented by a Tokyo Round side

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173 See the Kennedy Round *Agreement on Implementation of Article VI*, done at Geneva 13 June 1967, BISD, 15th Supplement, 24, and the Tokyo Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, done at Geneva, 12 April 1979, BISD, 26th Supplement, 171.

174 The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 3 above.

175 The *Decision on Anti-Circumvention*; the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; and the *Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, are reprinted in World Trade Organization, The Legal Texts, note 3 above, 397.

176 Article XVI of GATT 1947, note 4 above. In the WTO context, see also the *Agreement on Subsidies and Countervailing Measures*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 3 above.

177 Article VI:3 of GATT 1994, note 3 above, defines countervailing duty as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise".

178 The strictest discipline was reserved for products "other than ... primary product[s]" – see Article XVI:4 of GATT 1947, note 4 above. The *Agreement on Agriculture*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement,

agreement.[179] This side agreement, in turn, was superseded by two agreements annexed to the WTO Agreement.[180] These WTO agreements supplement the operation of what are now Articles VI and XVI of GATT 1994. They include provisions defining important concepts[181] and strengthening due process guarantees in municipal anti-dumping and countervailing duty litigation.[182]

In 1946, during the London meetings of the Preparatory Committee for the Havana Conference, discussion of the United States proposed charter led to a distinction being drawn between four different types of dumping.[183] Two of these types were "price" and "social" dumping. During negotiations at the Havana Conference there was agreement that the draft charter's prohibition against dumping related to "price" dumping alone.[184] A report of Sub-Committee D of the Conference's Third Committee expressed the view that social dumping would be addressed in

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note 3 above, increases the discipline as to the use of subsidies in relation to primary products.

179 *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, done at Geneva 12 April 1979, BISD, 26th Supplement, 56.

180 The *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 3 above, and the *Agreement on Subsidies and Countervailing Measures*, note 176 above. Note also the WTO *Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, note 175 above. The *Agreement on Agriculture*, note 178 above, deals with agricultural subsidies in Part V.

181 Article 1 of the WTO *Agreement on Subsidies and Countervailing Measures*, ibid, offers a detailed definition of a "subsidy". Part II addresses "prohibited subsidies", Part III addresses "actionable subsidies" and Part IV addresses "non-actionable subsidies".

182 See, for example, Article 6 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, note 180 above; and Article 12 of the *Agreement on Subsidies and Countervailing Measures*, note 176 above.

183 Preparatory Committee of the International Conference on Trade and Employment, Committee II, Summary Record of Technical Sub-Committee, Seventh Meeting, 8 November 1946, UN Doc E/PC/T/C.II/48, 1. The preparatory work for the original GATT and the ITO Charter are available at <http://gatt.stanford.edu/page/home>, visited 20 April 2007.

184 United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948, Reports of Committees and Principal Sub-Committees, Interim Commission for the International Trade Organization Doc No ICITO I/8, 73-74; and Jackson, World Trade and the Law of GATT, note 49 above, 404-405.

the charter for short term purposes by safeguard provisions.[185] Article 7 of the Havana Charter would address the objective over the long term.[186]

The 1996 OECD Report[187] referred to at the outset of this chapter discusses whether low labour standards might be considered as a form of "social dumping" and thus subject to anti-dumping duties under the relevant WTO agreements. The ILO Secretariat has also considered the issue of social dumping.[188] The 1996 OECD Report notes serious practical difficulties facing any attempted reliance on existing anti-dumping rules in response to low labour standards. For example, it is difficult to see how the calculation of the dumping margin could possibly take account of low labour standards in the exporting country. These issues will be considered in more detail in Chapter 6.

The OECD and ILO reports referred to above also consider the question of social subsidies. The 1996 OECD Report focuses specifically on "export processing zones", where governments maintaining such zones suppress, or allow the suppression of, labour standards to a greater extent than in areas outside the export processing zones.[189] Whilst making a countervailing duty case under existing WTO rules holds out better prospects of success than in the case of alleged "social dumping", significant obstacles remain.[190] The labour side agreement to the North American Free Trade Agreement ("NAFTA") addresses similar concerns.[191] These issues will be discussed in Chapters 5 (the NAFTA labour side agreement) and 6 (export processing zones, subsidies and countervailing duty).

(v) Waivers

Article IX:3 of the WTO Agreement provides, *inter alia*, that:

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185 United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948, Reports of Committees and Principal Sub-Committees, ibid, 84. See now Article XIX:1 of GATT 1994, note 3 above.

186 Ibid. For the terms of Article 7 see the text accompanying note 6 above.

187 See note 1 above.

188 In his report to the 81st Session of the International Labour Conference, the Director-General of the ILO (Michel Hansenne) advocated a new procedure for assessing the whether States were doing enough to ensure that basic social standards were being met – see Defending Values, Promoting Change – Social Justice in a Global Economy: An ILO Agenda, Report of the Director-General (Part I) to the 81st International Labour Conference, Geneva, 1994, 56-63. His proposed procedure, however, "would not aim to control alleged instances of social dumping", apparently because there was no agreement on the definition of "social dumping" and the concept "covers a far too wide range of situations" – ibid, 59. He conceded that there was agreement that the suppression of national labour standards in export processing zones fell within the definition of "social dumping", ibid.

189 The 1996 OECD Report, note 1 above, 171-173.

190 See the discussion of difficulties in the 1996 OECD Report, ibid, 172-173.

191 The *North American Agreement on Labor Cooperation*, note 9 above.

> "[i]n exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths … of the Members unless otherwise provided for in this paragraph."

Waivers are to be issued only for specified periods and are subject to yearly review by the Ministerial Conference to determine whether the exceptional circumstances justifying the waiver continue to prevail and whether the conditions of the waiver have been complied with.[192] This provision was used in 2003[193] and again in 2006[194] in relation to specified obligations under the WTO Agreement to provide "legal certainty" regarding the entitlement of certain WTO members to take trade measures in order to restrict the flow of "conflict diamonds". These waivers will be considered in Chapter 6. A waiver was also issued in relation to the *Cotonou* partnership agreement[195] between the European Community and African, Caribbean and Pacific States which will be discussed further in Chapter 5.

(f) International Trade Rules and Non-Governmental Entities

The focus of the anti-dumping provisions considered above is, in part, upon the conduct of non-governmental entities. Thus, while GATT 1947 and the WTO Agreement set out obligations and entitlements of States, some provisions of these agreements focus on the conduct of non-governmental entities engaged in international trade.[196]

With the exception of commerce involving State trading entities and the few remaining command economies,[197] trade regulated by the WTO Agreement is engaged in by non-governmental entities. Intellectual property rights secured

192 Article IX:4 of the WTO Agreement, note 3 above.

193 General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds – Decision of 15 May 2003, WT/L/518, 27 May 2003.

194 General Council, Kimberley Process Certification Scheme for Rough Diamonds – Decision of 15 December 2006, WT/L/676, 19 December 2006.

195 Ministerial Conference, European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15, 14 November 2001, para 1.

196 For a consideration of arguments relating to the reach of GATT 1947 over non-governmental or "private" conduct see GATT, Analytical Index, note 15 above, Volume 2, 650-653. Contrast to observations of the panel in *United States – Sections 301-310 of the Trade Act of 1974*, note 18 above, paras 7.76 to 7.90, regarding the protection of economic activities of "individual economic operators"

197 In relation to such trade, see, for example, GATT 1994, note 3 above, Articles III:8, XVII and *Ad* Article VI, paragraph 1, note 2. Non market economies have had to "negotiate their ticket" in such a way as to meet concerns of States with market economies over problems of government involvement in national economies. See, for example, the GATT accession protocols for Poland, done at Geneva 30 June 1967, BISD, 15th Supplement, 46; Romania, done at Geneva, 15 October 1971, BISD, 18th

by the TRIPS Agreement are normally held (and infringed) by non-governmental entities. Technical standards set by non-governmental entities are regulated by the WTO Agreement.[198] Thus, despite being primarily addressed to States, the legal rules regulating international trade have the conduct of non-governmental entities as an important focus. Often these entities are multinational enterprises.

This application of international legal rules to the conduct of non-governmental entities is significant for a number of reasons. First, as is apparent from Chapter 2, human rights violations are often committed by non-governmental entities. The violation of labour related human rights standards is one example. Secondly, the terms of provisions such as Article VI of GATT 1994 can be supplemented by a consideration of other international standards applied to the conduct of non-governmental entities. In particular the OECD,[199] the ILO[200] and the United Nations Sub-Commission on the Promotion and Protection of Human Rights[201] have developed codes or norms of conduct for multinational enterprises.[202] These codes regulate the commercial conduct of such entities as well containing rules inspired by international human rights norms. The codes are, however, only voluntary. The existence of such codes is nonetheless relevant to the current analysis as they reflect a degree of international consensus on relevant human rights stan-

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Supplement, 5; and Yugoslavia, done at Geneva 20 July 1966, BISD, 15th Supplement, 53.

198 See, for example, Article 8 of the *Agreement on Technical Barriers to Trade*, note 95 above.

199 See the Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises – Text, Commentary and Clarifications, OECD, Paris, 2001, in particular, paragraph 8 of the preface, Chapter II, paragraph 2, and Chapter IV.

200 See the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977, as amended at its 279th Session, Geneva, November 2002, in particular, paragraphs 1, 8, 21 – 23, 36 and 42 – 56.

201 See the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, United Nations Document E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, approved (apparently as a basis for further consultation and discussion) by the Sub-Commission in resolution 2003/16, adopted (without vote) on 13 August 2003. On responses to the norms see Karin Lucke, States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 38 above, 148.

202 Note also the Global Compact that began as an initiative of the UN Secretary-General in 1999. On notions of corporate responsibility generally see Janet Dine, Companies, International Trade and Human Rights, Cambridge University Press, Cambridge, 2005. On the Global Compact in particular see, for example, Justine Nolan, The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights, 24 University of Queensland Law Journal 445 (2005).

dards applicable to multinational enterprises.[203] Municipal mechanisms addressing human rights violations including those committed by multinational enterprises in other States will be considered in Chapter 5.

A third feature of international trade rules applicable to non-State entities relates to the entitlement under municipal laws of non-State entities to complain of violation of international trade rules.[204] The rights of non-State entities to complain of dumping and subsidies have important rule of law implications which will be considered further in Chapter 4.

(g) Customs Unions and Free Trade Areas

Significant economic structures that were envisaged under GATT 1947 but not dealt with in great detail under the treaty were customs unions and free trade areas.[205] Article XXIV of GATT 1947 operated as an exception to the MFN rule in that members of such arrangements could accord each other more favourable treatment than other GATT parties not part of the customs union or free trade area. In order to better regulate issues arising in relation to the European Union, NAFTA and other customs unions and free trade areas, the rules contained in Article XXIV of GATT 1947 were supplemented by a WTO understanding.[206]

As a regional political organisation, the European Union has instituted a number of measures that link trade and the protection of human rights.[207] These will be considered in Chapter 5. Similarly, the NAFTA side agreement on labour

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203 These codes, for example, address corporate responsibilities in relation to labour related human rights.

204 See, for example the anti-dumping procedures under United States legislation, described generally in Jackson *et al*, note 21 above, 700-705.

205 Article XXIV of GATT 1947, note 4 above. For criticisms and proposals for improvements to Article XXIV, see Jackson, The World Trading System, note 23 above, 172-173.

206 See the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 3 above. See also the *Agreement on Rules of Origin*, which is also an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid. In 2006 the General Council established, on a provisional basis, a new transparency mechanism for regional trade agreements – see General Council, Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671, 18 December 2006.

207 See, for example, Council of the European Union Regulation No 980/2005, note 12 above; and the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, done at Cotonou on 23 June 2000, Official Journal of the European Communities, L 317/3, 15 December 2000, entered into force on 1 April 2003. As at 11 August 2005 25 European Union member States and the European Community were parties and 76 developing States were parties.

standards is a treaty of importance to the assessment of human rights related trade measures and will also be considered in Chapter 5.

The *Treaty Establishing the European Community* contains provisions similar to those in the WTO Agreement that will be the subject of further consideration in Chapter 6.[208] The European provisions will not, however, be the subject of detailed analysis here for the following reasons.

The national institutions of States that are members of the European Union have established various mechanisms to ensure respect for human rights. European institutions such as the European Court of Human Rights (an institution of the Council of Europe) and the European Court of Justice (an institution of the European Community) also have the capacity to provide remedies for human rights violations. These remedies are comparable to those normally provided by institutions within developed States.[209] One apparent consequence of the effectiveness of national and regional institutions in ensuring respect for human rights in the European context is the absence of intra-European (*ie* within the European Union or the Council of Europe) trade measures taken for human rights purposes. The absence of such measures renders analysis in this work of provisions of European treaties envisaging their use otiose.

Secondly, the treaty practice in relation to provisions such as Article 30 of the *Treaty Establishing the European Community* appears to be of only limited relevance to the interpretation of provisions of the WTO Agreement.[210] Under the rules

208 See, for example, Article 30 of the *Treaty Establishing the European Community*, note 153 above. Article 30 roughly corresponds to Article XX of GATT 1994. See generally, for example, Professor Gabriël A Moens, "Trading Blocs: the European Union" in Gabriël Moens and Peter Gillies (eds), International Trade and Business: Law, Policy and Ethics, Cavendish Publishing, Sydney, 1998, 705, 717-723. More specifically, see Charnovitz, note 156 above, 724-729.

209 On the mechanisms and procedures to protect human rights within the European Union, see, for example, Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999; and Piet Eeckhout, "Trade and Human Rights in European Union Law: Linkages in the Case-Law of the European Court of Justice" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 10 above, 261.

210 It appears to have been relatively uncommon for decisions of the European Court of Justice to have figured in disputes under GATT 1947. In *United States – Restrictions on Imports of Tuna*, note 137 above, reprinted at 33 ILM 839 (1994), the United States referred to European jurisprudence in its submissions to the panel, see paragraph 3.25 of the panel report. The panel's findings, however, did not appear to rely on such jurisprudence. For assessments of the likelihood of greater convergence between European and WTO jurisprudence, see JHH Weiler (ed), The EU, the WTO, and the NAFTA – Towards a Common Law of International Trade, Oxford University Press, Oxford, 2000.

of treaty interpretation there appears to be limited scope for reference to European treaty provisions when seeking to interpret the WTO Agreement.[211]

(h) Dispute Resolution

The elaborate legal structure that this chapter describes would be of limited utility if mechanisms did not exist to enforce the various trade disciplines. Despite the original GATT's lack of a developed institutional structure, one major feature of the trade regime, as it developed around GATT 1947, was the gradual evolution of what became a sophisticated dispute resolution mechanism.[212]

In the 1950s, GATT parties endorsed a move away from use of dispute resolution committees made up of State representatives. In the place of committees, GATT parties began to rely on expert panels to hear complaints under GATT 1947.[213]

The problems associated with a representative committee mechanism were not, however, entirely avoided as panel decisions required endorsement by all GATT parties before they could give rise to rights of retaliation by successful parties to the disputes heard by panels. Thus, a State party found liable by a panel could block the adoption of the panel's report.[214]

An important annexure to the WTO Agreement is the *Understanding on Rules and Procedures Governing the Settlement of Disputes*[215] ("DSU") which brought about a number of significant changes to the dispute settlement mechanism that developed under GATT 1947. An appellate structure was introduced into trade dispute settlement.[216] A party unsuccessful before a panel can appeal to a standing appellate body.[217] The ability of the State found liable through the dispute settle-

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211 The rules of treaty interpretation reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, note 13 above, restrict the relevance of the European treaties and practice to the interpretation of the WTO Agreement. European treaties and practice do not appear to form part of the "context" of the WTO Agreement for the purposes of the rule reflected in Article 31(2) of the *Vienna Convention*. Nor do European treaties and practice appear to reflect the agreement of the parties to the WTO Agreement for the purposes of the rule in Article 31(3) of the *Vienna Convention*.

212 For an account of this evolution, see Jackson, World Trade and the Law of GATT, note 49 above, Chapter 8. For a brief account of the Uruguay Round developments in dispute resolution, see Jackson, The World Trading System, note 23 above, 124-127. Contrast Trebilcock and Howse, note 21 above, 112-118.

213 This change in procedure has been linked to the then Director-General of GATT, Eric Wyndham- White, see Jackson, The World Trading System, ibid, 115.

214 Jackson, The World Trade Organization, note 68 above, 71.

215 See note 18 above. For a detailed analysis of WTO dispute settlement mechanisms see, for example, Jeff Waincymer, WTO Litigation – Procedural Aspects of Formal Dispute Settlement, Cameron May, London, 2002.

216 See Article 17 of the DSU, ibid.

217 Article 17 paragraph 4 of the DSU, ibid.

ment process to block adoption of decisions has been removed. Consensus of State parties is now required in order to *block* adoption of a panel or Appellate Body report.[218]

The new dispute settlement mechanism is intended to govern disputes arising under all parts of the WTO Agreement.[219] The plurilateral agreements have their own procedures.[220] The common WTO dispute settlement mechanism reverses the trend apparent in the Tokyo Round side agreements for the establishment of multiple dispute settlement arrangements.[221]

Article XXIII[222] of GATT 1994 sets out the basic conditions regulating dispute resolution which have been incorporated into and expanded upon in the DSU. Article XXIII:1 provides that:

> "[i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any other situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

Article XXIII:2 of GATT 1994 provides the basis for the establishment of panels, the role of the Contracting Parties in relation to panel reports and the imposition of sanctions in cases of nullification or impairment. The paragraph also allows the "CONTRACTING PARTIES" to "consult with ... any appropriate inter-governmental organization in cases where they consider such consultation necessary".

218 Article 17 paragraph 14 of the DSU, ibid.

219 With variations provided under particular agreements, for example, Article 64, paragraph 2 of the TRIPS Agreement, note 93 above.

220 See, for example, Article XXII of the *Agreement on Government Procurement*, note 102 above.

221 Jackson, The World Trade Organization, note 68 above, 71.

222 Note also Article XXII of GATT 1994, note 3 above, which deals with consultations.

This would appear to allow consultation with bodies such as the ILO.[223] The prospect of such consultation has generated controversy.[224]

In 1953 the United States declared that distortions in trading patterns which were created by unfair labour conditions could justify reliance upon Article XXIII.[225] No such claim appears to have formally been made, though the United States still indicates that it has reserved the right to make such a claim.[226]

Attempts to rely on Article XXIII:1 in relation to labour related human rights would also have to satisfy the requirements contained in Article 26 of the DSU. This article requires "detailed justification" of claims of nullification or impairment under paragraphs (b) and (c) of Article XXIII:1. The reliance on WTO dispute settlement mechanisms to incorporate consideration of labour related human rights standards will be considered in more detail in Chapter 6.

As noted above, the DSU sets out practical rules and principles regulating the settlement of disputes arising under the various WTO agreements. These include broad powers contained in Article 13 of the DSU for panels to seek information from any source they deem appropriate, whether governmental or non-governmental. Whilst formal proceedings before panels and the Appellate Body are not open to the public, the DSU does not prohibit the publication of reasons for determinations.[227] Such reasons are, in practice, promptly published.[228]

There is no general rule of *stare decisis* in relation to international legal decision making and this applies to WTO panels and Appellate Body reports.[229] Prior

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223 The International Labour Organization was involved in the drafting of the ITO Charter. See, for example, Report of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, UN Doc E/PC/T/186, 10 September 1947, 6, footnote 3.

224 See the controversy surrounding whether the Director-General of the ILO should address the WTO Ministerial Conference held at Singapore in 1996, discussed in Virginia A Leary, The WTO and the Social Clause: Post-Singapore, 8 European Journal of International Law 118, 119 (1997).

225 Details of the United States declaration are set out in United States Commission on Foreign Economic Policy, Staff Papers Presented to the Commission on Foreign Economic Policy, February 1954, Washington, 437-438. Note also comments made during the drafting of the Havana Charter, quoted in GATT, Analytical Index, note 15 above, Volume 2, 668.

226 See the 1996 OECD Report, note 1 above, 174-175.

227 Panels circulate amongst parties to disputes confidential interim reports. See *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, note 43 above, paras 6.183-6.196, for concerns regarding the leaking of the confidential interim reports in that case.

228 See generally the Procedures for the Circulation and Derestriction of WTO Documents, a decision of the WTO General Council on 14 May 2002, WT/L/452, 16 May 2002.

229 See, for example, Article 59 of the *Statute of the International Court of Justice*.

reports are, however, persuasive.[230] A consideration of the reports of panels formed under the original GATT and WTO panel and Appellate Body decisions will form an essential aspect of the analysis undertaken in this book.

Article 3 paragraph 2 of the DSU provides that:

> "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."

The final sentence of this provision has been the source of considerable debate.[231] As Joost Pauwelyn has argued, the sentence appears designed to avoid the creation *by* panels or the Appellate Body of new legal obligations or entitlements.[232] The sentence does *not* expressly address issue of how panels or the Appellate Body should deal with *State* practice that leads to the creation of new international legal obligations or entitlements. The DSU effectively defines the "covered agreements" as the WTO Agreement and all the agreements annexed to it.[233] The reference in the paragraph 2 of the article to "customary rules" in the context of the rules of treaty interpretation does not appear to exclude the operation of relevant rules of general international law to other legal issues arising in relation to the WTO Agreement. The extent to which general international law might be taken into account in WTO dispute settlement will be considered briefly in Chapter 4 and will be considered in more detail in Chapter 6.

On a more general level, those commenting on the operation of GATT dispute settlement mechanisms have assumed contrasting positions on the fundamental

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230 The status of adopted and unadopted panel reports was considered by the WTO Appellate Body in its report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996, adopted by the Dispute Settlement Body on 1 November 1996, 14-15

231 See, for example, Joel P Trachtman, The Domain of WTO Dispute Resolution, 40 Harvard International Law Journal 333, 342-343 (1999); Gabrielle Marceau, A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33(5) Journal of World Trade, 87, 109-115 (1999); and Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 American Journal of International Law, 535, 554-565 (2001) Compare International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, note 113 above, 226, para 447.

232 Pauwelyn, ibid, 564.

233 See Article 1 and Appendix 1 of the DSU, note 18 above.

orientation of trade dispute settlement. Professor John Jackson has emphasised the importance of the legal rules that GATT sought to implement.[234] Olivier Long, a former Director-General of GATT, has emphasised negotiation and the avoidance of disputes as key features of the GATT.[235] Whilst acknowledging the role that negotiation and avoidance of conflict must play, Professor Jackson stresses the importance of clear rules that address current expectations and that are capable of some form of enforcement.[236]

The process of moderating the exercise of power by the operation of legal rules is still in its early stages in the international context when compared with most, if not all, municipal systems of law. But as the development of the WTO dispute settlement mechanism appears to illustrate, the process is under way in the context of the regulation of international trade. The development of a "rule" based system of dispute settlement that moderates the "power" based features of trade negotiation and regulation has important consequences for issues currently being considered. In Chapter 4 there will be assessment of rule of law criteria relevant to the imposition of human rights related trade measures. This assessment will include a consideration of whether WTO panels and the Appellate Body can provide appropriate third-party dispute resolution in relation to trade measures designed to secure respect for human rights.

6. Conclusion

This chapter has surveyed those issues which will be central to the development of the analysis in subsequent chapters. The OECD catalogue of possible intersections between human rights norms and existing international trade rules has been briefly considered. Six features of the rules contained in the WTO Agreement, that have potential relevance to the legality of human rights related trade measures, were identified:

1. Dumping rules and the treatment of "social dumping";
2. Rules relating to subsidies and the question of social subsidies;
3. The exception provisions found in GATT 1994, in particular Article XX;
4. The dispute resolution system, in particular Article XXIII of GATT 1994;
5. Objections and conditions under Article XIII of the WTO Agreement; and
6. The trade policy review mechanism established under the WTO Agreement.

A number of these issues will be the focus of analysis in Chapter 6. Safeguard measures, waivers and technical barriers to trade will also be considered.

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234 See Jackson, Restructuring the GATT System, note 70 above, 49-54; Jackson, The World Trading System, note 23 above, 107-111.

235 Olivier Long, Law and its Limitations in the GATT Multilateral Trade System, Martinus Nijhoff, Dordrecht, 1987. Compare Article 3 paragraph 7 of the DSU, note 18 above.

236 Jackson, the World Trading System, note 23 above, 108-111.

The Scope for individual States or regional organisations to impose human rights related trade measures that are not subject to the disciplines of the WTO Agreement will be considered in Chapter 5. As the WTO system expands in scope, so the scope for such measures appears to diminish.

The special rules regulating the trade of developing States will be examined in two chapters. Trade measures taken as part of trade preference programs benefiting developing States (which have incorporated the consideration of adherence to human rights norms) will be assessed in Chapter 5. The general treatment of developing States under multilateral trade treaties and the protection of human rights will be considered in Chapter 7.

Regardless of whether one is interpreting existing trade treaty provisions or considering reform proposals, the objects, purposes and policies underlying the instruments regulating international trade appear relevant. The brief account of important objectives set out in this chapter therefore appears relevant to the interpretation of treaty provisions in Chapter 6. The development and application of rule of law criteria in Chapter 4 will also involve the consideration of important objectives of both trade and human rights instruments.

An assessment of the legality of trade measures taken for human rights purposes requires consideration of the interaction of human rights norms with trade norms. It also requires a consideration of the interaction of different human rights standards, for example traditional civil and political rights and the right to development. Chapter 4 will therefore focus on theoretical and practical issues arising in relation to the interaction of trade rules, international human rights standards and other relevant rules and principles of international law.

Chapter 4

Interaction between Rules and Principles of International Law – Human Rights and Trade

1. Introduction

An assessment of the legality of trade measures taken for human rights purposes requires consideration of the interaction of rules and principles of international law on the protection of human rights and the regulation of international trade. This interaction raises issues of potential conflict *between* rules and principles of international law. These issues include the operation of international rules designed to *avoid* conflict between rules of international law.[1] They also include rules developed to *resolve* such conflicts.[2] Interaction also raises issues of institutional competence and the potential for conflict *between* different international institutions exercising jurisdiction to apply these different rules and principles.[3]

The human rights and trade rules and principles described in Chapters 2 and 3 have developed through different international institutional structures and pro-

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1 Such as presumptions against conflict – see, for example, International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi ("ILC Study Group Report on Fragmentation"), UN Doc A/CN.4/L.682, 13 April 2006, 206-244; Joost Pauwelyn, Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law, Cambridge University Press, Cambridge, 2003, 237-274; and C Wilfred Jenks, The Conflict of Law-Making Treaties, 30 British Year Book of International Law 401, 427-429 (1953).

2 In the context of law of treaties, see, for example, Articles 30 and 53 of the *Vienna Convention on the Law of Treaties*, 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 108 parties as at 27 April 2007. More generally, see, for example, ILC Study Group Report on Fragmentation, ibid, 30-206; and Pauwelyn, ibid, 275-486.

3 See, for example, Jonathan I Charney, Is International Law Threatened by Multiple International Tribunals? 271 Recueil des cours, 101 (1998); and Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals, Oxford University Press, Oxford, 2003.

cesses. State representatives involved in negotiations leading to the adoption, and in the application, of international instruments in the human rights field and in the trade field have been expert in issues related to human rights and trade respectively, but rarely have the individual representatives been expert in both fields.[4] This phenomenon increased the prospects of conflict between rules and principles developed in each field or "regime".[5]

Actual or potential conflicts between the different rules and principles of international law (and related procedures) that have developed within different functional areas of international legal regulation (for example, the international law of the sea, international trade regulation, international environmental regulation and international legal protection of human rights) have been the cause of concern for a number of years.[6] In 2000 the International Law Commission added the topic of

4 This in all likelihood reflects, at least in part, division of labour within national governments. For other possible reasons for this phenomenon, see Robert O Keohane and Joseph S Nye Jr, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" in Roger B Porter, Pierre Sauvé, Arvind Subramanian and Americo Beviglia Zampetti (eds), Efficiency, Equity and Legitimacy – The Multilateral Trading System at the Millennium, Brookings Institution Press, Washington, 2001, 264, 265-266.

5 As noted in Chapter 1 the International Law Commission's Study Group on fragmentation of international law identified three senses in which international lawyers formally employ the word "regime" when referring to international legal rules, procedures and institutions – see, for example, International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, 411, para 251(12). None of these three senses appears to correspond to the use of the term by political scientists working within the field of "regime theory". Contrast the approach of the Study Group of the International Law Commission with the assumptions of "regime theory" referred to by Laurence R Helfer, "Mediating Interactions in an Expanding International Intellectual Property Regime" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 180, 183. On possible links between "regime theory" in international relations scholarship and the work of one of the International Law Commission's special rapporteurs on State responsibility (Riphagen), see Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law, 17 European Journal of International Law 483, 502-505 (2006).

6 Relevant scholarship extends back at least as far as the 1950s with the work of Jenks, note 1 above. More recent scholarship, in addition to work cited in Chapter 1 (see note 59 in Chapter 1 above), includes W Czapliński and G Danilenko, Conflicts of Norms in International Law, 21 Netherlands Yearbook of International Law 3 (1990); LANM Barnhoorn and KC Wellens (eds), Diversity in Secondary Rules and the Unity of International Law, Martinus Nijhoff, The Hague, 1995; and Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis (2005) 74 Nordic Journal of International Law 27. For numerous other relevant works see those considered in the ILC Study Group Report on Fragmentation, note 1 above.

fragmentation of international law to its long-term program of work.[7] That work culminated in a substantial report on the topic prepared by a Study Group of the Commission in 2006. The report focussed on the substantive legal issues raised by fragmentation[8] rather than on institutional issues.[9]

The Study Group emphasised in its report that international legal rules on conflict avoidance and resolution, whilst important, were not the source of all answers to questions raised by fragmentation of international law:

> "Public international law does not contain rules in which a global society's problems are, as it were, already resolved. Developing these is a political task."[10]

Ultimately, in the view of the Study Group, the establishment of priorities "between international law's different rule systems" could not:

> "be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States. Normative conflicts do not arise as technical 'mistakes' that could be 'avoided' by a more sophisticated way of legal reasoning. New rules and legal regimes emerge as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes. They require a legislative, not a legal-technical response."[11]

This chapter does *not* address these broader "preferences" and related issues. As indicated in Chapter 1 there is already a considerable body of literature on these

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7 The International Law Commission's work on the topic began with a feasibility study undertaken by Gerhard Hafner. See International Law Commission, Report on the work of its fifty-second session, 1 May – 9 June and 10 July – 18 August 2000, Official Records of the General Assembly, Fifty-fifth Session, Supplement No 10, 131, para 729, and 143-150.

8 According to the Study Group's report "[t]he Commission has … wished to focus on the substantive question – the splitting up of the law into highly specialized 'boxes' that claim relative autonomy from each other and from the general law. What are the substantive effects of such specialization? How should the relationship between such 'boxes' be conceived?" – ILC Study Group Report on Fragmentation, note 1 above, para 13.

9 According to the Study Group "… institutional … problems … have to do with the competence of various institutions applying international legal rules and their hierarchical relations inter se. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves." – ibid.

10 ILC Study Group Report on Fragmentation, note 1 above, 247, para 488. Although as the Study Group acknowledges, sometimes competence to perform that political task is conferred by States on dispute resolution bodies – ibid, 138-141, paras 273-277.

11 Ibid, 245, para 484.

issues. Instead this chapter focuses on the issues that the Study Group believed that the International Law Commission could nonetheless make a "constructive contribution", namely the "techniques available for lawyers as they approach problems that appear to involve conflicts between rules or rule systems".[12] More specifically, the focus in this chapter will be on the particular problems that have arisen or may arise between the human rights and trade "rule systems" and the "techniques" (including legal rules and principles) available to lawyers to deal with them.[13]

We have already seen in Chapter 2 that human rights obligations under international law have *both* reciprocal and absolute dimensions.[14] The absolute dimension is reflected in the existence of, in the terminology of Sir Gerald Fitzmaurice,

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12 Ibid, 245, para 485.

13 Whilst I have derived considerable benefit from the analysis contained in the Study Group's report, the "flexible" positivist perspective adopted in this book stands in contrast to the stronger sociological and more critical perspectives often taken in the Study Group report. Consider, for example, the following quotation from the general conclusions section of the report:

> "The international legal system has never enjoyed the kind of coherence that may have characterized the legal orders of States. Nonetheless, the deepening complexity of late modern societies, tolerance and encouragement of conflicting traditions and social objectives within national societies, and the needs of technical specialization, have all undermined also the homogeneity of the nation-State. Today, the law of late modern States emerges from several quasi-autonomous normative sources, both internal and external. If this may have undermined the constitutional coherence of national law, it has been counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism. In an analogous fashion, the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But – and this is the second main conclusion of this report – *no homogenous, hierarchical meta-system is realistically available to do away with such problems*. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions. In order for it to do this successfully, *increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions*" – ibid, 249, para 493. [Emphasis in original.]

Notwithstanding theoretical differences, the Study Group report with, for example, its repeated reference to the importance of independent third party adjudication in cases of inter-regime conflict [see, for example, ibid, 142, para 280; and 166, para 323 and International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 418, para 251(28)], highlights issues of significance from a "flexible" positivist perspective. For the sake of completeness it is worth noting that the first "principal conclusion" of the report was that "*the emergence of special treaty-regimes (which should not be called 'self-contained') has not seriously undermined legal security, predictability or the equality of legal subjects*"- ILC Study Group Report on Fragmentation, ibid, 248-249, para 492.

14 Bruno Simma, From Bilateralism to Community Interest in International Law, 250 Recueil des cours, 221 (1994, VI), 370-376. But note that for Simma this absolute

"integral obligations".[15] Violation by one State of its international human rights obligations does not entitle another State or States to violate international human rights obligations in response. This absolute dimension of international human rights obligations was acknowledged by the International Court of Justice in the *Genocide Convention Advisory Opinion*.[16] It stands in sharp contrast with the reciprocal character of many of the international trade rules considered in Chapter 3.[17] Those trade rules are nonetheless the source of specific international legal entitlements and obligations. This chapter addresses the interaction of these different types of rules and principles and, in particular, focuses on the rules and principles (both general and technical) that are relevant to such interaction.

The chapter begins with a consideration of a group of general legal principles, a conception of the *international* "rule of law". The Study Group of the International Law Commission in its 2006 report emphasised the importance of "coherence" amongst legal "rules and rule complexes", whilst also acknowledging the importance of pluralism driving the establishment of such "special"[18] rules and rule complexes:

> "Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally. Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, pluralism should be understood as a

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dimension did not mean consent was overridden in a global context (except in relation to jus cogens).

15 See, for example, Third Report on the Law of Treaties by Mr GG Fitzmaurice, Special Rapporteur, Yearbook of the International Law Commission 1958, Volume II, 27-28.

16 *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Reports 1951, 15, 23.

17 Contrast the public law dimension of treaties requiring respect for human rights with the following statement from the Appellate Body:

> "The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement"

– *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, adopted by the Dispute Settlement Body on 1 November 1996, 15.

18 As noted in Chapter 1 the Study Group disapproved of the term "self-contained" and advocated the use of the word "special" in its place. See, for example, ILC Study Group Report on Fragmentation, note 1 above, 100, para 193.

constitutive value of the system. Indeed, in a world of plural sovereignties, this has always been so."[19]

This "formal and abstract virtue" appears to correspond in important respects to traditional conceptions of the rule of law. By examining particular conceptions of the *international* rule of law, the "virtue" of coherence of the international legal system might be better understood. These conceptions in turn appear to be important to the interaction of different rules and principles of international law.

Having examined issues related to the coherence of the international legal system, the chapter then examines issues of hierarchy in international law. Issue of hierarchy are of importance when addressing the interaction of particular rules and principles of international law. If, for example, international law recognises that certain rules of international law enjoy some form of priority over other rules of international law then this will have implications for how interactions between these rules are regulated.[20]

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19 Ibid, 248, para 491.

20 There is an extensive literature on issues of hierarchy amongst rules of international law. Some authors have considered general issues of hierarchy, see, for example, Michael Akehurst, Note – The Hierarchy of the Sources of International Law, 47 British Year Book of International Law 273 (1974-1975); Prosper Weil, Towards Relative Normativity in International Law? 77 American Journal of International Law 413 (1983); RStJ MacDonald, Fundamental Norms in Contemporary International Law, 25 Canadian Yearbook of International Law 115 (1987); W Riphagen, From soft law to ius cogens and back, 17 Victoria University Wellington Law Review 81 (1987); AJJ de Hoogh, The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective, 42 Austrian Journal of Public and International Law 183 (1991); Hilary Charlesworth and Christine Chinkin, The Gender of Jus Cogens, 15 Human Rights Quarterly 63 (1993); Ulrich Fastenrath, Relative Normativity in International Law, 4 European Journal of International Law 305 (1993); John Tasioulas, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, 16 Oxford Journal of Legal Studies 85 (1996); JHH Weiler and Andreas L Paulus, The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law? 8 European Journal of International Law 545 (1997); Martti Koskenniemi, Hierarchy in International Law: A Sketch, 8 European Journal of International Law 566 (1997); and Michael Byers, Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules, 66 Nordic Journal of International Law 211 (1997). Other authors have focussed on issues of hierarchy and human rights, see, for example, Theodore Meron, On Hierarchy of International Human Rights, 80 American Journal of International Law 1 (1986); and Ian D Seiderman, Hierarchy in International Law: The Human Rights Dimension, Intersentia, Antwerpen, 2001. Various conceptions of hierarchy have been offered in the literature. In this book the term "hierarchy" will generally be used to denote the claim that certain rules of international law enjoy forms of priority over other rules of international law, requiring, where possible, that subordinate rules be interpreted consistently with the superior norm, and where not possible, resulting in the invalidity

Forms of hierarchy amongst international rules and principles were recognised and developed in the 20th Century.[21] Hierarchical qualities are apparent in a number of rules of international law including rules requiring the protection of human rights.

The consideration of hierarchy will be followed by an analysis of the forms of interaction and potential conflict between specific international rules relevant to the protection of human rights and rules regulating international trade. The interaction *between* various international human rights norms in the context of efforts to encourage forms of economic development will also be considered.

The search for *coherence* was also linked by the International Law Commission's Study Group to the "the principle of systemic integration" which was described by the Study Group as:

> "… the process … whereby international obligations are interpreted by reference to their normative environment ('system')."[22]

According to the Study Group:

> "The rationale for such a principle is understandable. All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others.[23] The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole. This is why, as pointed out by McNair,[24] they must also be 'applied and interpreted against the background of the general principles of international law'."[25]

The final section of the chapter will consider how international rules on the avoidance, and resolution, of conflict might operate in the context of trade measures

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of the subordinate rules (whether *void ab initio* or voidable), or the suspension of the subordinate rules [as appears to be the case in relation to obligations under the United Nations Charter by virtue of Article 103 of the Charter]. Issues of conflict between rules of international law and municipal law will not generally be addressed.

21 This can be seen, for example, in the recognition of rules of *jus cogens*, discussed below, and in the operation of Article 103 of the UN Charter.

22 ILC Study Group Report on Fragmentation, note 1 above, 208, para 413.

23 On the views expressed in the Study Group report on hierarchy amongst rules and principles of international law see ibid, 166-167, paras 324-327. [Footnote not in original.]

24 A.D. McNair, The Law of Treaties [Oxford: Clarendon Press, 1961] p. 466. [Footnote in original although appearing after the quotation from Lord McNair.]

25 ILC Study Group Report on Fragmentation, note 1 above, 208, para 414.

designed to secure respect for international human rights obligations. This establishes the foundation for the analysis of specific interactions in subsequent chapters.

2. A Conception of the International Rule of Law and its Relevance to the Interaction of International Legal Rules and Principles

On a number of occasions international tribunals have referred to and relied upon conceptions of "the rule of law" when interpreting treaties or assessing the legality of international conduct. The International Court of Justice, for example, had regard to "the rule of law" in the *Asylum Case*[26] when interpreting a regional treaty that sought to regulate the granting of diplomatic asylum in the Americas. In assessing whether persons accused of political offences might be accorded diplomatic asylum under the relevant treaty, the Court concluded that individuals might lawfully obtain protection within a foreign embassy from criminal proceedings before local courts in situations where:

> "… in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents."[27]

In 1989, a Chamber of the International Court of Justice relied on this aspect of the *Asylum Case* when interpreting a provision of a bilateral treaty of friendship, commerce and navigation.[28]

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia had regard to "the rule of law" in the *Tadic* litigation.[29] Controver-

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26 *Colombian-Peruvian asylum case, Judgment of November 20th 1950*, ICJ Reports 1950, 266.

27 ibid, 284.

28 *Elettronica Sicula S.p.A. (ELSI), Judgment*, ICJ Reports 1989, 15. The Chamber in that case was interpreting a provision of the treaty that prohibited a party from taking "arbitrary … measures" against nationals or corporations of the other party. According to the Chamber:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' … . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" – ibid, 76, para 128.

29 *Prosecutor v Tadic (Jurisdiction)*, Appeals Chamber, 2 October 1995, 105 International Law Reports 420 (1997).

sially,[30] the Appeals Chamber, in the appeal on jurisdiction, observed that the defendant had "not satisfied [the] … Chamber" that the general principle requiring that criminal tribunals be "established by law", a principle that the Chamber found applicable to *national* courts, must also apply "with respect to proceeding conducted before an *international* court".[31] Having effectively questioned the relevance of the rule of law with this observation, the Appeals Chamber went on to observe that:

> "[t]his does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law'."[32]

The Appeals Chamber then went on to consider the meaning of the principle that a court must be "established by law". It considered three possible interpretations and made the following observation regarding the third:

> "The third possible interpretation of the requirement that the International Tribunal be 'established by law' is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."[33]

These judicial statements both demonstrate the manner in which a conception of the international rule of law might be used in international adjudication and underline the importance of a closer examination of such conceptions. At a deeper level, a commitment to the systemic unity of international law[34] and to the degree of

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30 See, for example, the criticisms of the Appeals Chamber's reasoning offered by Professor Crawford in Crawford, International Law and the Rule of Law, 24 Adelaide Law Review, 3, 8-9 (2003); and Crawford "The drafting of the Rome Statute" in Philippe Sands (ed), From Nuremberg to The Hague – The Future of International Criminal Justice, Cambridge University Press, Cambridge, 2003, 109, 125-133.

31 *Prosecutor v Tadic (Jurisdiction)*, note 29 above, 472, para 42. [Emphasis added.]

32 Ibid, 473, para 42.

33 Ibid, 474-475, para 45.

34 Compare the following observation made by the Study Group of the International Law Commission:

> "International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hier-

coherence of international legal rules and principles that systemic unity entails appear to require consideration of conceptions of the international rule of law.[35]

As noted above, other important factors pull in different directions, and conceptions of the rule of law offer guidance in international legal disputes but are not generally controlling.[36] The importance of coherence and its link with conceptions of the rule of law nonetheless justify further examination.

Whilst various competing conceptions of the "rule of law" have been offered,[37] reliance in this chapter will be placed principally on the conception of the interna-

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archical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time" – International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 407, para 251(1).

For assessments of the claim that international law constitutes a legal system, see, for example, Simma and Pulkowski, note 5 above, 494-505; and Shany, note 3 above, 86-94.

35 *Cf* Professor Crawford, International Law and the Rule of Law, note 30 above, 12, who observes that "… it seems that still we have only enclaves of the rule of law in international law", referring to the writings of Julius Stone on "enclaves of justice". See Stone, "Approaches to the Notion of International Justice" in Richard A Falk and Cyril E Black (eds), The Future of the International Legal Order: Retrospect and Prospect, Princeton University Press, Princeton, 1969, 372, 425-430 and 452-460, where Professor Stone discusses his use of the "enclave metaphor".

36 Other factors may, for example, outweigh rule of law concerns. According to Professor Raz "[s]ince the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values. … Conformity to the rule of law is a matter of degree, and though other things being equal, the greater the conformity the better – other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realisation of other goals. … [R]egarding the rule of law as the inherent excellence of law means that it fulfils essentially a subservient role. Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. This subservient role of the doctrine shows both its power and its limitations. On the one hand if the pursuit of certain goals is entirely incompatible with the rule of law then these goals should not be pursued by legal means. But on the other hand one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social goals, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty" – Joseph Raz, The Rule of Law and its Virtue, 93 Law Quarterly Review 195, 210-211 (1977).

37 See, for example, the catalogue of competing conceptions provided and analysed by Richard H Fallon Jr, "The Rule of Law" as a Concept in Constitutional Discourse, 97 Columbia Law Review 1 (1997).

tional rule of law offered by Sir Arthur Watts.[38] Most scholarship on the rule of law has centred on the role of the concept in municipal legal systems.[39] International instruments and authorities have, however, acknowledged the importance of the rule of law internationally.[40] The international decisions referred to above serve to illustrate this point.

Though the principal focus will be upon the essential features of the international rule of law identified by Sir Arthur Watts, the discussion of these features

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38 Sir Arthur Watts, The International Rule of Law, 36 German Yearbook of International Law 15 (1993).

39 Watts, ibid, 16.

40 See the 4th preambular paragraph of the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, in which members of the United Nations acknowledged:

> "…the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations" – General Assembly resolution 2625 (XXV), 24 October 1970, adopted without vote, General Assembly, Official Records, 25th Session, Supplement 28, 121.

Compare the much more elaborate statement in the 2005 World Summit Outcome where the Heads of State and Government who assembled in New York in September 2005 made the following statement:

> "Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:
>
> (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;
>
> …
>
> (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
>
> (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
>
> …
>
> (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary- General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis"

– General Assembly resolution 60/1, 16 September 2005 (adopted without vote), paragraph 134.

See also Watts, ibid, 21-25; Crawford, International Law and the Rule of Law, note 30 above; and Ernst-Ulrich Petersmann, How to Promote the International Rule of Law – Contributions by the World Trade Organization Appellate Review System, 1 Journal of International Economic Law 25 (1998).

will be supplemented by insights offered by other scholars into the rule of law.[41] Though Sir Arthur Watts does not address in any detail the human rights implications of his conception of the international rule of law,[42] it is submitted that many of the features of the international rule of law identified by him have significance when considering human rights related trade measures.

41 Sir Arthur Watts builds on the work of other international lawyers who have addressed the international rule of law, notably: Julius Stone, The International Court and World Crisis, Carnegie Endowment for International Peace, 1962 (Professor Stone discusses "contrasts between national and international life which hamper transference of the 'rule of law' ideal from one sphere to another" – 4-11); C Wilfred Jenks, The Prospects of International Adjudication, Stevens and Sons Ltd, London, 1964 (Jenks focuses principally on the rule of law and international adjudication – Chapter 14); and Sir Hersch Lauterpacht, The Function of Law in the International Community, Archon Books, Hamden, 1966 (Sir Hersch Lauterpacht's consideration of the rule of law is tied to his critique of prevailing conceptions of international law and the place of adjudication in the international legal system – 385-438) – see Watts, ibid 22, footnote 40. Professor Brownlie addressed the international rule of law in his 1995 Hague Academy Lecture – International Law at the Fiftieth Anniversary of the United Nations, 255 *Recueil des cours*, 9. Sir Arthur Watts also refers to municipal conceptions of the rule of law in the United Kingdom and Germany, Watts, ibid, 17-18. Reference will also be made to conceptions of the rule of law offered by Joseph Raz, note 36 above, and Lon L Fuller, The Morality of Law, revised edition, Yale University Press, New Haven, 1967. Both these works focus on municipal conceptions of the rule of law. Those writing on the rule of law do not always agree on the essential characteristics of the concept. Raz, for example, advocates a conception of the rule of law that is distinct from "… justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man" – Raz, ibid, 196. According to Sir Arthur Watts, equality of States before the law is an essential feature of the international rule of law – Watts, ibid, 30. To the extent that individuals are subjects of international law he may also be taken to have recognised the principle in the context of individual human rights – Watts, ibid, 21, footnote 37 and 30, footnote 55. Professor Brownlie asserts that "the development of standards of human rights, as well as the procedural standards prevalent in international tribunals as an aspect of general principles of law, demonstrate that domestic law standards, adopted as paradigms or ideals, have penetrated the sphere of international law to a considerable degree." Amongst the five elements of his "epitome of the rule of law" are requirements that "[t]he law itself must conform to certain standards of justice, both substantial and procedural" and "[a]ll legal persons are subject to rules of law which are applied on the basis of equality". Professor Brownlie concludes by noting that to his five elements "it should be added that the Rule of Law implies the absence of wide discretionary powers in the Government which may encroach on personal liberty, rights of property or freedom of contract" – Brownlie, ibid, 213.

42 Watts, ibid, 21, footnote 37.

Sir Arthur Watts distinguishes between violations of particular rules of law and compliance with *the* rule of law.[43] A related point made by a number of scholars (and noted above) is that conformity with the rule of law is an ideal that may not always be realised in practice.[44]

(a) Requirements of the International Rule of Law

(i) A Complete Legal System

The first element of the international rule of law identified by Sir Arthur Watts is a requirement that international law "must be capable of governing all situations which might arise within it".[45] International law must possess a "necessary quality of completeness".[46] The author acknowledges academic controversy on this issue[47] but observes nonetheless that "international law has come increasingly to be regarded as a complete legal system in which 'every international situation is capable of being determined *as a matter of law*, either by the application of specific legal rules where they already exist, or by the application of legal rules derived,

43 Ibid, 15-16. He Acknowledges, however, the link between violations of rules of law and the rule of law when he identifies "effective application of the law" as a requirement of the rule of law – at 35-41.

44 See, for example, Raz, note 36 above. Fuller appears to make the same point when he suggests that "the inner morality of law [a concept that has generally been identified with the "rule of law"] is to remain largely a morality of aspiration and not of duty" – Fuller, note 41 above, 43. Fuller explains his distinction between "morality of aspiration and "morality of duty" at 5-6.

45 Watts, note 38 above, 26.

46 Ibid, 27.

47 See, for example, Sir Hersch Lauterpacht, "Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law" in Symbolae Verzijl, Martinus Nijhoff, La Haye, 1958, 196; Professor Julius Stone, Non Liquet and the Function of Law in the International Community, 35 British Year Book of International Law 124 (1959); Prosper Weil, 'The Court Cannot Conclude Definitively…' *Non Liquet* Revisited, 36 Columbia Journal of Transnational Law 109 (1998); Daniel Bodansky, "Non Liquet and the Incompleteness of International Law" in Laurence Boisson de Chazournes and Philippe Sands (eds), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge, 1999, 153; Martti Koskenniemi, "The Silence of Law/The Voice of Justice" in de Chazournes and Sands, ibid, 488, 500-510; and Vaughan Lowe, "The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing?" in Michael Byers (ed), The Role of Law in International Politics – Essays in International Relations and International Law, Oxford University Press, Oxford, 2000, 207, 207-212.

by the use of known legal techniques, from other legal rules or principles.'"[48] The important role of general principles of law is acknowledged in this context.[49]

The completeness of international law appears to raise issues different to those raised by so-called "self-contained regimes" of international law.[50] Such "special" regimes do not involve the complete exclusion of international law.[51] Rather they appear to involve the application of specialised rules of international law and the displacement of *certain* more general rules, but by no means does this involve the displacement of *all* general rules and principles of international law.

Joost Pauwelyn refers to the "surprise" of many trade negotiators and World Trade Organization ("WTO") experts in Geneva when confronted with the claim that WTO rules create "international legal obligations that are part of public international law".[52] Pauwelyn's assertion that *no* legal argument *can* be put forward for the claim that WTO rules are not part of public international law[53] appears to have a rule of law dimension that is related to the requirement of completeness identified by Sir Arthur Watts.[54]

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48 Watts, note 38 above, 27, quoting Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th Edition, Longman, London 1992, Volume I, 12-13 (emphasis in original). Contrast Weil, ibid. Compare Joseph Raz, Ethics in the Public Domain – Essays in the Morality of Law and Politics, Clarendon Press, Oxford, 1994, Chapter 10.

49 Watts, ibid.

50 *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, 3, 37-41, paragraphs 80-89. See also Bruno Simma, Self-Contained Regimes, 16 Netherlands Yearbook of International Law, 111 (1985); PJ Kupyer, The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law? 25 Netherlands Yearbook of International Law, 227, 251-2 (1994); ILC Study Group Report on Fragmentation, note 1 above, 65-101; and Simma and Pulkowski, note 5 above.

51 As noted above, the International Law Commission Study Group report on fragmentation of international law recommends against the use of the expression "self-contained" preferring instead "special" precisely because "… there is no support for the view that anywhere general law would be fully excluded" – ILC Study Group Report on Fragmentation, ibid, 82, para 152(5).

52 Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 American Journal of International Law, 535, 538 (2001).

53 Ibid.

54 The view that WTO rules are not part of public international law, if strictly adhered to would presumably be productive of situations where there would be no law that was applicable to resolve disputes in cases where the WTO Agreement did not provide a relevant rule or principle. For the link between the completeness of international law and the prohibition of *non liquet*, see, for example, Lauterpacht, note 47 above. Contrast Pauwelyn's views on *non liquet*, Pauwelyn, Conflict of Norms in Public International Law, note 1 above, 150-154 and 419-422. See also the views of the Appellate Body in *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R, 6

(ii) A Relatively Certain Legal System

Together with the completeness of international law, Sir Arthur Watts places certainty in international law.[55] The requirement of certainty appears to be related to a number of other potential requirements of the rule of law. Professors Raz and Fuller both emphasise the link between the openness/public awareness of rules and the rule of law.[56] Public awareness is also linked to the clarity of rules. Sir Arthur Watts acknowledges the importance of clarity but notes that international law suffers from greater uncertainty than that faced by municipal legal systems.[57] There exists no global legislature to authoritatively pronounce rules of international law. Customary law rules are derived by observation of State practice and are notoriously difficult to identify with precision.[58]

In other respects, however, international law is comparable to municipal legal systems. Non-retroactivity, which Sir Arthur Watts links to the certainty requirement,[59] is generally a feature of both international and municipal systems.[60] International human rights standards reject retrospective criminal responsibility under municipal law.[61]

Finally, in the context of certainty and the rule of law, a number of scholars have argued that the rule of law requires stability.[62] Whilst not denying this, Sir Arthur Watts notes that the capacity for the law to change is also important in order to meet changing circumstances. He appears more concerned about difficulties in the processes that lead to change in international law.[63]

March 2006, adopted by the Dispute Settlement Body on 24 March 2006, paras 44-57; and ILC Study Group Report on Fragmentation, note 1 above, 65, para 122.

55 Watts, note 38 above, 27-30.

56 See Raz, note 36 above, 198-9; and Fuller, note 41 above, 49-51.

57 Watts, note 38 above, 28-29.

58 Ibid, 28.

59 Ibid, 30.

60 Sir Arthur Watts recognises the retrospective qualities of Article 103 of the UN Charter and rules of *jus cogens* – ibid, 30. But municipal systems also rely on retrospectivity in limited circumstances. In this regard, see Fuller, note 41 above, 51-62.

61 See, for example, Article 15 of the *International Covenant on Civil and Political Rights*, annexed to resolution 2200 (XXI) adopted by the General Assembly on 16 December 1966, entered into force 23 March 1976 , 999 UNTS 171.

62 See, for example, Raz, note 36 above, 199; and Fuller, note 41 above, 79-81.

63 Watts, note 38 above, 29. Note the apparent link between this point and an aspect of Professor Hudec's consideration of trade unilateralism in Hudec, "Thinking about the New Section 301: Beyond Good and Evil" in Jagdish Bhagwati and Hugh T Patrick (eds), Aggressive Unilateralism – America's 301 Trade Policy and the World Trading System, University of Michigan Press, Ann Arbor, 1990, 113.

(iii) Equality before the Law

Following completeness and certainty in international law, Sir Arthur Watts identifies equality before the law as a requirement of the international rule of law.[64] His focus is almost exclusively on the "sovereign equality" of States. He acknowledges that this equality is not absolute. The international rule of law does not require equalisation of military and economic power amongst States, but States must be equal in terms of legal personality.[65]

International law must apply universally to all States. International law must be applied and enforced equally in respect of all States. This does not preclude particular rules dealing with particular circumstances. Rules dealing with maritime border delimitations, for example, have no application to landlocked States. What the commitment to equality requires is that "… all States which come within the scope of a rule of law must be treated equally in the application of that rule to them. There must, in other words, be uniformity of application of international law and no discrimination between States in their subjection to rules of law which in principle apply to them."[66] The application and enforcement of international law will be revisited below.

International legal rules requiring the protection of human rights demand similar respect for the equality of individuals. International standards require that the legal personality of individuals be recognised by municipal law.[67] Equal protection under municipal law is also enshrined.[68] International trade rules also appear to enshrine this commitment to the equality of the parties to the *Marrakesh Agreement Establishing the World Trade Organization* ("the WTO Agreement"),[69] particularly in the context of dispute resolution.[70]

64 Watts, ibid, 30-32.

65 Ibid, 30-31.

66 Ibid, 31.

67 See, for example, Article 16 of the *International Covenant on Civil and Political Rights*, note 61 above.

68 See, for example, Article 14 of the *International Covenant on Civil and Political Rights*, ibid.

69 Done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994). In terms of the formal equality of parties to the WTO Agreement, see, for example, Article IX of WTO Agreement, which provides, in paragraph 1, that in "meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote".

70 See, for example, Pauwelyn, Conflict of Norms in Public International Law, note 1 above, 269-271.

(iv) Absence of Arbitrary Power

According to Sir Arthur Watts "[c]entral to the rule of law is the absence of arbitrary power".[71] He recognises the legitimate place of discretion in official decision-making but distinguishes the existence of discretion, which should be exercised "within the limits established by law" and arbitrariness, which occurs "outside the scope of any legal constraint".[72]

Sir Arthur Watts acknowledges that international law still recognises areas of unreviewable discretion, such as when a foreign diplomat is declared "*persona non grata*". He continues by noting, however, that:

> "[t]here may … be a discernible trend to limit areas in which international law allows a State to act at its pleasure without having to account for its actions internationally. This has been particularly evident, for example, in relation to a State's treatment of aliens, where its former freedom of action to refuse admission to aliens, and to expel them, has been constrained by the acknowledgement of State responsibility for arbitrary expulsions and by the impact of human rights law."[73]

The implications flowing from this "discernible trend" in relation to international obligations to protect human rights will be considered further below.

A desire to control arbitrary exercises of power also appears to be reflected in the requirements of the rule of law identified by Ian Brownlie.[74] One apparent demand of the rule of law identified by Lon Fuller that appears related to the prohibition of exercises of arbitrary power is the demand that laws should not require the impossible.[75] Professor Fuller acknowledged that this principle was not absolute.[76] He provided examples of rules of strict liability that involve limited and potentially justifiable exceptions to the principle. According to Fuller "the most

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71 Watts, note 38 above, 32.

72 Ibid, 34. The author acknowledges that the borderline between discretion and arbitrariness may be "very blurred."

73 Ibid, 33.

74 Brownlie, note 41 above, 213. Professor Brownlie's first two "key elements constituting the rule of law" are:

"(1) Powers exercised by officials must be based upon authority conferred by law.

(2) The law itself must conform to certain standards of justice, both substantial and procedural."

Control of certain exercises of arbitrary power is expressly identified by Professor Raz as a value served by the rule of law at the municipal level – Raz, note 36 above, 202-203. According to Raz not all aspects of arbitrary rule are incompatible with the rule of law, but "many common manifestations of arbitrary power run foul of the rule of law".

75 Fuller, note 41 above, 70-79.

76 Ibid, 75.

serious infringement of the principle that the law should not command the impossible" are "laws creating strict criminal liability".[77]

The concern about laws that require the impossible can be contrasted with the international legal obligations under human rights treaties requiring the protection of economic, social and cultural rights. Under the *International Covenant on Economic, Social and Cultural Rights* States are only required to "take steps to the maximum of [their] … available resources, with a view to achieving progressively the rights" in the treaty.[78] International legal obligations to protect human rights do not demand the impossible from States. This point appears to have particular significance in relation to labour standards and undermines claims as to the existence of, for example, one fixed international minimum wage standard under international law that does not take into account living standards in developing States.

(v) Effective Application of the Law

The final feature of the international rule of law identified by Sir Arthur Watts relates to the application and enforcement of rules of international law.[79] It is here that international law suffers its greatest difficulties. The absence of compulsory jurisdiction generally in international law is a serious shortcoming of the international legal system.[80] According to Sir Arthur Watts "… a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law".[81]

The position of the International Court of Justice generally can be (and has been[82]) contrasted with the position under WTO rules and, in particular, under the *Understanding on Rules and Procedures Governing the Settlement of Disputes*

77 Ibid, 77.

78 Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*, annexed to resolution 2200 (XXI) adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

79 Watts, note 38 above, 35-41.

80 Although it also appears important to recall, as the International Court of Justice did in 2007, that jurisdiction to adjudicate upon a dispute and the existence of legal obligation are distinct concepts – *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Judgment of 27 February 2007, para 148.

81 Watts, note 38 above, 37.

82 See, for example, Ernst-Ulrich Petersmann, Human Rights and International Economic Law in the 21st Century – The Need to Clarify their Interrelationship, 4 Journal of International Economic Law 3, 24-25 (2001); Petersmann, note 40 above, 34-35; and Petersmann, Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System? 31 New York University Journal of International Law and Policy 753 (1999).

("DSU").[83] The position of the European Court of Justice and the European Court of Human Rights can also be contrasted. An expansion of the effective application of international human rights standards beyond the binding regional regimes of Europe and beyond the non-binding global mechanisms established under human rights treaties such as the *International Covenant on Civil and Political Rights*[84] ("ICCPR" – and its first optional protocol), appears to be a major motivation behind some of the efforts to link the protection of human rights to WTO dispute resolution mechanisms.[85]

Other features of the rule of law identified by Sir Arthur Watts and Professors Brownlie, and Raz are the principle of independent adjudication,[86] respect for rules of procedural fairness[87] and the accessibility of remedies for violations of rules of law.[88] Each of these principles has particular resonance in international instruments protecting human rights[89] and in agreements annexed to the WTO Agreement.

One important feature of the rule of law requirements considered above is their capacity to indirectly address concerns about economic protectionism. Procedures designed to secure transparency, impartiality and fidelity to human rights standards appear to provide a means by which to limit the possibility of capture by rent seeking protectionist interests.

Related to this issue is the question of procedures for raising trade and human rights linkage. Academic analysis of both the protection of fundamental rights in the European Union *via* the European Court of Justice and the protection of human

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83 The *Understanding on Rules and Procedures Governing the Settlement of Disputes* is an annexure to and an integral part of the WTO Agreement, note 69 above.

84 Note 61 above.

85 Steve Charnovitz, for example, suggests that the WTO has become a "magnet" for linkage proposals "because it is perceived as powerful and effective" – Charnovitz, Triangulating the World Trade Organization, 96 American Journal of International Law 28, 29 (2002).

86 Watts, note 38 above, 36 – problems for the international rule of law are identified by Sir Arthur Watts, for example, in the context of *ad hoc* judges in the International Court of Justice; Brownlie, note 41 above, 213 – "[t]he judiciary should not be subject to the control of the executive"; and Raz, note 36 above, 200-201 – "[t]he independence of the judiciary must be guaranteed".

87 Watts, ibid, 36, footnotes 75 and 79 – in footnote 75 reference is made to "the ideal of justice independently and impartially administered, and being seen to be so administered"; Brownlie, ibid, 213 – "a body determining facts and applying legal principles with dispositive effect … should observe certain standards of procedural fairness"; and Raz, ibid, 201 – "[t]he principles of natural justice must be observed".

88 Watts, ibid, 37; Brownlie, ibid, 213 – whilst not referring explicitly to access to justice, Professor Brownlie's 5th element of the rule of law – "[a]ll legal persons are subject to rules of law which are applied on the basis of equality" – implies a commitment to access to justice; and Raz, ibid, 201 – "[t]he courts should be easily accessible".

89 Compare Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, note 61 above.

rights under the *European Convention on Human Rights*[90] ("ECHR") has emphasised the importance of rights of individual petition.[91] The rule of law internationally would appear to be enhanced by individual petition rights. States appear to be generally reluctant to resort to international adjudication to resolve inter-State disputes. This reluctance is apparent both in relation to human rights violations[92] and in relation to the enforcement of other rules of international law.[93] Individual petition rights may reduce the likelihood that factors unrelated to the violation of international law will influence decisions whether or not to initiate judicial proceedings to seek redress for such violations.

The existence of individual petition rights in human rights linkage proposals does not avoid the risk of protectionist capture. Judicial protection of human rights cannot completely exclude the possibility that human rights proceedings might be brought for economic protectionist purposes.[94] Rule of law commitments to impartiality, independence, due process and transparency, however, should significantly limit this risk.[95]

(b) Human Rights and the International Rule of Law

The relationship between international obligations to protect human rights and the international rule of law is characterised by some ambiguity. At least three different approaches to the relationship between human rights and the requirements of the rule of law can be discerned.[96] First, it is possible conceive of the rule of law

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90 European *Convention on Human Rights and Fundamental Freedoms*, done at Rome on 4 November 1950, entered into force 3 September 1953, 213 UNTS 222; as amended by Protocol Number 11, done at Strasbourg on 11 May 1994 and which entered into force on 1 November 1998, ETS No 155.

91 See generally, Laurence R Helfer and Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale Law Journal 273 (1997).

92 Louis Henkin, International Law: Politics and Values, Martinus Nijhoff, Dordrecht, 1995, 213-4. See the discussion of this phenomenon in Chapter 2.

93 Watts, note 38 above, 38. Note, however, that it does not appear to be as significant a factor under the WTO's dispute resolution system.

94 There do not appear to be rules precluding complainants receiving financial support from commercial interests to assist human rights claims within the European and American human rights systems.

95 A commitment to the international rule of law appears to undermine arguments in favour of an automatic disqualification of trade and human rights linkage on account of fears of protectionist abuse. The possibility of protectionist abuse may, however, provide economic justifications for modification or abandonment of linkage proposals. See Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 1, for economic analyses of various environmental and labour related linkage proposals.

96 These three different approaches were identified by Professor Hilary Charlesworth in a paper entitled "International Human Rights Law and the Rule of Law" at a symposium

as being encompassed by human rights. Certain requirements of the rule of law appear to form part of human rights standards protected under international law. Reference, in this regard, can be made to the various due process guarantees in provisions such as Article 8 of the ICCPR.[97]

Secondly, some international instruments (such as Article 6 of the *Treaty of European Union*[98]) appear to treat the rule of law and human rights as distinct legal concepts. Article 6 refers to human rights and the rule of law as if they are mutually dependent but legally distinct concepts.

A third approach to the rule of law and human rights treats the protection of human rights as one feature of the rule of law generally. This appears to be the approach of those who consider that the rule of law has both procedural and substantive dimensions.[99] The ambiguity in the relationship between human rights and the rule of law appears to be similar to the ambiguity that exists in the relationship between human rights and democracy and in the relationship between human rights and development.[100]

As already noted, the conception of the international rule of law advocated by Sir Arthur Watts focuses on inter-State relations rather than on the human rights obligations owed to individuals. He considered that the concern found in municipal conceptions of the rule of law as to the protection of rights of individuals as against government authorities was difficult to transpose to the international plane.[101] He did, however, also acknowledge that as "the status of individuals as subjects of international law increases", so an exclusively inter-State conception of the international rule of law would have to be adjusted.[102]

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on "Globalising the Rule of Law?" held in Brisbane, 18 August 2000 – on file with the author.

97 Note 61 above.

98 See the *Treaty on European Union*, reprinted in consolidated form in the Official Journal of the European Union, C 321 E/1, 29 December 2006.

99 This is how Professor Raz characterises the approach to the rule of law in a document endorsed by the International Congress of Jurists which is criticised by Raz – note 36 above, 195. See, for example, Norman S Marsh, "The Rule of Law as a Supra-National Concept" in AG Guest (ed), Oxford Essays in Jurisprudence, Oxford University Press, Oxford, 1961, 223.

100 On the relationship between these concepts, see Jack Donnelly, Human Rights, Democracy, and Development, 21 Human Rights Quarterly 608 (1999). Compare Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? (2002) 21 Law and Philosophy 137.

101 Watts, note 38 above, 21.

102 Ibid, footnote 37. In this regard it is also important to note that Sir Arthur Watts emphasised the importance of what he called the "private" and the "'public' aspects of the international legal order" – ibid, 38. He considered that these concepts could be "… helpful in order to distinguish between those aspects of the law, and its enforcement, which primarily affect the private interests of the [State] parties and those aspects which primarily touch the interests of the international community as a whole" – ibid.

Reliance on Sir Arthur Watts' conception of the rule of law would therefore not appear to give the same prominence to international human rights standards as other more substantive conceptions of the rule of law. Reliance on his conception is nonetheless defensible on pragmatic grounds because it appears to correspond closely to the conception of the rule of law employed by international tribunals that have considered and applied the rule of law in international adjudication.[103] It is important, however, to acknowledge that to the extent that a more substantive conception of the international rule of law is accepted in international adjudication, greater interpretative opportunities to consider international human rights standards would appear to arise.[104]

In Chapter 1, various ways in which trade measures can be targeted in response to human rights violations were considered. It was suggested that trade measures might be targeted at non-governmental commercial enterprises directly implicated in human rights violations (labour related or other human rights standards).[105] Alternatively, trade measures could be directed at government owned enterprises and enterprises controlled by members of the government in circumstances in which the enterprises are not *directly* implicated in human rights violations committed by the government. Finally, trade measures can be directed at some or all exports from a State regardless of the absence of any formal connection between the trade affected and the perpetrators of human rights violations.

While his subsequent discussion of the "public" aspects focussed on collective security it appears equally applicable to the protection of human rights under international law, in particular to peremptory human rights norms and human rights obligations owed *erga omnes*. These concepts will be addressed in more detail below.

103 See, for example, the references to the rule of law by the Appeals Chamber in *Prosecutor v Tadic (Jurisdiction)*, note 29 above. Note also that Sir Arthur Watts' conception appears consistent with the conception of the rule of law referred to by the European Court of Human Rights in the *Golder v United Kingdom*, European Court of Human Rights, Series A, Number 18, 1 European Human Rights Reports 524, para 34, a decision upon which Sir Arthur Watts relied in articulating his conception of the international rule of law – ibid, 36.

104 Compare Hilary Charlesworth, Comment, 24 Adelaide Law Review 13, 13-14 (2003).

105 As noted in Chapter 2, arguments that seek to limit the application of international human rights standards to obligations imposed on States (thus excluding non-governmental entities from international legal responsibility for human rights violations) have been undermined by developments such as State recognition of individual criminal responsibility directly under international law. In any event legal responsibility under international law and being targeted by a trade measure involve different legal questions. There appears to be no automatic objection based on international human rights obligations to a trade measure directed at a non-governmental entity implicated in human rights violations.

A commitment to the rule of law appears to require that justice ought to be individualised.[106] The notion of collective punishment under international law is generally rejected.[107] Sanctions that fail to differentiate between human rights perpetrators and others would appear to offend (at least potentially) against the rule of law requirement to avoid arbitrary exercises of power.[108] Whilst the enforce-

106 A failure to have regard to individual circumstances in applying rules of law would be an arbitrary exercise of power. For an example of the linkage between arbitrariness proscribed by article 9(1) of the *International Covenant on Civil and Political Rights*, note 61 above, and individualised justice – see the views of the Human Rights Committee in *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 30 April 1997, paragraph 9.4.

107 This concept is implicit in Article 14 of the *International Covenant on Civil and Political Rights*, ibid, and is made explicit, in the context of armed conflict, by regulation 50 to the *Convention (IV) Respecting the Law and Customs of War on Land*, done at The Hague on 18 October 1907. There appears to be an equivalent customary prohibition – see Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Cambridge University Press, Cambridge, 2005, Volume I, 374-375. The International Law Commission in its commentary to Article 50 of the 1996 draft *Articles on State Responsibility* (which had been provisionally adopted at first reading by the Commission) observed that a restriction on countermeasures that derogated from "basic human rights" was a consequence, *inter alia*, of "… the need to ensure that such measures have minimal effects on private parties in order to avoid collective punishment" – see para 22 of the Commission's Commentary to draft Article 50, Report of the Commission on the Work of its Forty-seventh Session, 2 May – 21 July 1995, Official Records of the General Assembly, Fiftieth Session, Supplement Number 10, 149-173. The footnote to the commentary goes on to note that "[t]he collective punishment aspect of prohibited reprisals is discussed indirectly in the commentary to common article 3 of Geneva Convention I … as follows: 'The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish.'" Professor Crawford, in his 3rd report on State responsibility appeared to endorse the avoidance of collective punishment as a justification for precluding countermeasures that derogate from basic human rights – see Crawford, Third Report on State Responsibility, Addendum, A/CN.4/507/Add.3, 18 July 2000, para 312. See also the International Law Commission's commentary to Article 50 of the *Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the Commission on the Work of its Fifty-third Session, 23 April – 1 June and 2 July – 10 August 2001, General Assembly, Official Records, Fifty-sixth Session, Supplement Number 10, 334-336.

108 It might be objected that the term "sanctions" in this sentence ought to be distinguished from punishment as "sanctions" imposed under linkage measures are not penal in character. It is submitted, however, that the principle apparent in rules prohibiting collective punishment has broader application, reflecting the requirement of the rule of law to avoid arbitrary exercises of power. It therefore has application to non-penal trade measures.

ment of laws (including human rights standards) may involve consequences for third parties, this is generally restricted to circumstances where effects on third parties are generally unavoidable and consistent with human rights obligations.[109] Restrictions imposed on trade regardless of the absence of any link between the exports targeted and the perpetrators of human rights violations (other than that they originate from the same territory) can therefore be questioned on rule of law related grounds.

There exist international human rights obligations in relation to the protection of employment.[110] Such obligations are directed principally at the protection of employment from arbitrary interference by employers and may not formally extend beyond this limited scope.[111]

International trade measures that result in the loss of employment do not appear to formally violate this human right. The "discernible trend" identified by Sir Arthur Watts[112] of limiting the scope of unrestrained discretion does not at present appear to extend to trade measures that disrupt employment.

There also exist international human rights obligations in relation to the right to property.[113] The right to property has also been linked to other economic "freedoms" such as the entitlement, protected under European Community treaties, to trade across European borders and the general right to undertake commercial activities.[114] It has been contended that the freedom to trade across borders should be recognised as a human right.[115] The absence of recognition of such rights in human rights treaties is said to reflect a general asymmetry of human rights standards when dealing with economic rights.[116]

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109 A common example would be the incarceration (following the commission of a serious crime and conviction) of an income earner who has dependants.

110 See the text accompanying note 323 in Chapter 2. See, in particular, Krzysztof Drzewicki, "The Right to Work and Rights in Work", in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), Economic, Social and Cultural Rights: A Textbook, 2nd revised edition, Martinus Nijhoff, Dordrecht, 2001, 223.

111 Drzewicki, ibid, 237-238.

112 See text accompanying note 73 above.

113 See the text accompanying note 294 in Chapter 2. See, in particular, Catarina Krause, "The Right to Property", in Eide *et al*, note 110 above, 191.

114 See, for example, Article 16 of the *Charter of Fundamental Rights of the European Union*, proclaimed at Nice on 7 December 2000, reprinted in 40 ILM 266 (2001), which provides that "[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised." Article 17 addresses the "right to property".

115 Ernst-Ulrich Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 European Journal of International Law 621, 644 (2002).

116 See Petersmann, Human Rights and International Economic Law in the 21st Century – The Need to Clarify their Interrelationship, note 82 above, 6.

The international obligation to protect the human right to property is derived from human rights treaty instruments[117] and the protection of property rights under municipal law.[118] The right is also analogous to the rules of diplomatic protection in respect of property rights of aliens and to the rights provided by bilateral and multilateral investment treaties.

An entitlement to trade across borders does not, however, have similar recognition in human rights instruments, or in more general instruments and practice beyond regional initiatives.[119] The tolerance of tariffs by the WTO Agreement and the consistent use by States of tariffs undermines any claim that there presently exists a general entitlement trade without restriction across national borders.[120] Even if such an entitlement were to develop under general international law it appears unlikely that it would be classified as a human right.[121] Classification as a human right appears to be of particular significance when assessing how human rights are to be balanced with each other and with other legal rights and interests.[122]

The international obligation to protect the human right to property appears to extend to the protection of contractual rights from arbitrary interference by governments.[123] European jurisprudence suggests that obligations to protect the human right to property of aliens may be more extensive than the obligations to protect the property rights of a State's own nationals.[124] The obligation to protect the property rights of aliens may, however, be limited to the property rights of *resident* aliens.[125]

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117 Krause, note 113 above, 194-197.

118 The enactment and enforcement of municipal laws protecting property rights is relevant State practice.

119 Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 European Journal of International Law 815, 824-825 (2002), refers to the claim that the European Court of Justice has not recognised freedom of trade as a "human right".

120 Professor Alston also refers to the absence of constitutional protections of freedom to trade, Alston, ibid, 843. A regional right is a different proposition.

121 Compare Piet Eeckhout, "Trade and Human Rights in European Union Law: Linkages in the Case-Law of the European Court of Justice" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 261, 265.

122 See the discussion in Alston, note 119 above, 843, 826.

123 Krause, note 113 above, 199.

124 See for example the decision of the majority of the European Court of Human Rights in *James v United Kingdom*, judgement of 21 February 1986, Series A, Number 98, paras 58-66.

125 See, for example, Jennings and Watts, note 48 above, 910-911.

The enjoyment of international human rights can be limited and obligations can be derogated from in particular circumstances. Total trade embargoes such as those that can be imposed by the Security Council under Chapter VII of the United Nations Charter may be justifiable in extreme circumstances. As noted in Chapter 2, trade measures under Chapter VII have nonetheless been criticised for their failure to properly take human rights standards into account.[126] Unilateral trade measures imposed for human rights purposes that target all exports and are imposed in the absence of systematic or widespread violations of human rights are *a fortiori* vulnerable to criticism on similar grounds.

(c) Limited Convergence of Principles – Trade and Human Rights Instruments

The WTO Agreement reflects a commitment to the rule of law[127] and presupposes some protection of property rights without which there could be no international trade.[128] The basic commitment to property rights under the original *General Agreement on Tariffs and Trade* was enhanced by new rules for the protection of particular property rights under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"). As noted above, a commitment to the rule of law is apparent within WTO dispute settlement mechanisms. This commitment is supplemented by provisions such as Article X of the 1994 *General Agreement on Tariffs and Trade* ("GATT 1994"),[129] which sets out in some detail rule of law requirements that are similar to those found in human rights instruments.

As noted in Chapter 3, the preambles to the WTO Agreement and GATT 1994, and Article XXXVI of GATT 1994, all refer to the raising of standards of living. The language of these provisions of the WTO Agreement is consistent with a commitment to the protection of human rights.[130] This claim will be expanded upon in Chapter 6. Obligations under general international law to protect human rights

126 See, for example, Committee on Economic, Social and Cultural Rights, General Comment Number 8 (1997) – The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc E/1998/22, 4 December 1998.

127 See, for example, Thomas Cottier, "Governance, Trade and Human Rights" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 121 above, 93, 103.

128 Contrast the ILC Study Group Report on Fragmentation, note 1 above, 130, para 254, where the observation is made that "… trade regimes presuppose and are built upon the protection of human rights (in particular the right to property)".

129 An annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 69 above.

130 The scope of the object and purpose of the WTO Agreement is the subject of considerable academic debate – compare the various views as to the objects of the WTO Agreement expressed in Symposium: The Boundaries of the WTO, 96 American Journal of International Law 1-158 (2002). Consider also the following observation by Professor Petersmann:

are also relevant to the interpretation and application of the WTO Agreement, in particular where those obligations have a peremptory character. Peremptory norms and other rules and principles that appear to have hierarchical qualities will now be considered.

3. Hierarchy Amongst Rules of International Law

Concepts of hierarchy amongst rules of international law can be found in the works of scholars such as Grotius[131] and Vattel,[132] who wrote from natural law perspectives. According to Vattel there was a "necessary Law of Nations" which was "not subject to change" and from which arose obligations that were "necessary and

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"[t]he basic objectives of human rights law and WTO law are complementary and similar: to prohibit discrimination among citizens, regardless of their nationalities, and to progressively extend individual freedom and non-discrimination across frontiers. Both human rights law and international trade law aim at protecting rule of law, eg by legal guarantees of individual access to courts" – Petersmann, From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law? 37 Common Market Law Review 1363, 1376-1377 (2000).

See also the criticism of attempts to treat trade rights as human rights in Alston, note 119 above, 826.

131 On the assumption that Grotius' conception of sovereignty reflected rules of international law, then Grotius appears to have accepted a form of hierarchy amongst such rules. According to Grotius "[t]he best division of law thus conceived is found in Aristotle, that is, into natural law and volitional law…" – Grotius, *De Jure Belli ac Pacis Libri Tres*, translated by Francis W Kelsey, Clarendon Press, Oxford, 1925, Volume 2, Book I, 38. For Grotius, the law of nations appears to be a form of volitional law – the "law of nations … has received its obligatory force from the will of all nations, or of many nations" – ibid, 44. Grotius explains his reference to the will "of many nations" by stating that "… outside of the sphere of the law of nature, which is frequently called the law of nations, there is hardly any law common to all nations. Not infrequently, in fact, in one part of the world there is a law of nations which is not such elsewhere …" – ibid. Grotius later addresses sovereignty and asserts that "[t]hat power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will. When I say 'of another', I exclude from consideration him who exercises the sovereign power, who has the right to change his determinations; I exclude also his successor, who enjoys the same right, and therefore has the same power, not a different power" – ibid, 102. Grotius offers a number of "comments" or "cautions" on sovereignty. In his third comment he observes "… that sovereignty does not cease to be such even if he who is going to exercise it makes promises – even promises touching matters of government – to his subjects or to God. I am not now speaking of the observance of law of nature and of divine law, or of the law of nations; observance of these is binding upon all kings, even though they have made no promise. I am speaking of certain rules, to which kings would not be bound without a promise" – ibid, 121.

132 E de Vattel, The Law of Nations or Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, translated by Charles G Fenwick, Carnegie Institute, Washington, 1916, 4, §§7 – 9.

indispensable".[133] Treaties that departed from this necessary law were "unlawful".[134]

The existence and the importance of hierarchies within international law have been questioned by scholars writing from various theoretical perspectives.[135] At least one international lawyer writing from a positivist perspective has raised concerns about the development of hierarchy amongst rules of international law.[136] Positivism, however, does not appear to require the rejection of concepts of hierarchy amongst rules of international law.[137]

Notwithstanding theoretical critiques, the existence of forms of hierarchy amongst rules of international law nonetheless appears to be manifested in the recognition of peremptory norms (*jus cogens*) and the existence of international obligations owed *erga omnes*.[138] The notion of State crimes under international law, if accepted, would also appear to reflect a conception of hierarchy. In a more practical sense, obligations under the Charter of the United Nations are given a form of priority by Article 103 of the Charter.

In light of the apparent acceptance by States of the existence of forms of hierarchy within international law[139] it is not proposed to examine the various theo-

133 Ibid, 4, §9.

134 Ibid.

135 See, for example, the discussion of different theoretical approaches to the question of hierarchy in Weiler and Paulus, note 20 above, 558-562. Concepts of hierarchy in international law have not, however, always been rejected by critics – see, for example, , the criticism of the content of *jus cogens* offered by Charlesworth and Chinkin, note 20 above, 68-74. Contrast this criticism with the "feminist rethinking" of *jus cogens* discussed by Charlesworth and Chinkin, ibid, 74-75, and the assessment of this "rethinking" offered by Weiler and Paulus, ibid, 561-562.

136 See Weil, note 20 above.

137 See, for example, Fastenrath, note 20 above, 324-326. Professor Hart's "soft" positivism acknowledges that substantive values can be included amongst the criteria of legal validity – HLA Hart, The Concept of Law, 2nd edition, Clarendon Press, Oxford 1994, 247-250. See also Professor Brownlie's "informal or flexible" positivism – Brownlie, "Discussion – Lex lata *and* lex ferenda" in Antonio Cassese and Joseph HH Weiler (eds*),* Change and Stability in International Law-Making, Walter de Grutyer Berlin 1988, 90, 91-92.

138 Following a review of developments since 1945 in relation to peremptory norms and obligations *erga omnes*, Professor James Crawford offered the following observations in his first report on State responsibility:

> "…the developments outlined above confirm the view that within the field of general international law there is some hierarchy of norms, and that the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind. Such a difference would be expected to have its consequences in the field of State responsibility" – Crawford, First Report on State responsibility, UN Doc A/CN.4/490/Add.1, 9, para 71.

139 See the discussion below of peremptory norms and obligations owed *erga omnes*.

retical critiques of conceptions of hierarchy. The focus instead will be on analysis of peremptory norms, State crimes, obligations *erga omnes* and obligations under the Charter given priority under Article 103. An assessment will be offered of the significance of these rules and principles to the interaction of international rules on the protection of human rights and the regulation of international trade.

***(a) Peremptory Norms* (Jus Cogens)**

The existence of peremptory norms under international law appears to reflect a form of hierarchy. According to Article 53 of the *Vienna Convention on the Law of Treaties*, 1969, a treaty is void if, at the time of the treaty's conclusion, it conflicts with a peremptory norm of general international law.[140] No provision is made for severance of conflicting provisions of the treaty.[141] Article 64 of the *Vienna Convention* addresses the situation of a peremptory norm that develops in the future and its effect on an inconsistent pre-existing treaty. Such a treaty "becomes void and terminates", although severance of conflicting provisions appears possible.[142]

Notwithstanding initial scepticism about the existence of peremptory norms under general international law,[143] controversies surrounding such norms today do not appear to relate to whether the concept of peremptory norms forms part of international law. Instead, current controversies appear to relate to precisely *which* norms have peremptory status and the implications flowing from such status.[144]

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140 See also Article 53 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, done at Vienna on 21 March 1986, UN Document A/CONF.129/15, not yet in force, reprinted in 25 ILM 543 (1986).

141 See Article 44(5) of *Vienna Convention*, note 2 above. Note that the ILC Study Group Report on Fragmentation, note 1 above, 184, para 365, footnote 506, suggests that severance may be possible. See also Pauwelyn, Conflict of Norms in Public International Law, note 1 above, 281-282.

142 Article 44(5) of the *Vienna Convention*, ibid, does not preclude severance in cases falling under the rule set out in Article 64.

143 See, for example, the explanations offered by the French delegation for its vote against what became Article 53 of the *Vienna Convention*, ibid – United Nations Conference on the Law of Treaties, Official Records, second session, Vienna 9 April – 22 May 1969, UN Doc A/CONF.39/11/Add.1, 93-95, paras 7-18. See also Georg Schwarzenberger, International Jus Cogens? 43 Texas Law Review 455 (1965); compare Weil, note 20 above, 442.

144 See, for example, Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th ed, Longman, London, 1992, Volume I, 7-8; and Louis Henkin, International Law: Politics and Values, Martinus Nijhoff, Dordrecht, 1995, 38-39. For an extensive bibliography of works that address peremptory norms, see Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law – Historical Development, Criteria, Present Status, Finnish Lawyers' Publishing Company, Helsinki, 1988, 728-776; and Alexander Orakhelashvili, Peremptory Norms in International Law, Oxford University Press, Oxford, 2006, 593-613. For an attack on the concept of peremptory

Article 53 of the *Vienna Convention* defines a peremptory norm as:

> "… a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

The International Law Commission's 1966 commentary to its draft of what would become Article 53 includes a consideration of the types of treaties that would be rendered void for conflict with peremptory norms:

> "… [S]ome members of the Commission felt that there might be advantage in specifying [in the article], by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included (*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the articles to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of states or the principle of self-determination were mentioned as other possible examples."[145]

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norms of international law , see A Mark Weisburd, The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina, 17 Michigan Journal of International Law 1 (1995). Compare Dinah Shelton, Normative Hierarchy in International Law, 100 American Journal of International Law 291 (2006). Whilst disavowing any intention to address peremptory norms, John O McGinnis appears to dismiss their practical relevance to the interpretation of the WTO Agreement – McGinnis, The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO, 44 Virginia Journal of International Law 229, 233 and 268 (2003). One particular difficulty relates to uncertainty regarding the peremptory status of norms that appear closely related to accepted peremptory norms, for example, the provision of civil remedies for persons who have been the victims of torture. See, for example, Erika de Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law, 15 European Journal of International Law 97, 107; and Kate Parlett, Immunity in Civil Proceedings for Torture: The Emerging Exception, [2006] European Human Rights Law Review 49, 51.

145 The commentary is set out in International Law Commission, Report of the International Law Commission on the work of the second part of its 17th session, UN Doc A/6309/Rev.1, reprinted in Yearbook of the International Law Commission 1966, Volume II, 169, 248, para 3; see also Oscar Schachter, International Law in Theory and Practice, Martinus Nijhoff, Dordrecht, 1991, 343-344.

The Commission decided against including in the article any examples of peremptory norms.[146] It preferred instead to have the content of the rule regarding peremptory norms "worked out in State practice and in the jurisprudence of international tribunals".[147]

The International Law Commission revisited the issue of peremptory norms in 2001 in its commentary to the *Articles on State Responsibility*.[148] In paragraph 5 of the Commission's commentary to Article 26,[149] the Commission observed that:

> "[t]he criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole.[150] So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[151] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[152]"

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146 Two reasons for this decision are given in the commentary:

> "First, the mention of some cases of treaties void for conflict with a rule of jus cogens might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of jus cogens, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles"
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> – International Law Commission commentary to the draft Vienna Convention, ibid.

147 Ibid.

148 The commentary is set out in International Law Commission, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, General Assembly Official Records, 56th Session, Supplement Number 10, 59.

149 Ibid, 208.

150 Compare the observations of Akehurst, note 20 above, 281-285. [Footnote not in original.]

151 See, e.g. the decisions of the International Criminal Tribunal for the former Yugoslavia in Case IT-95-17/1-T, *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998; *I.L.M.*, vol. 38 (1999), p. 317, and of the English House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, esp. at pp. 108-109, and 114-115 (Lord Browne-Wilkinson). Cf. *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 257, para. 79. [Footnote in original.]

152 Cf. East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 90, at p. 102, para. 29. [Footnote in original.] More recently the International Court of Justice expressly recognised the peremptory character of the prohibition of genocide in *Armed Activi-*

(i) Peremptory Norms and the Interpretation of Treaties

In the context of the interaction of various rules of international law, one practical consequence of a rule being recognized as having a peremptory character may arise in the interpretation of treaties. According to the International Court of Justice:

> "It is a rule of interpretation that a text emanating from a Government[153] must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[154]

In light of the consequences for a treaty in cases of conflict with a peremptory norm, this general rule of interpretation would appear to acquire additional force when the relevant "existing law" is recognised as having a peremptory character.[155]

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ties on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Judgment of 3 February 2006, para 64. Compare the approach of the Inter-American Court of Human Rights in *Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03*, 17 September 2003, Inter-Am Ct HR (Ser A) No 18 (2003), paras 97-101 and 173 ["the fundamental principle of equality and non-discrimination has entered the domain of jus cogens" – para 173(4)].

153 This statement was made by the Court in the context of its interpretation of a State's declaration under Article 36(2) of the Statute of the Court. The principle would appear to apply with equal force to treaties. [Footnote not in original.]

154 *Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of 26 November 1957*, ICJ Reports 1957, 125, 142. This rule is discussed in the context of the Marrakesh Agreement Establishing the World Trade Organization by Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 American Journal of International Law, 535, 574-577 (2001). For a discussion of the relevance of peremptory norms to the interpretation of the jurisdiction of, and applicable law before, an international tribunal, see Orakhelashvili, note 144 above, 492-496; compare the separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment of 3 February 2006, paras 9-14.

155 The International Law Commission addressed the issue of interpretation and peremptory norms in paragraph 3 of its commentary to Article 26 of the *Articles on State Responsibility*, note 148 above, 207, where the Commission observed that:

> "[w]here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts." The footnote to this paragraph refers

Such additional force appears, for example, to be emphasised by Judge Simma in his separate opinion in the *Case Concerning Oil Platforms*.[156] Judge Simma expressly agreed with the Court's acceptance of "… the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the treaty law applicable between the parties as well as of the rules of general international law 'surrounding' the treaty".[157] Judge Simma then observed that:

> "[i]f these general rules of international law are of a peremptory nature … then the principle of interpretation just mentioned turns into a *legally insurmountable limit to permissible treaty interpretation*."[158]

A potential illustration of such an interpretative approach is a situation that may arise in the context of an extradition treaty. A State party to such a treaty may receive an extradition request in circumstances where there is a well-founded fear that the individual whose extradition has been sought may be tortured following rendition. It is submitted that, as a consequence of the peremptory character of the prohibition of torture, the extradition treaty should be interpreted as not requiring extradition in those circumstances.[159] Whilst not couched in terms of a principle of treaty interpretation, the *Institut de droit international* adopted a resolution with similar effect in 1983:

> "In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused …".[160]

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to a possible analogy in the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993,* ICJ Reports 1993, 325, 439-441. There the Judge Lauterpacht was considering a Security Council resolution.

Professor Meron suggests that the peremptory character of rules will be relevant in balancing different human rights norms – see Theodor Meron, Human Rights Law-Making in the United Nations – A Critique of Instruments and Process, Clarendon Press Oxford, 1986, 190-191 and 200-201.

156 *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment*, ICJ Reports 2003, 161.

157 Ibid, 331, para 9.

158 Ibid. [Emphasis added.]

159 This, of course, raises the issue of whether there is a peremptory obligation of *non-refoulement*. On this issue see de Wet, note 144 above, 101-105 and 111-112.

160 Quoted and discussed by Meron, note 155 above, 194-196. See also Schachter, note 145 above, 343-344; and Articles 3 and 8 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, annexed to General Assembly resolution 39/46 which was adopted on 10 December 1984, entered into force on 26 June 1987, 144 parties as at 27 April 2007. Whilst the prohibition of torture has been recognised as a peremptory norm, for example in *Prosecutor v Furundzija*, note 151

Treaties regulating international trade should, in principle, be subject to such an interpretative approach. The implications for trade treaties will be examined further below.

(ii) Peremptory Norms and Other Rules of International Law

International rules possessing a peremptory character appear to have significance beyond the law of treaties. Professor Brownlie has observed that:

> "[a]part from the law of treaties the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence; prescription cannot purge this type of illegality."[161]

These observations are supported by the International Law Commission's *Articles on State Responsibility*. Consent, for example, on the part of an injured State may in some cases preclude the wrongfulness of the conduct injuring the State.[162] The *Articles on State Responsibility* provide, however, that consent cannot preclude the wrongfulness of an act "not in conformity with an obligation arising under a peremptory norm of general international law".[163]

Article 41 of the International Law Commission's *Articles on State Responsibility* refers to obligations on States to:

- "… cooperate to bring to an end through lawful means any serious breach …[of an obligation arising under a peremptory norm of general international law]"; and
- not "…recognize as lawful a situation created by a serious breach ... [of an obligation arising under a peremptory norm of general international law, or] … render aid or assistance in maintaining that situation."

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above, paras 153-157, it is unclear whether the obligation to punish torturers is also a peremptory norm. The practice of giving amnesties suggests that there is no such peremptory norm. On amnesties for human rights violations, see Diane F Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale Law Journal 2537 (1990-1991); Michael P Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? 31 Texas International Law Journal 1 (1996); and Dinah Shelton, Remedies in International Human Rights Law, 2nd ed, Oxford University Press, Oxford, 2005, 389-400.

161 Brownlie, Principles of Public International Law, 6th ed, Oxford University Press, Oxford, 2003, 490.

162 See Article 20 of the *Articles on State Responsibility*, note 148 above, 48.

163 Article 26 of the *Articles on State Responsibility*, ibid, 50. See also Giorgio Gaja, *Jus Cogens* Beyond the Vienna Convention, 172 Recueil des cours 271, 290-298 (III, 1981).

Article 40(2) provides that "[a] breach of … [an obligation arising under a peremptory norm of general international law] is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."[164]

In relation to the obligation to cooperate, the commentary to Article 41 observes that:

> "[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 [of Article 41] in that respect may reflect the progressive development of international law."[165]

No equivalent statement is made in relation to the duty of non-recognition and the prohibition of aid or assistance in maintaining a situation created by a serious breach. The commentary refers to State practice and judicial support for such obligations.[166]

Notwithstanding the International Law Commission's view in 2001 that the rule set out in Article 41(1) (ie the obligation on third States to cooperate to bring to an end such breaches of international law) was possibly progressive development,

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164 *Articles on State Responsibility*, note 148 above, 53. Para 7 of the Commission's commentary to Article 40 argues that the limitation of Articles 40 and 41 to serious breaches is supported by State practice – ibid, 285. Reference is made to international human rights complaints procedures (discussed in Chapter 2) and the non-application of the exhaustion of local remedies rule in the case of systematic breaches of human rights. Para 8 of the Commission's commentary to Article 40 provides guidance as to what would constitute a serious breach for the purposes of Article 40 – ibid. See also Orakhelashvili, note 144 above, 282-287.

165 *Articles on State Responsibility*, ibid, 287, para 3.

166 Ibid, 287-291, paras 6-12. The prohibition of aid or assistance is linked to Article 16 of the Article on State Responsibility, which deals with aid or assistance in the commission of an internationally wrongful act – see para 11 of the commentary to Article 41, 290-291. An important question not specifically addressed in the commentary is whether the obligations enshrined in Article 41 are themselves peremptory. It is difficult to argue that the obligation to cooperate is peremptory given the Commission's suggestion that the inclusion of the obligation in Article 41 constituted progressive development. It is arguable, however, that the duty of non-recognition and the prohibition of aid or assistance in maintaining a situation created by a serious breach of a peremptory norm are themselves peremptory. Support for this view might be found in the close relationship between peremptory norms and the prohibition of aid or assistance maintaining a situation created by serious violations of those norms. It is submitted that most States would accept and recognise that no derogation is permitted from the obligation not to so aid or assist. Compare, however, Christian J Tams, Enforcing Obligations Erga Omnes in International Law, Cambridge University Press, Cambridge, 2005, who has observed that "[i]nsofar as States condoning conduct of other States might be in breach of their self-standing duty not to recognise consequences of grave wrongful acts, this breach would usually not give rise to responsibility *erga omnes*", 230-231 and 184.

the International Court of Justice in 2004 appeared to accept that a similar obligation existed under international law. In paragraph 159 of the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[167] the Court observed that:

> "[i]t is … for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall [by Israel, which the Court found to be in violation of *erga omnes* obligations], to the exercise by the Palestinian people of its right to self-determination is brought to an end."[168]

The Court based the existence of such an obligation on the *erga omnes* character of the obligations that the Court considered to be violated. This reliance on the concept of obligations owed *erga omnes* as a source of obligations on third States was criticised by Judge Higgins.[169] Judge Kooijmans, who explicitly linked this finding of the Court to Article 41 of the *Articles on State Responsibility*, refused to join the majority, apparently due to a disagreement regarding the precise nature of obligations owed by third States. He appeared unprepared to accept the existence of an obligation on third States to bring to an end impediments to the enjoyment of rights. Instead he appeared to accept that there existed a related obligation of "[c]ooperation ... in the framework of a competent international organization, in particular the United Nations".[170]

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167 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory – Advisory Opinion*, ICJ Reports 2004, 136.

168 Ibid, 200, para 159.

169 Ibid, 216-217, paras 37 and 38, where the Judge observed (in para 38) that:

> "… an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of 'erga omnes'. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails 'decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out' … . Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of erga omnes".

See also Judge Kooijmans, ibid, 231, paras 40-41.

170 Ibid, 232, para 42. Judge Kooijmans was here quoting from the International Law Commission's commentary to Article 41 of the *Articles on State Responsibility*, note 148 above. The Judge did, however, appear to treat such an obligation as being *lex lata* rather than *lex ferenda*.

The Court also accepted that there was a general obligation on third States of non-recognition and a general prohibition of providing aid or assistance. The Court thus appeared to confirm the views of the International Law Commission that Article 41(2) of the *Articles on State Responsibility* was a codification of the existing law. According to the Court:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."[171]

Articles 40 and 41 of the *Articles on State Responsibility* replaced a draft article that addressed State crimes.[172] The concept of State criminality will be addressed further below. There will also be further consideration of the obligations set out in Article 41 and their potential impact on the obligations of States under trade treaties.

As indicated above, when discussing possible peremptory norms in 1966, the International Law Commission referred to prohibitions of "trade in slaves" and "genocide" and then expressly noted that "in the suppression of [violations of these norms] … every State is called upon to co-operate".[173] This reference to "suppression" raises the issue of the positive legal duties upon States to *prevent* violation of certain peremptory norms. As members of the Commission in 1966 appear to have recognised, a strong case for such obligations of prevention, which in all

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171 Ibid, 200, para 159. Judge Higgins voted for the equivalent paragraph in the *dispositif* notwithstanding her doubts regarding the relevance of the notion of *erga omnes* obligations. Judge Kooijmans expressly agreed with the findings regarding obligations not to aid or assist but questioned the meaning of a obligation of non-recognition in the context of the case – ibid, 232, paras 43-45.

172 Draft Article 19 which addressed State crimes was initially adopted by the International Law Commission in 1976 – for a detailed account of the history of draft Article 19, see Marina Spinedi, "International Crimes of State: The Legislative History" in Joseph HH Weiler, Antonio Cassese and Marina Spinedi (eds), International Crimes of State – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, Walter de Grutyer, Berlin, 1989, 7. For an account of developments in relation to draft Article 19 after 1984, see Professor Crawford's first report on State responsibility, UN Docs A/CN.4/490/Add.1, Add.2, and Add.3. See also Orakhelashvili, note 144 above, 272-282.

173 See text accompanying note 145 above.

likelihood are also peremptory in character,[174] exists in relation to the prohibitions of genocide[175] and trade in slaves.[176]

Such obligations of prevention under general international law would no doubt be similar to those considered by the International Court of Justice in its decision on the merits in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[177] There the Court emphasised that the obligation to prevent genocide under the *Genocide Convention* was an obligation of "conduct and not one of result" and required a State to exercise due diligence:

> "… [R]esponsibility is … incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[178]

Obligations on States to exercise due diligence to prevent violation of certain peremptory norms have the potential to require States to restrict trade in particular

174 The force of this conclusion is demonstrated by reflection on the alternative proposition, namely that the same international community of States as a whole that accepted and recognised that no derogation was permissible regarding the prohibitions of genocide and slavery nonetheless considered derogations from the legal obligations to prevent genocide and slavery to be permissible. Such a conclusion cannot reasonably be asserted. This is not to say, however, that the contours of a peremptory norm to prevent genocide are the same as the contours of any comparable norm regarding slavery.

175 See Articles I and VIII of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277. Whilst the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 27 February 2007, expressly refrained from making any finding "whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law" – paragraph 429 – it is inconceivable such a duty does not exist in respect of the prohibition of such acts under general international law.

176 Articles 2, 3 and 4 of the *Slavery Convention*, 60 LNTS 253, as amended by protocol of 7 December 1953, 212 UNTS 17; and Article 3 of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 266 UNTS 3, are relevant in determining the content of a positive obligation to prevent slavery. The scope of a general obligation to prevent slavery may differ from the scope of an obligation to prevent genocide.

177 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Judgment of 27 February 2007.

178 Ibid, para 430.

circumstances.[179] The precise content of obligations to prevent can probably only be assessed in concrete circumstances[180] but the existence of such obligations is relevant to the interpretation and application of the WTO Agreement and other trade treaties.

Another non-treaty context in which the peremptory character of norms has been held to be relevant is the scope of rules of sovereign immunity. Members of the House of Lords, for example, emphasised the peremptory character of norms when considering rules of sovereign immunity in the Pinochet litigation.[181] The

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179 Consider the following hypothetical scenario offered by Professor John Jackson:

> "Suppose you have a group of like-minded states, a 'coalition of the willing', if you will, who say they are not going to tolerate another Rwanda, and are going to do everything they can to bring pressure, just short of sending in troops. They agree to cut off the trade with the culprit state, as far as they can, but, at the same time, know that countries X, Y, and Z are just making a huge profit out of not complying, to say nothing of the potentates that rule the target country and are lining their pockets. So the coalition extends its trade limits to X, Y, and Z, and these states bring a case in the WTO. How far would or should the coalition be able to defend such a WTO case?" – Jackson, "General Editor's Foreword", in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 5 above, v, ix.

180 The International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Judgment of 27 February 2007, described the nature of the obligation to prevent genocide deriving from the *Genocide Convention*, note 175 above, in the following terms:

> "In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce" – para 430.

181 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 Appeal Cases 147, 198-205 (*per* Lord Brown-Wilkinson) and 260-265 (*per* Lord Hutton); compare *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 Appeal Cases 61, 107-111 (*per* Lord Nicholls of Birkenhead) and 113-116 (*per* Lord Steyn).

peremptory character of international norms, however, appears to have had more limited impact on the consideration of sovereign immunity in judgments of the European Court of Human Rights[182] and the International Court of Justice[183] delivered in 2001 and 2002 respectively. The majority judgments in both these cases were the subject of forceful dissents on this issue,[184] and in the *Arrest Warrant Case*, the majority judgment appears to leave open the possible relevance of peremptory norms to the scope of sovereign immunity for acts committed in a "private capacity".[185] These cases nonetheless demonstrate that the peremptory character of a norm may not in all cases result in the complete abrogation of non-peremptory norms that appear to conflict with or otherwise reduce the apparent effectiveness of the peremptory norm.[186]

(iii) Peremptory Norms and Human Rights

The observations made by the International Law Commission quoted above[187] identify certain rules protecting human rights as having a peremptory character. It is not entirely clear whether *all* human rights obligations under customary international law also have a peremptory character.

The reference by the International Law Commission to "stringent" criteria for the identification of peremptory norms[188] might be taken to imply that peremptory human rights norms are not coextensive with customary human rights norms. This appears to have been the conclusion reached by the American Law Institute in its third Restatement of the Foreign Relations Law of the United States.[189] The Restatement catalogue of peremptory norms excludes one of the human rights

182 See *Al-Adsani v United Kingdom*, Application Number 35763/97, judgment of 21 November 2001.

183 See the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment*, ICJ Reports 2002, 3.

184 In the *Arrest Warrant Case*, ibid, see the dissenting opinions of Judge Al-Khasawneh, 97-98, paras 6-7, and Judge *ad hoc* Van Den Wyngaert, 142- 163, paras 8-39. See also the separate opinion of Judges Higgins, Kooijmans and Buergenthal at 85 and 88-89, paras 74-75 and 85. In *Al-Adsani*, note 182 above, see the dissenting opinion of Judges Rozakis and Caflisch that was joined by President Wildhaber and Judges Costa, Cabral Barreto and Vajić. Judges Ferrari Bravo and Loucaides expressed similar views.

185 The *Arrest Warrant Case*, ibid, 25, para 61 and the separate opinion of Judges Higgins, Kooijmans and Buergenthal, 88-89, para 85.

186 For an analysis of relevant authorities in the context of torture, see for example, Parlett, note 144 above.

187 See the text accompanying note 145 above.

188 See the text accompanying note 149 above.

189 See the American Law Institute, Restatement of the Law Third – The Foreign Relations Law of the United States, American Law Institute Publishers, St Paul, 1987, Volume 2, §702, Comment *n*, 167,

norms considered customary in §702.[190] According to the Restatement, a State which "practices, encourages or condones … a consistent pattern of gross violations of internationally recognized human rights" does *not* violate a peremptory norm.[191] The similarity between this type of human rights violation and crimes against humanity was noted in Chapter 2.[192] The position taken in the Restatement can therefore be contrasted with the view expressed in the International Law Commission's commentary to Article 26 of the *Articles on State Responsibility*, where the prohibition of crimes against humanity was identified as a peremptory norm.[193] Professor Schachter suggested that all customary human rights norms were also peremptory.[194]

An argument that peremptory human rights norms are a subset of customary human rights norms might be based on the existence of treaty provisions allowing derogations from international human rights obligations in times of public emergency.[195] These provisions prohibit emergency derogations in respect of *certain* human rights.[196] These non-derogable human rights obligations might be consid-

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190 Ibid. Thus the American Law Institute considers that a State violates a peremptory norm "if, as a matter of state policy, it practices, encourages or condones":
- genocide;
- slavery or slave trade;
- the murder or causing the disappearance of individuals;
- torture or other cruel, inhuman, or degrading treatment or punishment;
- prolonged arbitrary detention; and
- systematic racial discrimination.

Professor Meron considers that to the Restatement's catalogue "one should perhaps add certain norms of humanitarian law" – Meron, note 155 above, 192. See also the reference by the International Court of Justice to "fundamental rules" of humanitarian law that "… constitute intransgressible principles of international customary law" – *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, note 151 above, 257, paragraph 79.

191 Restatement, ibid.

192 See text accompanying note 155 above.

193 Commentary to the Article 26 of the *Articles on State Responsibility*, note 148 above, 208, para 5.

194 Schachter, note 145 above, 343. Note, however, that Professor Schachter's threshold requirement restricts his catalogue of customary human rights.

195 See Article 4 of the ICCPR, note 61 above; Article 15 of the ECHR, note 90 above; and Article 27 of the *American Convention on Human Rights*, done at San Jose on 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123.

196 Under Article 4 of the ICCPR, ibid, the following rights are non-derogable: the right to life; the right to be free from torture and "cruel, inhuman or degrading treatment or punishment"; the right to be free from slavery; the right not to be imprisoned merely for failing to fulfil contractual obligations; the right not to have one's conduct retrospectively rendered criminal; the right to legal personhood; and the right to freedom of thought, conscience and religion. Under Article 15 of the ECHR, ibid, the following rights are non-derogable: the right to life; the right to be free from torture

ered peremptory norms given that the prohibition of derogation is central to the definition of peremptory norms.[197]

An attempt to limit the catalogue of peremptory norms by reference to non-derogable rights under human rights treaties can be challenged in a number of ways.[198] It has been suggested that non-derogability in human rights treaties may not necessarily reflect hierarchical ranking of human rights obligations. The Human Rights Committee, for example, has offered non-hierarchical reasons why certain human rights obligations have been made non-derogable under Article 4 of the ICCPR:

> "One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A

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and "inhuman or degrading treatment or punishment"; the right to be free from slavery; and the right not to have one's conduct retrospectively rendered criminal. Article 27(2) of the American Convention, ibid, provides that Article 27(1):

> "… does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

197 Article 53 of the *Vienna Convention on the Law of Treaties*, note 2 above, provides, *inter alia*, that:

> "… a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted …".

According to the Human Rights Committee "[t]he proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the [ICCPR] (e.g., articles 6 and 7)" – General Comment No 29, States of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 11.

198 In its commentary on the draft article that would eventually become Article 53 of the *Vienna Convention*, ibid, the International Law Commission observed that it would not "… be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from the provision is to be permitted, so that another treaty which conflicted with that provision would be void" – Report of the International Law Commission on the work of the second part of its 17th session, note 145 above, 248, para 2. See also Human Rights Committee, General Comment No 29, ibid.

> reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category."[199]

A link between four of the human rights obligations[200] that are non-derogable under human rights treaties *and* peremptory norms might nonetheless be asserted on the grounds that these four rights are the only rights that are expressly non-derogable under the ICCPR, the ECHR and the *American Convention of Human Rights* ("American Convention")[201] and that, unlike the prohibition of imprisonment for debt, these four common non-derogable rights can in some sense be considered fundamental.

An attempt to restrict the class of peremptory human rights norms based on these four rights still, however, faces difficulties. It does not, for example, address the issue of rights that appear to be implicitly non-derogable. The Human Rights Committee refers to, for example, rights that are non-derogable "because without them there would be no rule of law."[202] The right to life is a non-derogable right in the principal human rights treaties but, in the absence of a prohibition of the death penalty, some protection of due process rights is essential for the protection of the right to life.[203]

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199 Human Rights Committee, General Comment No 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6, 11 November 1994, reprinted in 34 ILM 839 (1995), para 10.

200 Professor Meron refers to the following four rights as an "irreducible core" of non-derogable rights in the major human rights instruments:
- The right to life;
- The prohibition of slavery;
- The prohibition of torture; and
- The prohibition of retroactive penal measures – Meron, note 155 above, 186.

See also Joan Fitzpatrick, "Protection Against Abuse of the Concept of Emergency" in Louis Henkin and John Lawrence Hargrove (eds), Human Rights: An Agenda for the Next Century, American Society of International Law, Washington 1994, 203, 210-211. Compare Professor Schachter, note 145 above, 339, on retroactive penal measures.

201 See note 196 above.

202 General Comment No 24, note 199 above, para 10.

203 This issue has been the subject of consideration by the Inter-American Court of Human Rights in the context of Article 27(2) of the American Convention, note 195 above – see *Habeas Corpus in Emergency Situations (Articles 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, Inter-American Court of Human Rights, Series A, Number 8 (1987), reprinted in 27 ILM 512 (1988); and *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion

An attempt to limit the class of peremptory human rights by reference to derogation provisions must also take account of the stringent necessity requirements contained in the derogation provisions of the various treaties. Under Article 4 of the ICCPR, for example, derogation is only permitted "to the extent strictly required by the exigencies of the situation". Such a provision would therefore appear to preclude justification for derogations resulting in gross violations of human rights.[204]

OC-9/87, 6 October 1987, Inter-American Court of Human Rights, Series A, Number 9 (1987). These advisory opinions are discussed in Seiderman, note 20 above, 80-83. Compare Meron, note 155 above, 93-100; and Human Rights Committee, General Comment No 29, note 197 above, paras 15 and 16. See also Restatement, note 189 above, Volume 2, §702, Reporter's note 11, 174, which observes that *jus cogens* and non-derogable human rights are "not necessarily congruent". Note also the limits to the scope of the non-derogable right to life in Article 2 of the ECHR, note 90 above. This suggests a more complex relationship between the peremptory character of a norm and derogability under human rights instruments. Seiderman, ibid, 88, makes a similar point when he observes that:

> "… the *jus cogens* prohibition on the use of force may not apply when force is used in legitimate self-defense. This limitation might be conceived as part of the definition of rules against the use of force or as an exception to the general rule. In either case, the limitation does not in any way affect the *jus cogens* status of the core of the rule against the use of force."

204 Seiderman, ibid, 8, observes that:

> "[b]ecause the capacity of a state to derogate from conventional human rights obligations is subject to the strict conditions of necessity and proportionality, rights that are in principle derogable may generally only be circumscribed in scope, not obliterated"

Note also Article 5(1) of the ICCPR, note 90 above. The Siracusa Principles, drafted by a group of international lawyers that included Professor M Cherif Bassiouni, Dame Rosalyn Higgins and Professors John P Humphrey, Alexandre Kiss and Richards B Lillich, also addressed this issue. Principle 70 provides, *inter alia*, that:

> "[a]lthough protection against arbitrary arrest and detention … and the right to a fair and public hearing in the determination of a criminal charge … may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation"

– The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 Human Rights Quarterly 3, 12 (1985).

Seiderman, ibid, 84, also refers to the absence of derogation clauses in other global human rights treaties such as the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Rights of the Child*. Derogation is also not provided for under Geneva Conventions of 1949 and the additional protocols – see Principles 67 and 68 of the Siracusa Principles, ibid, 11. Compare the view of the Human Rights Committee that:

If, in effect, derogation provisions cannot excuse gross human rights violations, then the provisions might be seen to support the peremptory character of the prohibition of gross violations of human rights (whether or not the particular human rights are derogable under the treaty provisions).

The wider the range of human rights norms recognised as possessing a peremptory character, the wider the range of trade measures having human rights purposes that a State may be entitled to take consistently with its obligations under international law. Circumstances of interaction between human rights norms and rules regulating international trade will be considered further below.

(b) State Crimes

Another potential basis for the assertion of hierarchy amongst rules of international law is the alleged existence of international norms the violation of which gives rise to *State* criminality.[205] The issue of State criminality was addressed in a draft article on State responsibility that was adopted provisionally by the International Law Commission in 1976.[206] Paragraph 2 of the draft article defined State crimes in terms reminiscent of the definition of peremptory norms in Article 53 of the *Vienna Convention on the Law of Treaties*, 1969.[207] Paragraph 3 provided the following indicative list of circumstances that could give rise to State crimes:

> "(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

> "[i]f action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct"

– General Comment No 29, ibid, para 12.

205 The issue of State criminality under international law is distinct from the notion of individual criminality under international law. The rules and principles of individual criminality have been in a process of development since the establishment of the Nuremberg and Tokyo tribunals following the Second World War. Developments in the 1990s included the establishment by the Security Council of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda and the negotiation of the Statute of the International Criminal Court.

206 Provisionally adopted on 6 July 1976 – Yearbook of the International Law Commission, 1976, Volume I, 253. For details on the provisional adoption of draft Article 19, Spinedi, note 172 above, 21-37.

207 Draft Article 19(2) provided that:

> "[a]n 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"

– Yearbook of the International Law Commission, 1976, Volume II, Part 2, 75.

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."[208]

States remain divided over the concept of State criminality.[209] A similar division is apparent in the academic literature.[210] Areas of controversy include whether there exists within the law of State responsibility a distinction between crimes and *delicts*.[211] Amongst those who accept such a distinction there is controversy as to the consequences that should flow from cases of State criminality.[212]

In light of such controversies the International Law Commission decided in 2000 to replace the notion of State criminality in the draft *Articles on State Responsibility* with provisions addressing serious violations of peremptory norms.[213] The relevant provisions are Articles 40 and 41 in the articles as finally adopted by the Commission. These articles have already been briefly discussed.[214]

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208 Yearbook of the International Law Commission, ibid.

209 For a summary of State responses to draft Article 19, see Professor Crawford's first report on State responsibility, note 172 above, paras 52-60.

210 For a summary of the academic literature on State criminality, see the select bibliography contained at the end of Professor Crawford's first report on State responsibility, ibid; the references contained in footnote 722 of para 369 of Professor Crawford's third report on State responsibility, UN Document A/CN.4/507/Add.4; and the bibliography in Nina HB Jørgensen, The Responsibility of States for International Crimes, Oxford University Press, Oxford, 2000, 299-314.

211 See, for example, the comments on draft Article 19 offered by the French Government – referred to by Professor Crawford in his first report on State responsibility, ibid, 6-7, para 52.

212 There was, for example, controversy surrounding whether punitive measures could be taken in cases of State criminality and concerns about the appearance of collective guilt – see the Report of the International Law Commission on the work of its 50th Session, 20 April – 12 June 1998 and 27 July – 14 August 1998, General Assembly Official Records, Fifty-third Session, Supplement Number 10, paras 313 – 315. Analogies with corporate criminal responsibility in various municipal systems may not adequately address the difference between holding shares in a corporation and possessing the nationality of a State.

213 See Professor Crawford's "Introduction" in Crawford (ed), The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries, Cambridge University Press, Cambridge, 2002, 1, 36.

214 See the text accompanying note 164 above.

On the relationship between State criminality and peremptory norms, the general consensus amongst those who accepted the existence of State crimes appears to have been that State crimes were effectively a subset of peremptory norms.[215] The general consequences flowing from recognition of a norm as possessing a peremptory character (discussed above) would therefore have applied to State crimes. It was envisaged by some that additional consequences would apply to reflect the penal quality of this subset of peremptory norms.[216]

For the purposes of assessing the interaction of human rights norms and trade regulation under international law it appears that the consequences of State criminality would have been an important part of any analysis. However, with the replacement of State criminality by Articles 40 and 41 of the *Articles on State Responsibility* and the continuing controversy surrounding the concept, it is proposed to limit analysis to a consideration of the consequences of serious breaches of peremptory norms set out in Article 41. This will be undertaken below

***(c) Obligations owed* Erga Omnes**

The identification by the International Court of Justice of obligations owed *erga omnes* provides another basis for asserting the existence of hierarchy under international law. The Court's dictum in the *Barcelona Traction Case*[217] was discussed briefly in Chapter 2 where it was noted that the Court appeared to recognise that States that were not injured by a violation of international law might nonetheless invoke the responsibility of the State violating the obligation. As the Court distinguished between *erga omnes* obligations and other obligations under international law, the question arises as to whether the *erga omnes* character of an obligation is of significance in addressing the interaction of various rules of international law.

A difficulty that confronts any examination of the character of *erga omnes* obligations arises from ambiguities in the judicial pronouncements that have been central to the identification of such obligations.[218] Three paragraphs in the judgment of the International Court of Justice in the *Barcelona Traction Case* form the principal judicial account of the concept.[219] There have been various other judicial pronouncements that have referred to such obligations or have considered

215 See the Report of the International Law Commission on the work of its 50th Session, note 212 above, para 280.

216 Professor Crawford addressed the relevant draft articles in his first report on State responsibility, note 172 above, paragraph 51.

217 *Barcelona Traction, Light and Power Company, Limited, Judgment*, ICJ Reports 1970, 3.

218 Judge Higgins commented in her separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory – Advisory Opinion*, note 167 above, that "[t]he Court's celebrated dictum in Barcelona Traction, Light and Power Company, Limited … is frequently invoked for more than it can bear" – 216, paragraph 37.

219 The *Barcelona Traction Case*, note 217 above, 32 and 47, paragraphs 33, 34 and 91.

analogous concepts.[220] The *Barcelona Traction* judgment, however, remains the principal judicial source when examining the character of obligations owed *erga omnes*.

It will be recalled that the Court in the *Barcelona Traction Case* drew an "essential distinction" between obligations arising "vis-à-vis another State in the field of diplomatic protection" and "obligations of a State towards the international community as a whole".[221] These *erga omnes* obligations "*[b]y their very nature* … 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 …".[222] Whilst there appears to be a clear overlap between peremptory norms and obligations *erga omnes*,[223] the Court's observations in the *Barcelona Traction Case* can be contrasted with the positivist terms of the definition of peremptory norms in Article 53 of the *Vienna Convention*.[224]

The literature on obligations owed *erga omnes* has focussed on the language used by the Court to emphasise at least two possible criteria for identifying obligations owed *erga omnes*. A number of writers appear to base the dictum in the

220 For a comprehensive treatment of the judicial antecedents, the background to the dictum in the *Barcelona Traction Case* and subsequent developments – see Tams, note 166 above; and Maurizio Ragazzi, The Concept of International Obligations Erga Omnes, Clarendon Press, Oxford, 1997.

221 The *Barcelona Traction Case*, note 217 above, 32, paragraph 33.

222 Ibid. [Emphasis added.]

223 Professor Crawford, in his third report on State responsibility, made the following observations on the relationship between *erga omnes* obligations and peremptory norms:

> "From the Court's reference [in its *Barcelona Traction* judgment] to the international community as a whole, and from the character of the examples it gave, one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole"

– UN Doc A/CN.4/507, 49, para 106.

224 According to Article 53 of the Vienna Convention on the Law of Treaties, note 2 above, a peremptory norm is one that is "accepted and recognized <u>by</u> *the international community of* <u>States</u> as a whole as a norm from which no derogation is permitted…". [Emphasis added.] On this issue, see, for example, Gennardy M Danilenko, International *Jus Cogens*: Issues of Law-Making, 2 European Journal of International Law 42, 46. Although note the criticism of the formulation of Article 53 in ILC Study Group Report on Fragmentation, note 1 above, 190, para 375.

Barcelona Traction judgment on the non-reciprocal nature of certain obligations under international law.[225] According to Giorgio Gaja:

> "… rules protecting human rights generally impose obligations without regard to the nationality or other personal characteristics of the individual: in the case of a rule included in a multilateral treaty on human rights, the breach of the obligation with regard to an individual affects the rights of all the Contracting States, whether the individual in question is their national or not. The concept of an obligation that in a given case exists towards many States essentially corresponds to the concept of obligation *erga omnes* as used by the ICJ in its famous passage in the *Barcelona Traction* case."[226]

The reference by the Court in the *Barcelona Traction Case* to "obligations of a State towards the international community as a whole" being "by their very nature the concern of all States"[227] supports Gaja's assessment.

A second criterion for identifying *erga omnes* obligations is the specific content of the obligations. Maurizio Ragazzi offers an essentially naturalist[228] interpretation of the *Barcelona Traction* dictum. It is the inherent importance of the obligations that gives rise to their *erga omnes* quality. Ragazzi criticises Gaja's approach:

> "… [B]y reversing the order of priority between cause and effect, [the proposition advocated by Gaja] is unduly restrictive: it reduces the fundamental problem of the content of obligations *erga omnes* and the values they protect to issues of legal technique which, while important, certainly do not exhaust the definition of obligations *erga omnes* … [T]he obligations identified by the International Court in the *Barcelona Traction* case are *erga omnes* primarily because of the intrinsic value of their content, and only secondarily because of their legal structure … ."[229]

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225 Giorgio Gaja, "Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts" in Weiler, Cassese and Spinedi, note 172 above, 151; Seiderman, note 20 above, 125-129; ILC Study Group Report on Fragmentation, ibid, 193-203.

226 Gaja, ibid.

227 The *Barcelona Traction Case*, note 217 above, 32, paragraph 33.

228 The naturalist implications of Ragazzi's approach are apparent, for example, at Ragazzi, note 220 above, 183, especially footnote 83. Contrast Tams, note 166 above, 128-156, who, whilst rejecting the "structural" approach advocated by Gaja and others, relies more pragmatically on comparisons with peremptory norms and on expressions of values by members of the international community to develop criteria by which to assess whether norms are of sufficient importance so as to give rise to obligations owed *erga omnes*.

229 Ragazzi, 202-203.

Ragazzi's position is supported by the Court's reference to "the importance of the rights involved" when referring to obligations *erga omnes*, the examples given by the Court of such obligations, and the Court's reference to "the *basic* rights of the human person"[230] amongst those examples. It will be recalled that the Court observed that:

> "… obligations [*erga omnes*] 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 the corresponding rights of protection have entered into the body of general international law (Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 23); others are conferred by international instruments of a universal or quasi-universal character."[231]

The practical implications of these differing interpretations appear to centre on whether all customary human rights obligations can be said to be *erga omnes* obligations. Notwithstanding Ragazzi's observations regarding restrictiveness, it appears that the interpretation advocated by Gaja is consistent with the view that *all* customary human rights obligations should be considered to be obligations owed *erga omnes*.[232] This view accords with the approach adopted in the Restatement that equates customary human rights obligations and obligations owed *erga omnes*.[233] It also appears to be consistent with views expressed by members of the International Law Commission that the three types of rules so far considered in this chapter "formed increasingly smaller concentric circles, namely: erga omnes obligations, jus cogens norms, and international crimes".[234] The Court's implicit rejection in the *Barcelona Traction Case* of the existence of *erga omnes* obligations in

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230 The *Barcelona Traction Case*, note 217 above, 32, paragraph 33. [Emphasis added.] Professor Meron's discusses the use in the UN Charter and in global human rights instruments of terms such as "rights and freedoms", "human rights", "fundamental human rights" and "human rights and fundamental freedoms". He notes that these terms "appear, in general, to be used interchangeably. This practice suggests that there is no substantive or definable legal difference between these terms. In these instruments at least, 'human rights' are not inferior to 'fundamental' rights and freedoms. They are the same" – Meron, note 155 above, 178. Professor Meron goes on to note that the United States draft of the UN Charter submitted at Dumbarton Oaks in 1944 "referred to 'basic human rights', a term that was subsequently replaced by 'human rights and fundamental freedoms'" – ibid.

231 The *Barcelona Traction Case*, ibid, 32, paragraph 34.

232 As discussed in Chapter 2, customary human rights obligations have a non-reciprocal dimension.

233 Restatement, note 189 above, Volume 2, §702, Comment *o*, 167.

234 Report of the International Law Commission on the work of its 50th Session, note 212 above, paragraph 280; see also paragraph 326.

relation to denials of justice in civil proceedings[235] is also arguably consistent with this assessment, as a human right to protection from denials of justice may not have been customary at the time of the Court's decision.[236]

Ragazzi's more rigorous approach to identification of obligations owed *erga omnes* may produce a catalogue of *erga omnes* human rights obligations that is narrower than the class of customary human rights obligations.[237] *Erga omnes* human rights obligations would not, however, be narrower than the obligations arising from peremptory human rights norms.[238]

In relation to the interaction of human rights norms and trade regulation under international law, the entitlement to invoke State responsibility for violation of obligations owed *erga omnes* was noted in Chapter 2. The potential link between *erga omnes* obligations and the law of countermeasures was also noted.

(d) Universal Jurisdiction, Obligations owed Erga Omnes *and Peremptory Norms*

A link might be made between the entitlement of a State to invoke *State* responsibility for breach of obligations owed *erga omnes* and the entitlement of States to exercise universal jurisdiction over *individuals* (and possibly other juridical entities) under international law. Principles of universal jurisdiction recognise the entitlement of *municipal* courts to exercise criminal jurisdiction[239] over persons without the need to establish the traditional jurisdictional connections of territoriality,[240] nationality[241] or some security interest of the State.[242] Whilst peremptory norms, *erga omnes* obligations and principles of universal jurisdiction have different areas of operation under international law,[243] there appear to be conceptual con-

235 The *Barcelona Traction Case*, ibid, 47, paragraph 91.

236 Note the references set out in Chapter 2 and in note 204 above that relate to the potential customary status of due process rights. Compare Tams, note 166 above, 176-179.

237 Ragazzi, note 220 above, 200-203.

238 Compare Tams, note 166 above, 139-151; and Ragazzi, ibid, 200.

239 The commentary to the Restatement also considers universal jurisdiction as a basis for civil jurisdiction – note 189 above, Volume 1, §404, Comment *b*, 255.

240 See, for example, Jennings and Watts, note 144 above, 458-461.

241 Ibid, 462-466.

242 See, for example, the Restatement, note 189 above, Volume 1, §402, 237-240.

243 Peremptory norms were initially conceived of in terms of the law of treaties, but as noted above, they have expanded beyond this area of international law. Obligations owed e*rga omnes* are generally linked to the entitlement of States to invoke the international responsibility of another State. Principles of universal jurisdiction address, *inter alia*, when it is permissible for the national courts of a State to exercise criminal jurisdiction over an individual or a juridical entity in the absence of the traditional jurisdictional bases recognised under international law.

nections.[244] Decisions of national and international judicial bodies appear to have relied on these links in analysing the scope of the different concepts.[245]

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244 Compare the definition of peremptory norms in Article 53 of the *Vienna Convention on the Law of Treaties*, note 2 above, and the observations in the *Barcelona Traction Case*, note 217 above, 32, regarding obligations *erga omnes* with §404 of the Restatement which provides that:

> "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern…" – note 189 above, Volume 1, 254.

There appears to be overlap in the operation of the principles. Thus the existence of universal jurisdiction over pirates has long been recognised, see, for example, Jennings and Watts, note 144 above, 469; and the prohibition of piracy appears to have been recognised by members of the International Law Commission to be a peremptory norm, see Yearbook of the International Law Commission 1966, note 145 above, Volume II, 248. The *dicta* of the International Court of Justice in the *Barcelona Traction Case*, ibid, referred to *erga omnes* obligations to protect persons from slavery; and universal jurisdiction has been exercised in relation to slavery, see, for example, Professor Schachter, note 145 above, 267. Professor Brownlie poses the question whether "the principle of universal jurisdiction [can] develop in relation to *jus cogens*?" – Brownlie, note 161 above, 490, footnote 37. See also, for example, Schachter, ibid, 269; M Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 Virginia Journal of International Law, 81, 96-104 (2001); and Kenneth C Randall, Universal Jurisdiction under International Law, 66 Texas Law Review 785, 829-831 (1988).

245 In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)*, note 181 above, 198, Lord Brown-Wilkinson made the following observation:

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

See also the judgment of Lord Millet, 275. In *Prosecutor v Furundzija*, note 151 above, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia observed that:

> "… at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court

Principles of universal jurisdiction are also closely linked to the concept of individual responsibility for crimes under international law.[246] State practice used to identify crimes for which States are entitled to exercise universal jurisdiction under general international law includes negotiation of, and adherence to, multilateral treaties recognising forms of universal jurisdiction,[247] the enactment of municipal legislation asserting universal jurisdiction[248] and judicial decisions (both national and international) relying upon or recognising universal jurisdiction.[249]

Catalogues of crimes for which States may exercise universal jurisdiction under general international law include:

– Genocide;[250]

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in *Demjanjuk*, 'it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission'" – paragraph 156.

246 See, for example, Jennings and Watts, note 144 above, 469-470. Although note that some treaties appear to envisage forms of universal jurisdiction for conduct that is not universally regarded as criminal under international law, as opposed to national law. For example, in relation to drug related offences – see Article 4(2)(b) of the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, adopted at Vienna on 19 December 1988, entered into force on 11 November 1990, 1582 UNTS 164 (1990), 183 parties as at 10 May 2007. Compare Professor Brownlie's view that it was "not strictly correct" to treat the punishment of individuals for crimes under international law as "an acceptance of the principle of universality" – Brownlie, note 161 above, 303-304.

247 See, for example, Articles 5 and 7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, note 160 above.

248 There is an extensive collection of references to municipal laws potentially involving assertions of universal jurisdiction in a report by Amnesty International entitled "Universal Jurisdiction: The duty of states to enact and implement legislation", International Secretariat of Amnesty International, London, 2001 ("Amnesty International Report"). Note, however, the criticism of this report by Professor Bassiouni, note 244 above, 83. Professor Bassiouni's criticisms are not substantiated in his article.

249 See, for example, the cases referred to in note 245 above.

250 See, for example, Articles 8, 9 and 17 of the International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind, reprinted in the Report of the International Law Commission on the work of its 48th Session, 6 May – 26 July 1996, General Assembly Official Records, Fifty-first Session, Supplement Number 10; International Law Association Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, London Conference, 2000, 5; Restatement, note 189 above, Volume 1, §404, 254; Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction, Program in Law and Public Affairs, Princeton, 2001, Principle 2; Amnesty International Report, note 248 above, Chapters 7 and 8.

– Crimes against humanity;[251]
– War crimes including both grave breaches of the Geneva conventions of 1949[252] and the first additional protocol of 1977[253] (committed during international armed conflicts) *and* serious breaches of Article 3 common to the Geneva conventions of 1949 (committed during internal armed conflicts);[254]
– Slavery;[255] and
– Torture.[256]

There is also support for universal jurisdiction in relation to forced disappearances.[257] Whilst it has been argued that the catalogue of crimes for which there

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251 See, for example, Articles 8, 9 and 18 of the Draft Code of Crimes Against Peace and Security of Mankind, ibid; International Law Association Committee on International Human Rights Law and Practice, ibid, 5-6; the Princeton Principles on Universal Jurisdiction, ibid, Principle 2; Amnesty International Report, ibid, Chapters 5 and 6.

252 The *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* , 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 UNTS 135; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287. The four Geneva conventions were all done at Geneva on 12 August 1949 and they entered into force on 21 October 1950. There were 194 parties to the conventions as at 17 April 2007.

253 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, done at Geneva on 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3, 167 parties as at 17 April 2007.

254 See, for example, Articles 8, 9 and 20 of the Draft Code of Crimes Against Peace and Security of Mankind, note 250 above; Jennings and Watts, note 144 above, 470; International Law Association Committee on International Human Rights Law and Practice, note 250 above, 6-7; the Princeton Principles on Universal Jurisdiction, note 250 above, Principle 2; Amnesty International Report, note 248 above, Chapters 3 and 4.

255 See, for example, the Restatement, note 189 above, Volume 1, §404, 254; and the Princeton Principles on Universal Jurisdiction, ibid, Principle 2. Compare Bassiouni, note 244 above, 112-115.

256 See, for example, Jennings and Watts, note 144 above, 470; International Law Association Committee on International Human Rights Law and Practice, note 250 above, 8; the Princeton Principles on Universal Jurisdiction, ibid, Principle 2; Amnesty International Report, note 248 above, Chapters 9 and 10.

257 See, for example, International Law Association Committee on International Human Rights Law and Practice, ibid, 9; Amnesty Report, ibid, Chapters 11 and 12. See also the *International Convention for the Protection of All Persons from Enforced Disappearance*, annexed to General Assembly resolution 61/177 which was adopted on 20 December 2006, not yet in force, signed by 59 States as at 16 April 2007. The treaty does not, however, appear to expressly address the entitlement to exercise

is universal jurisdiction is considerably shorter than the catalogue of customary human rights obligations,[258] it must also be recalled that crimes against humanity appear to encompass systematic and widespread violations of a broad range of human rights.

The scope of *erga omnes* obligations and crimes for which universal jurisdiction is recognised are important to the current analysis as these rules and principles are potentially relevant to the interpretation of provisions such as Article XX of the GATT 1994 and their application to trade measures imposed to protect human rights. These issues will be examined in more detail in Chapter 6.

(e) Obligations under the Charter of the United Nations and the Effect of Article 103 of the Charter

In Chapter 2 there was consideration of the human rights obligations flowing from Article 56 of the Charter of the United Nations. Obligations under the Charter receive a form of hierarchical status under Article 103 of the Charter. This article provides that:

> "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The operation of Article 103 can be contrasted with the effect of conflict with a peremptory norm. Article 103 "prevail[s]" in cases of conflict and does not expressly refer to the invalidity of a conflicting treaty.[259] Article 53 of the *Vienna Convention on the Law of Treaties*, 1969, provides that a treaty that conflicts with a peremptory norm is "void". It has been argued that Article 103 of the Charter does result in the invalidity of treaty obligations conflicting with *direct* Charter obligations.[260] An opposing view has been offered by members of the International Law Commission who have argued that in cases of conflict, obligations under the

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universal jurisdiction although it might be implied from the obligation to extradite or prosecute in cases where no other State seeks extradition and none of the other grounds of jurisdiction are relevant.

258 Compare the point made by Ratner and noted in Chapter 2 that "[i]nternational criminal law does not simply incorporate human rights law" – Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale Law Journal 443, 467-468 (2001).

259 Contrast the Article 20 of the League of Nations Covenant which provided, *inter alia*, that "[t]he members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof …".

260 Bruno Simma (ed), The Charter of the United Nations – A Commentary, 2nd Edition, Oxford University Press, Oxford, 2002, Volume II, 1297-1298.

conflicting treaty are merely suspended for the period of conflict with Charter obligations.[261]

Another issue regarding the scope of Article 103 relates to its effect, if any, on obligations under customary international law. It appears that despite the language of Article 103, subsequent practice in relation to Charter obligations evidences an agreement between the parties to the Charter that obligations under the Charter prevail over conflicting customary obligations.[262]

In relation to obligations arising by virtue of the Security Council decisions made under Chapter VII of the Charter, the WTO Agreement includes provisions that effectively recognise the priority of obligations arising under Chapter VII of the Charter.[263] These provisions will be discussed in detail in Chapter 6.

Difficulties in relation to the operation of Article 103 appear to arise when peremptory norms are potentially affected by decisions of the Security Council under Chapter VII of the Charter. According to Judge *ad hoc* Lauterpacht at the provisional measures stage in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between the Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent."[264]

The Study Group of the International Law Commission in its 2006 report on fragmentation of international law endorsed this approach.[265] There also appears to be a strong interpretative presumption that obligations under the Charter are consistent with peremptory norms.[266]

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261 ILC Study Group Report on Fragmentation, note 1 above, 170-173, paras 333-340.

262 Simma, note 260 above, 1298-1299; and ILC Study Group Report on Fragmentation, ibid, 175-176, paras 344-345.

263 Consider, for example, Article XXI of GATT 1994, note 129 above, and Article XIV *bis* of the *General Agreement on Trade in Services*. Both agreements are annexures to and integral parts of the WTO Agreement, note 69 above.

264 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, note 155 above, 440, para 100.

265 See ILC Study Group Report on Fragmentation, note 1 above, 176- 177 and 181, paras 346 and 360. See also Simma, note 260 above, 1299.

266 See Judge Simma's separate opinion in *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment*, note 156 above, 331, para 9.

In the absence of a specific Security Council resolution under Chapter VII of the Charter requiring the taking of trade measures to ensure respect for human rights, it appears unlikely that Article 103 (and human rights obligations under the Charter) will lead to a significantly different outcome to that flowing from the peremptory character of certain human rights obligations and their customary status (if that is not coextensive). Entry into, or action under, a treaty in conflict with a peremptory norm appears to be legally void. Entry into, or action under, a treaty in conflict with customary human rights obligations appears incapable of altering those legal obligations and will give rise to State responsibility.[267] Article 103 appears to lead to similar consequences (ie at least suspension) in cases where a treaty is entered, or action is taken under a treaty, in conflict with human rights obligations arising under the Charter of the United Nations.[268]

The only significant difference may be in cases where, for example, the General Assembly (rather than the Security Council) calls for trade restrictions in order to give effect to a legal obligation, that appears to arise from the Charter, not to aid or assist a State in violating its Charter obligations. If the obligation not to aid or assist does derive from the Charter[269] then Article 103 would appear to apply. The issue of State responsibility for aiding or assisting another State in the violation of international obligations is dealt with further below.

The Interpretative principle considered above[270] in the context of peremptory norms also appears to require, where possible, the interpretation of treaties consistently with obligations under the Charter. A critical question then becomes whether trade treaties potentially conflict with human rights rules under the Charter. Direct and indirect interaction between human rights and trade norms will now be considered.

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267 See the text accompanying note 265 in Chapter 2. Note also, for example, Article 60(5) of *Vienna Convention on the Law of Treaties*, note 2 above.

268 A separate issue is whether non-peremptory human rights norms might be suspended under a Security Council resolution – see, for example, *R (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, 29 March 2006. As discussed below there are a number of interpretative presumptions that stand in the way of such a result.

269 In International Law Commission's commentary on Chapter IV of the *Articles on State Responsibility* (which includes Article 16) there is recognition that the rules in Chapter IV blur the distinction between primary and secondary obligations – *Articles on State Responsibility*, note 148 above, 153. The better view, it is submitted, implicit in the Commission's reference to the blurring of primary and secondary obligations (note also the reference to "derivative" responsibility), is that aiding or assisting another State to violate Charter obligations also involves a *Charter* violation.

270 See note 154 above.

4. Forms of Interaction Between Human Rights Norms, Trade Norms and Other Norms and Values

Having considered issues of hierarchy amongst rules of international law, attention will now be turned to forms of interaction between different international legal norms and values.[271] In particular, the focus will be upon interactions involved in trade measures designed to ensure respect for human rights.

(a) Direct Interaction

International obligations to protect human rights do not appear to have the same potential for interaction with international trade rules as, for example, obligations of environmental protection under certain international environmental agreements. Thus the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[272] and the *Montreal Protocol on Substances that Deplete the Ozone Layer*[273] include specific provisions regarding, respectively, trade in endangered species[274] and trade in ozone depleting substances such as chlorofluorocarbons.[275] Such provisions have the potential to conflict directly with obligations under inter-

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271 The reference to "values" here relates to the reference in provisions such as those found in human rights treaties that allow States to limit the enjoyment of human rights, for example, where this is necessary in order to protect "national security in a democratic society", "public order (*ordre public*)" or "public health or morals".

272 Done at Washington on 3 March 1973, entered into force on 1 July 1975, 993 UNTS 243 (1976), reprinted in 12 ILM 1085 (1973), 170 parties as at 3 June 2006.

273 Done at Montreal on 16 September 1987, entered into force on 1 January 1989, 1522 UNTS 3 (1989), reprinted in 26 ILM 1550 (1987), agreement amending the protocol reprinted in 30 ILM 537 (1991), 191 parties as at 19 February 2007.

274 Article VIII(1) of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, note 272 above, for example, provides that:

> "[t]he Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:
> (a) to penalize trade in, or possession of, such specimens, or both; and
> (b) to provide for the confiscation or return to the State of export of such specimens."

275 Article 4(1) of the *Montreal Protocol*, note 273 above, for example, provides that:

> "[a]s of 1 January 1990, each Party shall ban the import of the controlled substances in Annex A from any State not party to this Protocol."

Both the *Convention on Trade in Endangered Species* and the *Montreal Protocol* purport to require trade measures. Other environmental agreements authorise rather than require trade measures. See, for example, the *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, done at Wellington on 24 November 1989, entered into force on 17 May 1991, reprinted in 29 ILM 1449 (1990), 13 parties as at 5 May 2003, which provides in Article 3(2)(c) that:

> "[e]ach Party may also take measures consistent with international law to:
> (c) prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet …".

national trade agreements. With the exception of trade in slaves[276] and at least one treaty regarding the health of workers,[277] human rights related treaties[278] do not generally require or authorise the taking of measures affecting international trade.[279]

States appear to be accorded a wide margin of appreciation as to how they will implement their international human rights obligations. Particular measures

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276 See Article 2(a) of the *Slavery Convention*, done at Geneva on 25 September 1926, entered into force on 9 March 1927, 60 LNTS 253, as amended by protocol of 7 December 1953, 212 UNTS 17, 96 parties to the amended convention as at 27 April 2007, which provides that:

> "[t]he High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps:
> (a) To prevent and suppress the slave trade …".

277 See, for example, the *International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches*, done at Berne, 26 September 1906, accessible at <http://www.austlii.edu.au/au/other/dfat/treaties/1919/9.html>, visited 12 May 2007, which provides, in Article 1, that:

> "[t]he High Contracting Parties bind themselves to prohibit in their respective territories the manufacture, importation and sale of matches which contain white (yellow) phosphorus."

278 Although note the Kimberley Process Certification Scheme regarding trade in "conflict diamonds', which provides in Section III that "[e]ach Participant [in the scheme] should … ensure that no shipment of rough diamonds is imported from or exported to a non-Participant" – reproduced by the WTO in Council for Trade in Goods – Kimberley Process Certification Scheme for Rough Diamonds – Request for a WTO Waiver – Communication from Canada, Japan and Sierra Leone, G/C/W/431, 12 November 2002, 11. See also General Council, Kimberley Process Certification Scheme for Rough Diamonds – Decision of 15 December 2006, WT/L/676, 19 December 2006. Compare the "Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar" adopted by International Labour Conference at its 88th session, Geneva, June 2000, which approved a recommendation that "governments … review … the relations that they may have with the member State concerned [ie Burma] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour …" – paragraph 1(b)(i). The United States Congress referred to this resolution when enacting the *Burmese Freedom and Democracy Act* 2003, Public Law 108-62, which restricted trade with Burma.

279 Trade measures can be a required under Chapter VII of the UN Charter but human rights issues appear to be often subordinated to other concerns by members of the Security Council. For a discussion of human rights issues before the Security Council, see Henry J Steiner and Philip Alston, International Human Rights in Context, 2nd ed, Oxford University Press, Oxford, 2000, 648-672. See, for example, China's position in the Security Council in defending its veto of a resolution condemning Burma – record of the 5619th meeting of the Security Council, 12 January 2007, UN Doc S/PV.5619, 3.

are not generally prescribed.[280] Following violations of human rights, States may be under more specific obligations to respond to such violations,[281] but again, trade measures are rarely, if ever, required.

Questions may arise as to whether trade with a State responsible for human rights violations somehow involves participation by trading partners in those human rights violations.[282] In cases of serious breaches of peremptory norms, trade may potentially violate obligations enshrined in Article 41 of the *Articles on State Responsibility*. Failure to restrict certain forms of trade might also violate the positive duties to prevent violation of specific peremptory norms.

The United States appears to have raised related arguments in an environmental context in its submissions to a WTO panel in 1997. In the *Shrimp Turtle Case*[283] the panel heard complaints against the United States regarding restrictions on the importation into the United States of shrimp that had been caught in a manner that potentially harmed endangered sea turtle species.[284] The United States argued before the panel that its restrictions on such imports into the United States market meant that "… the US market would not cause a further depletion of endangered sea turtles and the United States was not forced to be an unwilling partner in the extinction of sea turtles."[285]

Notwithstanding the reference to causation by the United States, it is unlikely that *merely* trading with a State responsible for human rights violations will give rise to State responsibility. The importation of products that have been manufactured in a manner involving violation of international human rights standards, for example, would not normally implicate the importing State in those violations.

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280 See, for example, Article 2 of the ICCPR, note 61 above.

281 See, for example, the jurisprudence of the Inter-American Court of Human Rights that has developed following the Court's decision in the *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, Number 4, 1988, reprinted in 28 ILM 294 (1989), paragraphs 164 to 167 – see generally Shelton, note 160 above, 394-399.

282 Article 16 of *Articles on State Responsibility*, note 148 above, addresses responsibility for aid or assistance in the commission of an internationally wrongful act. Contrast the obligations under the *Genocide Convention* considered by the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Judgment of 27 February 2007, paras 418-438.

283 See the World Trade Organization panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998. The Appellate Body's report in this case was published on 12 October 1998, WT/DS58/AB/R, adopted by the Dispute Settlement Body on 6 November 1998.

284 See paragraphs 2.1 to 2.16 and 3.1 to 3.2 of the panel report, ibid, for a summary of the background to the complaints.

285 Panel report, ibid, paragraph 3.145.

Under international law a State is responsible if it aids or assists the commission of an international wrongful act.[286] However, according to the International Law Commission:

> "A State is not responsible for aid or assistance … unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State."[287]

Allowing trade in products known to have been manufactured in a manner involving the violation of human rights would not appear to amount to intentional facilitation of such violations. State responsibility would not therefore arise on this basis. The fact that international trade is generally undertaken by non-State entities also reduces the potential for this form of State responsibility.[288]

The International Law Commission has, however, implicitly acknowledged that in some cases responsibility for aid or assistance through trade could arise in relation to human rights violations. According to the Commission's commentary to its *Articles on State Responsibility*:

> "… a State may incur responsibility if it … provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations *General*

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286 The rule under general international law appears to have been codified in Article 16 of the *Articles on State Responsibility*, note 148 above. Article 16 provides that:

> "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State."

On the extent to which Article 16 codifies existing international law, see Roberto Ago's 7th report on State responsibility, reprinted in the Yearbook of the International Law Commission 1978, Volume II, Part 1, 59, para 74; the International Law Commission's commentary to what was then draft article 27, Report of the International Law Commission on its thirtieth session, reprinted in Yearbook of the International Law Commission 1978, Volume II, Part 2, 103-104, para 16; and Professor Crawford's second report on State responsibility, UN Doc A/CN.4/498/Add.1, para 170.

287 Para 5 of commentary to Article 16 of the *Articles on State Responsibility*, ibid, 156. See also International Law Commission's commentary to what was then draft Article 27, Yearbook of the International Law Commission 1978, Volume II, Part 2, 103, para 14. On the issue of intention, see the decision of the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Judgment of 27 February 2007, paras 418-424 and the Declaration of Judge Keith.

288 The legal responsibility of a State for the acts of non-State entities is limited – see, for example, Jennings and Watts, note 144 above, 549-550.

> *Assembly* has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[289]
>
> Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct."[290]

More onerous obligations may arise for States in relation to cases of serious breaches of peremptory norms.[291] As noted above,[292] States appear to be under a general obligation not to render "aid or assistance in maintaining" a situation that has been created by a serious breach by a State of an obligation under a peremptory norm. Thus, for example, in the case of a State that employs forced labour in violation of a peremptory norm of international law, trade with that State that helps to maintain the system of forced labour may give rise to State responsibility. Positive obligations also appear to exist to exercise due diligence to prevent the violation of certain peremptory norms.[293]

Articles XXI and XX of the GATT 1994[294] may be relied upon by States in order to avoid an obligation to allow trade in such circumstances. Interpreting

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289 Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, 14 December 1982, A/37/745, p. 50. [Footnote in original.] This footnote to the Commission's commentary to Article 16 refers to a draft resolution of the General Assembly that addressed human rights violations in Guatemala in the early 1980s. By para 5 of the draft resolution the General Assembly called "upon Governments to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported." The resolution that was subsequently adopted by the General Assembly on 17 December 1982 included an identical paragraph – see resolution 37/184.

290 Commentary to Article 16 of the *Articles on State Responsibility*, note 148 above, 158-159, para 9. [Emphasis added.] It is important to emphasise that when the International Law Commission here discusses State responsibility for aid or assistance the example it gives is the supply of arms contrary to a *General Assembly* call for such supply to cease. The Commission was not restricting its comments to cases of Chapter VII action by the Security Council. This is significant and demonstrates that Article XXI of GATT 1994 (and other similar provisions) may not be sufficient to avoid the problem of aid or assistance involving trade in non-military goods or services.

291 The relationship between Article 41 and Article 16 is discussed in paragraph 11 of the International Law Commission's commentary to Article 41 of the *Articles on State Responsibility*, ibid, 290-291.

292 See the text accompanying note 164 above.

293 See text accompanying note 175 above.

294 GATT 1994, note 129 above.

these and similar articles in a manner that provides justification of trade measures taken against a State implicated in human rights violations appears to allow for the reconciliation of the trading obligations with obligations under general international law not to aid or assist in the violation of human rights and obligations to exercise due diligence in the prevention of such violations. Articles XXI and XX of GATT 1994 will be examined in greater detail in Chapter 6.

(b) Indirect Interaction

Whilst direct interaction between human rights obligations and rules governing international trade does not generally arise, there is significant potential for interaction between human rights obligations *and* rights and values that are related to international trade. Reference was made in Chapter 2 to economic and social rights and the human right to development. International trade is considered by many States to be an important means by which to secure greater enjoyment of these rights.[295] Trade measures taken to secure respect for civil and political rights might accordingly be challenged as threats to the enjoyment of economic and social rights and the right to development.[296]

The Vienna Declaration and Programme of Action, adopted by the representatives of 171 States during the World Conference on Human Rights in 1993, declares that:

295 See, for example, General Assembly resolution 61/170, adopted on 19 December 2006, which, in paragraph 1, referred to "unilateral measures … which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights … and other international human rights instruments, in particular the right of individuals and peoples to development". One hundred and thirty-one States voted in favour of this resolution, while 54 States voted against its adoption. Contrast the ILC Study Group Report on Fragmentation, note 1 above, 130, para 254, where the observation is made that "… trade regimes presuppose and are built upon the protection of human rights (in particular the right to property)".

296 See, for example, the various resolutions of intergovernmental bodies criticising "unilateral coercive measures" by reference to human rights. Examples include General Assembly resolution 61/170, ibid, and those General Assembly, Commission on Human Rights and Human Rights Council resolutions noted in Chapter 1. On links between economic development and respect for civil and political rights – see, for example, Amartya Sen, Development as Freedom, Oxford University Press, Oxford, 1999, 146-159. See also the Organisation for Economic Co-operation and Development, Trade, Employment and Labour Standards, OECD, Paris 1996, Part II. This report was updated by another OECD report – International Trade and Core Labour Standards, OECD, Paris 2000.

> "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[297]

Similar assertions of indivisibility, interdependence and interrelation of human rights were made during the Cold War era as an apparent response to efforts by certain Western States to undermine the international commitment to economic and social rights,[298] and to efforts by Soviet bloc States, amongst others, to subordinate the protection of civil and political rights to the enjoyment of economic and social rights.[299] The affirmation of indivisibility of human rights in the Vienna Declaration also appears to have been a response to a perceived challenge to the indivisibility of human rights by certain East Asian States in the lead-up to the Vienna Conference.[300] A similar affirmation of indivisibility was made in the 2005

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297 Section I, paragraph 5 of the Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993), reprinted in 32 ILM 1661 (1993). See also para 13 of the Proclamation of Tehran, adopted by the International Conference on Human Rights, Teheran, Iran 22 April – 13 May 1968, UN Doc A/CONF.32/41 (1968), endorsed by General Assembly resolution 2442 (XXIII) adopted on 19 December 1968. Such statements should be assessed in light of the apparent disparity between international and municipal mechanisms to secure protection of civil and political rights and those established to secure protection of economic, social and cultural rights. On interdependence generally see Philip Alston, "Economic and Social Rights" in Louis Henkin and John Lawrence Hargrove (eds), Human Rights: An Agenda for the Next Century, American Society of International Law, Washington, 1994, 137, 147-151.

298 See, for example, Professor Henkin's discussion of economic and social rights and the different positions taken by States on these rights and their relationship to civil and political rights – Henkin, note 144 above, 190-194.

299 Compare Jack Donnelly, Recent trends in UN human rights activity: description and polemic, 35 International Organization 633 (1981) with Philip Alston, The alleged demise of political human rights at the UN: a reply to Donnelly, 37 International Organization 537 (1983).

300 Thus paragraph 5 of Section I of Vienna Declaration and Programme of Action, note 297 above, continues with the following assertion:

> "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

See generally Joanne R Bauer and Daniel A Bell (eds), The East Asian Challenge for Human Rights, Cambridge University Press, Cambridge 1999; Report of the Regional Meeting for Asia of the World Conference on Human Rights – UN Docs A/Conf.157/ASRM/8, 7 April 1993; Bilahari Kausikan, Asia's Different Standard, 92 Foreign Policy 24 (1993); Amartya Sen, Freedom and Needs, The New Republic, January 10-17 1994, 31; Amartya Sen, Human Rights and Asian Values, The New Republic, July 14-21 1997, 33; Amartya Sen "Human Rights and Economic Achievements" in Bauer and Bell, ibid, 88, 91; Yash Ghai, Human Rights and Governance: The Asia Debate, 15

World Summit Outcome adopted by the General Assembly in September 2005.[301]

The claim that human rights are indivisible, interdependent and interrelated raises the question of balancing different human rights.[302] The balancing of the right to freedom of expression and rights to the protection of privacy and reputation is well known in municipal legal systems.[303] Balancing also occurs between the exercise of human rights and non-human rights values. Thus, for example, the exercise of the right to freedom of expression may be limited where limitation

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Australian Yearbook of International Law 1 (1994); and Yash Ghai, Human Rights and Asian Values, 9 Public Law Review 168 (1998). For a general consideration of cultural relativism, see Fernando R Tesón, International Human Rights and Cultural Relativism, 25 Virginia Journal of International Law 869 (1984-1985); J Donnelly, Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights, 76 American Political Science Review 303 (1982). See also Jack Donnelly, "Human Rights and Asian Values: A Defence of 'Western' Universalism" in Bauer and Bell, ibid, 60, 83-87. Kausikan is perhaps most forthright in his suggestion that economic development justifies some form of deferral of the enjoyment of civil and political rights. Kausikan, ibid, 34-35, asserts that:

> "[m]ost East and Southeast Asian governments are uneasy with the propensity of many American and some European human rights activists to place more emphasis on civil and political rights than on economic, social, and cultural rights. They would probably not be convinced, for instance, by a September 1992 report issued by Human Rights Watch entitled *Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty*. They would find the report's argument that 'political and civil rights, especially those related to democratic accountability,' are basic to survival and 'not luxuries to be enjoyed only after a certain level of economic development has been reached' to be grossly overstated. Such an argument does not accord with their own historical experience. That experience sees order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity."

301 General Assembly resolution 60/1 of 16 September 2005, adopted without vote, para 121. Similar language appears in many General Assembly resolutions.

302 Claims of interrelatedness appear to be linked to provisions such as Article 5(1) of the ICCPR. Compare the terms of Article 41 of the *Convention on the Rights of the Child*, annexed to General Assembly resolution 44/25 which was adopted on 29 November 1989, entered into force on 2 September 1990; and Article 23 of the *Convention on the Elimination of All Forms of Discrimination against Women*, annexed to General Assembly resolution 34/180 which was adopted on 18 December 1979, entered into force on 3 September 1981.

303 The balance struck between the protection of speech and reputation varies amongst municipal legal systems. The jurisprudence that has developed, for example, in the United States under the first amendment to the United States constitution appears to favour free speech to a greater extent than do defamation rules developed in other common law jurisdictions. For a comparative analysis of various municipal approaches, see John Fleming, "Libel and Constitutional Free Speech" in Peter Cane and Jane Stapleton (eds), Essays for Patrick Atiyah, Clarendon Press, Oxford, 1991, 333.

is necessary "[f]or the protection of national security or of public order (*ordre public*), or of public health or morals."[304] Balancing is also apparent in the relationship between the right to property and rights to the provision of government funded services.[305]

Such balancing may be implicit in the definition of particular rights[306] or it may be explicit in provisions that allow for the limitation of the exercise of human rights in order to accommodate the rights of others. The Universal Declaration of Human Rights, for example, in paragraph 2 of Article 29 provides that:

> "[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

The ICCPR, ECHR and the American Convention do not contain *general* limitation clauses along the lines of Article 29 the Universal Declaration. Instead they recognise the entitlement to limit the exercise of particular human rights through *specific* limitation clauses.[307] A common feature of these provisions is that the

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304 See Article 19(3) of the ICCPR, note 61 above. Compare Article 10(2) of the ECHR, note 90 above; and Articles 13 and 14 of the American Convention, note 195 above. Note that values such as "public health or morals" (referred to in Article 19(3) of the ICCPR) need not themselves be enshrined in rules of international or even municipal law before they can be taken into account in assessing limitations on human rights. Comparable issues of interaction appear arise when considering trade rules and the relationship between "free trade" values and non-trade values. Such issues are discussed further below.

305 The Universal Declaration of Human Rights, General Assembly resolution 217A (III), United Nations Document A/810, 71 (1948), recognises, for example, the right to property (Article 17) and the right to free elementary education (Article 26). Note that conflicts can arise between human rights norms contained in different instruments – see for example, the discussion of the protection of the equality of women and freedom of religion – Meron, note 155 above, 153-160; and Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law, 85 American Journal of International Law 613, 635-638 (1991).

306 Article 10(1) of the ECHR, note 90 above, for example, provides that:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

307 See, for example, Articles 12(3), 14(1), 18(3), 19(3), 21 and 22(2) of the ICCPR, note 61 above.

enjoyment of human rights can be limited not only to secure respect for the rights of others,[308] but also in order to vindicate more general societal values.[309]

Trade measures designed to secure respect for human rights in other States appear to involve a more complex range of issues than those involved in the balancing of human rights and other values within an exclusively national context. Democratic accountability and the legitimacy of national institutions appear to have been used to justify deference in favour of national regulation that impacts on the enjoyment of human rights.[310] Trade measures directed at human rights violations in *other* States involve national institutions in *one* State seeking to secure respect for human rights standards in *another* State. The notion of a margin of appreciation in such cases therefore appears to be even more problematic than it is in a purely national context.[311]

The efficacy of national as opposed to international efforts to secure respect for human rights also appears to be a basis for distinction. International trade measures may not always succeed in securing respect for human rights in the target State.[312] Such measures may, however, be one of the few options available to a State imposing such measures that involve real pressure on the target State to end human rights violations.[313]

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308 The "rights of others" that are relevant when assessing limitations on the enjoyment of human rights do not appear to be restricted to human rights. Thus, for example, in *Markt Intern Verlag GmbH and Beerman v Germany*, 12 European Human Rights Reports 161 (1989), para 31, the European Court of Human Rights held that the "right" of a mail order firm not to have its business damaged justified limitations on the enjoyment of the human right to freedom of expression.

309 Values such as the protection of public morality need not (and generally are not) specified in legislative instruments.

310 See, for example, the decision of the European Court of Human Rights in *Handyside v United Kingdom*, European Court of Human Rights, 1976 Series A, Number 24, 1 European Human Rights Reports 737 (1976), paragraph 48.

311 Office of the High Commissioner for Human Rights, Human Rights and World Trade Agreements – Using general exception clauses to protect human rights, United Nations, Geneva, 2005, 10; and Steve Charnovitz, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law, 689, 724-729 (1998). For a general discussion of the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights, see P van Dijk and GJH van Hoof, Theory and Practice of the European Convention on Human Rights, third edition, Kluwer, The Hague, 1998, 82-95; and Paul Mahoney, Marvellous Richness of Diversity or Invidious Cultural Relativism? 19 Human Rights Law Journal 1 (1998).

312 On the effectiveness of non-forcible measures, see Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, Economic Sanctions Reconsidered, 2nd ed, Institute for International Economics, Washington, 1990 – Volume 1 (History and Current Policy) and Volume 2 (Supplemental Case Histories).

313 The giving of conditional aid or loans appears to be the only other lawful alternative. The threat or use of force is generally prohibited under Article 2(4) of the UN Charter.

Notwithstanding the differences between international trade measures imposed for human rights purposes and purely national regulation that involves balancing or limitation of the enjoyment of human rights, certain issues that have arisen when assessing national regulation appear relevant to an assessment of international trade measures. In the context of the balancing of different human rights, a number of factors can be noted. These factors may pull in different directions.

One factor that appears relevant in balancing human rights relates to the particular ways in which human rights interact in practice. If a core aspect of one right interacts with a peripheral aspect of another right, then the balance between the rights might reasonably be tipped in favour of the first right.[314] Thus freedom of expression appears to have weighed more heavily than the protection of privacy when considering expression criticising public officials as opposed to other persons.[315] In assessing international trade measures, it may be that trade measures that target trade in products manufactured by entities directly implicated in human rights violations should be assessed differently to measures that target trade untainted by human rights violations. In the case of untainted trade, the economic and social rights and the right to development of persons within the target State might outweigh the arguments in favour of trade measures.

A second factor of apparent relevance in balancing rights is the hierarchical status of the different rights in issue. According to Professor Meron the *jus cogens* status of rights "may" be relevant "… when it comes to balancing one right which has assumed the status of *jus cogens* against another human right which has not gained such an exalted status".[316] Trade measures taken in response to violations

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314 Compare Professor Henkin, "Introduction" in Henkin (ed), The International Bill of Rights, Columbia University Press, New York, 1981, 1, 30-31, where he observes that "... usually conflict will be between a principal right and some peripheral application of another, and it may be possible to derive from the Covenant some evidence as to the choice permitted to the state. In any event, if a state may be entitled to choose between individual human rights enshrined in the Covenant, it ought not be able to prefer other rights and interests which it might create by its own law for its own purposes." See also Donna J Sullivan, Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution, 24 New York University Journal of International Law and Politics, 795, 821-823 (1992) and Andrew S Butler, Limiting Rights, 33 Victoria University Wellington Law Review 113 (2002).

315 See, for example, *Lingens v Austria*, 8 European Human Rights Reports 407 (1986), para 42; and Steve Peers, "Taking Rights Away? Limitations and Derogations" in Steve Peers and Angela Ward (eds), The European Union Charter of Fundamental Rights, Hart Publishing, Oxford, 2004, 141, 145-146.

316 Meron, note 155 above, 190-191. In relation to cases of apparent conflict between different peremptory norms the ILC Study Group Report on Fragmentation, note 1 above, includes the following observation:

> "The question concerning the relationships between conflicting *jus cogens* norms – for example the question of the right to use force in order to realize the right of self-determination – is much more difficult. At this stage, it cannot be presumed that the doctrine of

of peremptory norms can be more readily justified than trade measures directed at violations of other (non-peremptory) human rights.[317] Such an approach appears consistent with the obligations on States enshrined in Article 41 of the *Articles on State Responsibility* and the obligations to exercise due diligence in seeking to prevent the violation of certain peremptory norms.

In relation to limitations on the enjoyment of human rights, as noted above, major human rights treaties allow limitations on the exercise of certain human rights provided that relatively strict necessity tests[318] are satisfied. The ICCPR, the ECHR and the American Convention, for example, require that restrictions on the exercise of certain rights must be "necessary in a democratic society".[319] Identical or similar language is employed in each of the limitation clauses found in these treaties. In cases of apparent conflict between the enjoyment of a human right that is *not* subject to a limitation clause and a human right the enjoyment of which *is* subject to a limitation clause, it may be appropriate to accord greater weight to the enjoyment of the first right.[320]

It has been noted that, in relation to limitation clauses in human rights treaties, there is:

> "… something of a paradox in a legal scheme which is supposed to protect the individual against the collective, itself sanctioning limitations to rights on collective interest grounds."[321]

The necessity tests found in limitation clauses are critical to the balancing of individual rights and communal values within this "paradoxical" scheme. Thus, under Article 8 of the ECHR, the "economic well-being of the community" can be used to justify restrictions on the right to respect for private and family life. What stops this right from being rendered meaningless by such broad communal values is the

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jus cogens could itself resolve such conflicts: there is no hierarchy between jus cogens norms *inter se*" – 185, para 367.

317 Note, however, Professor Meron's warnings about the employment of hierarchy amongst human rights, ibid, 200-202. Compare Chinkin and Charlesworth, note 20 above.

318 According to the jurisprudence of the European Court of Human Rights the "necessity" tests in the limitation clauses translate into requirements that there be a pressing social need for the limitation of rights and that the scope of the limitation be proportionate to the legitimate aim pursued – see, for example, *Vogt v Germany*, 21 European Human Rights Reports 205, paragraph 52.

319 See, for example, Article 21 of the ICCPR, note 61 above; Article 8(2) of the ECHR, note 90 above; and Article 15 of the American Convention, note 195 above.

320 Compare Sullivan, note 314 above, 807-810.

321 Aileen McHarg, Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, 62 Modern Law Review 671, 672 (1999).

requirement that any restriction on the right must be "necessary in a democratic society".[322]

For the purposes of illustration a comparison might be drawn between limitations on the exercise of human rights protected under international law *and* limitations on the trade entitlements that flow from Articles I, III and XI of GATT 1994. One hypothetical approach to human rights related trade measures, following the pattern of limitation clauses in human rights treaties, would be to allow international values, such as the interest of the international community in freedom of interstate trade, to justify restrictions on the entitlement of States to impose human rights related trade measures only where such restrictions are "necessary" in the interests of the international community.

An immediate objection to such an approach is that an entitlement to impose human rights related trade measures is not analogous to a human right. Rather, an entitlement to impose such trade measures corresponds more closely to the provision of a remedy for the violation of a human right. A right to a remedy for violation of human rights is, however, also recognised in major human rights treaties.[323] Whilst such an *individual right* should be distinguished from a *State's obligation* to provide such a remedy, the hypothetical approach remains instructive.[324]

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322 The "paradox" of limitation clauses in human rights treaties identified above is similar to Ronald Dworkin's conception of rights as trumps over considerations of general welfare. According to Dworkin the status of rights as trumps does not preclude rights yielding to overwhelming considerations of general welfare:

> "Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit (though if he acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental). What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be using some sense of 'right' other than the strong sense necessary to give his claim the political importance it is normally taken to have" – Dworkin, Taking Rights Seriously, 2nd impression, Duckworth , London, 1978, 191-192. [Emphasis in original.]

323 See Articles 2 and 26 of the ICCPR, note 61 above; Articles 13 of the ECHR, note 90 above; Article 25 of the American Convention, note 195 above; and Shelton, note 160 above, 113-155.

324 In the case of aid or assistance to a State violating international law or, *a fortiori*, that of a State responsible for serious breaches of peremptory norms, it may no longer be a case of entitlement to impose trade measures but rather one of legal obligation. A similar obligation appears to be reflected in the due diligence obligation to prevent the violation of certain peremptory norms. The hypothetical approach discussed above would not apply in such cases. The performance of obligations under peremptory

A sharp contrast can be drawn between such a hypothetical approach and the terms of Article XX of GATT 1994. Under Article XX it is possible that trade measures imposed to secure respect from human rights might be justified under the WTO Agreement *provided* that the trade measures meet Article XX's "necessity" and other requirements. Thus it is the *restriction* on *trade* that must be "necessary" to gain the protection of Article XX. This appears to involve a reversal of the primary rule (*ie* an entitlement or obligation to restrict trade) and the justification of limitation (*ie* the interests of the international community in free trade) postulated above.[325] The terms of Article XX will be considered in more detail in Chapter 6.

What this analysis points to is one of the difficult issues raised by "inter" as opposed to "intra" "regime" conflicts. International human rights instruments, not surprisingly, demand that limitations on the enjoyment of human rights satisfy a "necessity" test. International trade instruments, again not surprisingly, demand that limitations on "most favoured nation" and "national treatment" entitlements satisfy a "necessity" test. According to the International Law Commission Study Group on fragmentation of international law, in cases of conflict *between* regimes, there may be no clear interpretative solution.[326] Legal technical approaches become less helpful and political solutions may be required.[327] But the importance of independent dispute resolution (that is independent of each conflicting regime) was nonetheless emphasised by the Study Group.[328] This points to the continuing relevance of legal techniques of conflict avoidance and resolution that have developed under international law. It is to such techniques that attention will now be turned.

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norms is not subject to limitation based on a defence of necessity. Whilst necessity is a basis for precluding wrongfulness under the law of State responsibility, in cases involving peremptory norms the defence is not available – see Article 26 and associated commentary in the *Articles on State Responsibility*, note 148 above, 206-209.

325 Compare Ernst-Ulrich Petersmann, "Human Rights and International Trade Law: Defining and Connecting the Two Fields" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 5 above, 29, 34-35, 37, 46 and 63; and Frederick M Abbott, "TRIPS and Human Rights: Preliminary Reflections" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 121 above, 145, 152.

326 See, for example, ILC Study Group Report on Fragmentation, note 1 above, 245, para 484.

327 Ibid.

328 See for example conclusion 28 of the Study Group which includes the following observation:

> "When the conflict concerns provisions within a single regime … then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen" – International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 418.

5. The Avoidance and Resolution of Conflict Between Rules of International Law

Issues of interaction between different rules of international law have been discussed above. Attention will now be turned to a consideration of how international interpretative rules on the avoidance, and international rules on the resolution, of conflict might operate in the context of trade measures designed to secure respect for human rights.

One aspect of the avoidance of conflict between international rules has already been noted, namely the principle of interpretation that international instruments should "… be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[329] The limited range of human rights obligations requiring restrictions on international trade has also been noted.[330]

Professor Campbell McLachlan has argued[331] that the interpretative principle referred to above should be seen as a reflection of the "principle of systemic integration" and that the principle also has a "positive aspect", namely that the parties to a treaty:

> "… are taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way".[332]

(a) The Concept of Conflict between Rules of International Law

This "positive aspect" will be addressed further below. Before doing so, it is valuable to reflect in more detail on the "negative aspect" of conflict between rules of international law. In particular it appears useful to make some preliminary observations on the precise nature of "conflict" between international rules and then to consider some suggested approaches to conflict resolution.

C Wilfred Jenks distinguished what he described as "divergences" of international rules from conflicts in a strict sense:

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329 *Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of 26 November 1957*, note 154 above, 142.

330 See the text accompanying note 272 above.

331 Campbell McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 International and Comparative Law Quarterly 279, 311 (2005).

332 Ibid. Professor McLachlan here employs the words of JHW Verzijl in the *Georges Pinson Case*. The International Law Commission's Study Group on the fragmentation of international law appears to have adopted Professor McLachlan's approach, see, for example, International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 413-414, para 251(19).

> "A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making treaties with a number of common parties may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."[333]

Joost Pauwelyn has noted that one consequence of adopting such a narrow conception of conflict is that international law "… would consistently elevate obligations in international law over and above rights in international law."[334] Pauwelyn illustrates his point with the following example:

> "Imagine … that a WTO rule imposes an obligation not to restrict certain trade flows, but a later non-WTO rule (say, an environmental convention) grants an explicit right to restrict trade. Under the strict definition of legal conflict … there would be no conflict. Indeed, complying with the WTO rule (not restricting trade flows) would not mean violating the later environmental rule. It would simply mean forgoing the right (to restrict trade) granted by the environmental rule."[335]

Pauwelyn considers the definition of conflict offered by Jenks to be too strict and suggests that conflict should be defined to encompass situations such as the above

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333 C Wilfred Jenks, The Conflict of Law-Making Treaties, 30 British Year Book of International Law 401, 425-426 (1953). In his conclusions to this article, Jenks makes the following observation:

> "There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another; but though there is no conflict in such cases there is a divergence, and such divergence may defeat the object of one or other of the conflicting instruments, either by making one of them practically inoperative or by preventing the attainment of international uniformity" – ibid, 451.

See also, for example, Seyed Ali Sadat-Akhavi, Methods of Resolving Conflicts Between Treaties, Martinus Nijhoff, Leiden, 2003, 5-7.

334 Pauwelyn, note 154 above, 551.

335 Ibid. It appears that the narrow definition of conflict, at least in the context of the interaction between different international "regimes", reflects an unjustified analogy drawn from municipal legal systems. In municipal systems with a single legislature, construing different pieces of legislation (containing obligations and entitlements) in a manner that favours obligations may be justified. In the international sphere, given the absence of a unified legislative will, such a result appears unjustified as it fails to respect the will of those States that have agreed to the creation or recognition of a legal entitlement.

scenario.[336] The International Law Commission's Study Group on fragmentation of international law came to a similar conclusion in its 2006 report. The Study Group adopted:

> "… a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem. Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decision will involve interpretation and choice between alternative rule-formulations and meanings that cannot be pressed within the model of logical reasoning."[337]

The scope of the definition of conflict is important because the establishment of the existence of a conflict precedes the application of international principles of conflict resolution. It is to such principles that attention will now be turned.

(b) Possible Approaches to Conflict between Rules of International Law

Jenks identified seven principles[338] relevant to the resolution of conflict between law-making treaties. According to Jenks "[n]one of these principles has absolute

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336 Ibid. Compare, however, Pauwelyn, Conflict of Norms in Public International Law, note 1 above, 424. See also Czaplinsky and Danilenko, note 6 above, 13.

337 ILC Study Group Report on Fragmentation, note 1 above, 19, para 25. Erich Vranes also advocates a broad definition of conflict relying heavily on legal theory – see Vranes, The Definition of "Norm Conflict" in International Law and Legal Theory, 17 European Journal of International Law 395 (2006). Vranes offers the following definition of conflict: "There is a conflict between two norms, *one of which may be permissive*, if in obeying or applying one norm, the other one is necessarily or possibly violated" – ibid, 415. [Emphasis in original.]

338 According to Jenks:

> "There are a number of principles which call for consideration when it is necessary to resolve a conflict on a legal basis. These may be distinguished as the hierarchic principle, the *lex prior* principle, the *lex posterior* principle, the *lex specialis* principle, the autonomous operation principle, the 'pith and substance' principle, and the legislative intention principle" – Jenks, note 333 above, 453. Compare Akehurst, note 20 above.

Most of these principles identified by Jenks are self explanatory. The 'pith and substance' principle is drawn by Jenks from Canadian constitutional jurisprudence. He appears to envisage the principle's operation in international law as involving a decision as to "…which of two conflicting norms really deals with the essentials of the matter and must therefore be regarded as of primary authority" – ibid, 450. The autonomous operation principle is discussed further below. Some of the principles identified by Jenks appear to have been enshrined in Article 30 of the *Vienna Convention on the Law of Treaties*, 1969 – see Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, second edition, Manchester University Press, Manchester, 1984, 96. Article 30 will be addressed further below. The article appears only to have residuary operation – see Sinclair, ibid, 97. Article 30 also has its own peculiar approach to treaty conflicts. The article applies to "successive treaties relating to the same subject matter" – see Article 30(1) – and Jennings and Watts, note 144 above, 1212. Based on

validity or can be applied automatically and mechanically to any particular class of case".[339]

The first principle identified by Jenks was the hierarchic principle. Two aspects of this principle appear to be of relevance in assessing trade measures for human rights purposes. The first relates to peremptory norms. The consequences of conflict with a peremptory norm have already been considered. Given the serious consequences for a treaty arising from conflict with a peremptory norm, there is a strong interpretative presumption[340] of consistency with peremptory norms.[341] If obligations referred to in Article 41 of the *Articles on State Responsibility* and those requiring preventative action have a peremptory character, then this interpretative presumption would appear to have greater significance for the interpretation of provisions such as Articles XX and XXI of GATT 1994 which could provide the basis for measures required by such peremptory obligations.[342]

The second aspect of the hierarchic principle is the operation of Article 103 of the Charter of the United Nations. The consequences of conflict with Charter obligations have already been considered. As noted above, Article XXI of GATT 1994 appears to reconcile the operation of Chapter VII and Article 103 of the Charter with the obligations contained within the WTO Agreement. The situation regarding other Charter obligations appears more complicated.[343] Article XXI of GATT 1994 and equivalent provisions are dealt with in detail in Chapter 6.

Jenks also considered the *lex prior*, *lex posterior* and *lex specialis* principles. Application of Jenks' narrow conception of conflict in the context of the limited range of international legal *obligations* on States to impose trade measures for human rights purposes, reduces the relevance of the *lex prior*, *lex posterior* and *lex specialis* principles. This appears to reflect the point made by Pauwelyn regarding narrow conceptions of conflict. The result of applying such a narrow conception

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these words questions have been raised regarding the applicability of Article 30 when dealing with conflicts such as those created by trade measures that have been taken for human rights purposes. The ILC Study Group Report on Fragmentation, note 1 above, 18, paras 22-23, rejects a restrictive interpretation of these words in Article 30(1). Article 30 appears to have no operation to conflicts between a treaty on the one hand *and* a non-treaty peremptory rule or other rule of general international law on the other.

339 Jenks, ibid, 453.

340 For Judge Simma it is a "legally insurmountable limit to permissible treaty interpretation" – see the text accompanying note 158 above.

341 See the text accompanying note 155 above.

342 If Articles XX and XXI of GATT 1994, note 129 above, are interpreted in order to ensure consistency with the rules enshrined in Article 41 then the issue arises whether it is possible under the WTO Agreement to develop a coherent basis upon which to distinguish between different human rights related trade measures. This issue is discussed further in Chapter 6.

343 See note 290 above.

of conflict is to privilege legal obligations (in this case trade obligations) over legal entitlements (in this case the entitlement to impose human rights related trade measures). This appears to be particularly problematic when the obligations and entitlements derive from different "regimes" of international law.

Narrow conceptions of conflict do not, however, completely exclude the possibility of conflict involving human rights related trade measures. As discussed above, *obligations* to impose human rights related trade measures may, for example, arise by virtue of the operation of the rules recognised in Article 41 of the *Articles on State Responsibility* and the rules requiring preventative action.[344]

In such cases, and when applying the broader conception of conflict referred to above, the principles *lex prior*, *lex posterior* and *lex specialis* do appear to have a correspondingly broader area of potential application. The principles also appear relevant as *interpretative* principles in cases where there is no conflict between rules of international law. The principles and their relevance to human rights related trade measures will be considered further below.

The fifth principle identified by Jenks, the autonomous operation principle, appears to have potential relevance to human rights related trade measures. According to Jenks:

> "The autonomous operation principle, understood in the sense that each international organization must regard itself as being bound in the first instance by its own constitution and will naturally apply instruments which it is itself responsible for administering rather than other instruments with which they may be in conflict, is in itself little more than a truism which is of no assistance to a party to conflicting instruments confronted with the difficulty of reconciling its conflicting obligations. It becomes a valid principle of conflict only when formulated as the proposition that, as a matter of both legal duty and practical common sense, there being no other way in which complete confusion can be avoided, organizations governed by or responsible for the administration of conflicting instruments must, except in so far as another instrument is on the basis of *principle* or precedent *clearly overriding* in character, operate *provisionally* on the basis of their own instruments until the conflict can be dealt with by negotiation, by the acceptance of a recommendation by a body such as the Economic and Social Council or the General Assembly (assented to in so far as necessary by the parties to the instrument) or by an *authoritative decision*."[345]

This passage highlights at least three important issues. The first is that, in cases of conflict between different rules of international law, *jurisdiction* will often exist for a dispute resolution body within a particular international organisation to adjudicate upon the dispute. The second issue relates to the *applicable law* in such a

344 This point also serves to illustrate the more general point that issues of rule conflict also arise in relation to conflicts between treaty and general international law and are not restricted to conflicts between treaties.

345 Jenks, note 333 above, 448. [Emphasis added.]

dispute. Jenks asserts that "provisionally" (and subject to "overriding" principle or precedent) this should be limited to the rules of the particular organisation. The third *institutional* issue raised by the passage relates to whether, despite the presence of jurisdiction, resolution of such a conflict is more appropriately resolved through political negotiation or by "authoritative decision" rather than by a decision-maker situated within one international organisation.

The first and second issues raise questions regarding the jurisdiction and the applicable law before panels and the Appellate Body of the WTO in cases of rule conflict.[346] Even where there exist obligations and entitlements under general international law to impose trade measures for human rights purposes, this would have little practical significance if, in the absence of any other international tribunal possessing jurisdiction, WTO panels and the organisation's Appellate Body refused to recognise or consider such obligations or entitlements.

It seems clear, for example, that, by virtue Article 11 of the DSU,[347] a WTO panel does not have substantive jurisdiction to resolve general disputes under international law. Its substantive jurisdiction is limited to resolving legal claims under the WTO Agreement.[348]

But WTO panels and the Appellate Body do nonetheless appear to have the power to consider international legal obligations and entitlements to impose human rights related trade measures. Notwithstanding views to the contrary,[349] Joost Pauwelyn has argued convincingly that the limited substantive jurisdiction of panels and the Appellate Body does not mean that the law applicable before these trade bodies is limited to the WTO Agreement.[350] Panels and the Appellate Body have had regard to rules of general international law on a number of occasions where this has been necessary in order to resolve disputes under the WTO Agreement.[351]

Pauwelyn has argued that panels and the Appellate Body can have regard to rules of general international law when assessing defences raised by Members of

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346 For a comprehensive treatment of the distinction between jurisdiction and applicable law, see Pauwelyn, Conflict of Norms in Public International Law, note 1 above, Chapters 5 and 8.

347 *Understanding on Rules and Procedures Governing the Settlement of Disputes*, note 83 above.

348 Specifically claims under the "covered agreements" referred to in Article 1 of the DSU, ibid. See, for example, Pauwelyn, note 154 above, 554.

349 See, for example, Joel P Trachtman, The Domain of WTO Dispute Resolution, 40 Harvard International Law Journal 333, 342-343 (1999); Gabrielle Marceau, A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33(5) Journal of World Trade, 87, 109-115 (1999); and McGinnis, note 144 above, 266-268. Additional references can be found in Pauwelyn, note 154 above, 561, footnote 175.

350 Pauwelyn, ibid, 559-565.

351 See the references collected in Pauwelyn, ibid, 563.

the WTO that have been accused of violations of the WTO Agreement.[352] Pauwelyn here distinguishes between the jurisdiction of WTO dispute settlement which limits *claims* to those arising under the "covered agreements" of the organisation and *defences* that might be raised by a respondent in proceedings before a panel or the Appellate Body. It is not suggested that general international law will automatically prevail over inconsistent rules in the WTO Agreement. A point of "paramount importance" according to Pauwelyn is that even though general international law might be available as a potential defence and should be considered by a panel and the Appellate Body:

> "… this does not necessarily mean that these non-WTO rules part of the applicable law must always prevail over WTO law. Whether this is the case must be determined by conflict rules."[353]

Pauwelyn also emphasises the distinction between *interpretation* of a treaty and the *applicable law* in an international legal dispute.[354] This distinction was recognised by members of the International Law Commission during the drafting of what became the *Vienna Convention on the Law of Treaties*, 1969.[355] The distinction is important because the manner in which general international law is relevant, as a matter of treaty *interpretation*,[356] is not necessarily the same as the relevance

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352 Ibid, 560-565.

353 Pauwelyn, Conflict of Norms in Public International Law, note 1 above, 473. Although note the doubts regarding applicability of the lex specialis and lex posterior principles to "*inter*-regime" conflicts expressed in the ILC Study Group Report on Fragmentation, note 1 above, 130-131, paras 255-256.

354 Pauwelyn, ibid, 268-272 and 465-478.

355 Thus, for example, Sir Humphrey Waldock in his third report on the law of treaties made the following observations:

> "… [A]lthough the provisions of a treaty are to be *interpreted* in the light of the law in force when it was drawn up, the *application* of the treaty, as so interpreted, is governed by the general rules of international law in force at the time when the treaty is applied" – Yearbook of the International Law Commission, 1964, Volume II, 9. [Emphasis added.]

Waldock acknowledged, however, that "… 'interpretation' and 'application' of treaties are closely inter-linked" – ibid.

356 For example, it is by way of interpretation that panels and the Appellate Body would presumably have regard to peremptory norms when interpreting rules under the WTO Agreement in order to ensure that they are construed consistently with these norms. Given the severe consequences of conflict between the WTO Agreement and a peremptory norm, such a capacity to consider peremptory norms appears both logical and necessary. See Orakhelashvili, note 144 above, 492-496; and the separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment of 3 February 2006, paras 9-14.

of rules of general international law in an international legal dispute involving obligations or entitlements under treaties and other rules of international law.[357]

The Appellate Body considered the issue of the *interpretation* of the WTO Agreement by reference to other rules of international law in its report in *Mexico – Tax Measures on Soft Drinks and other Beverages*.[358] In that case Mexico sought to justify certain tax measures on non-sugar cane derived sweeteners on the grounds that these measures, which had an obvious discriminatory effect on overwhelmingly foreign suppliers of non-sugar cane sweeteners, were necessary in order for Mexico to respond to violation by the United States of the *North American Free Trade Agreement*[359] ("NAFTA"). The tax measures where characterised by Mexico as countermeasures under general international law in response to NAFTA violations and hence were argued to be not "wrongful" notwithstanding violation of Mexico's obligations under the WTO Agreement. More specifically Mexico attempted to defend the recourse to countermeasures by reference to the exception contained in Article XX(d) of GATT 1994, as a measure "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of" GATT 1994.

The panel and the Appellate Body rejected Mexico's interpretation of Article XX(d) and this aspect of the case will be considered in Chapter 6.[360] In rejecting Mexico's interpretation of Article XX, the Appellate Body, however, also made observations that appear to be relevant more generally. The Appellate Body could:

> "… see no basis in the [Dispute Settlement Understanding ('DSU')] … for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*'. (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements."[361]

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357 Thus, for example, the issue of conflict between a rule contained in the WTO Agreement and another rule of international law might be resolved by application of the general rules of conflict resolution rather than under provisions such as Article XX of GATT 1994 (which will be considered in Chapter 6).

358 *Mexico – Tax Measures on Soft Drinks and other Beverages*, note 54 above.

359 *North American Free Trade Agreement* ("NAFTA"), done 17 December 1992, entered into force on 1 January 1994, reprinted in 32 ILM 289 and 605 (1993).

360 The panel and the Appellate Body also rejected Mexico's argument that notwithstanding the existence of jurisdiction the panel could decide not to exercise jurisdiction – see the Appellate Body report, note 54 above, paras 46-53.

361 Ibid, para 56. Joost Pauwelyn has emphasised that the Appellate Body effectively left open whether the NAFTA forum selection clause, if it had been relied on by Mexico, would have altered the position – see Pauwelyn "Choice of Jurisdiction: WTO and

The Appellate Body returned to this concern later in its report when it observed that:

> "… Mexico's interpretation [of Article XX(d) of GATT 1994] would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. … [T]his is not the function of panels and the Appellate Body as intended by the DSU."[362]

One immediate difficulty with this approach is that, as a matter of treaty interpretation, consideration of the violation of *other* international legal obligations appears to be *required* by other provisions of the WTO Agreement. A similar issue confronted the International Court of Justice in the *Case Concerning the Oil Platforms*.[363] In that case the Court's jurisdiction was based on a compromissory clause of the 1955 *Treaty of Amity, Economic Relations and Consular Rights* between the United States and Iran. Iran alleged violation of the treaty involving, *inter alia*, United States military attacks on Iranian oil platforms during the Iran Iraq War. In its notice to the Security Council the United States formally defended these attacks as acts of self defence in response to prior attacks on United States flagged vessels.[364] Before the International Court of Justice, however, the United States argued that, given the Court's limited jurisdiction, the actions of the United States could only be assessed under the 1955 Treaty.[365]

The 1955 treaty expressly provided that the treaty did "… not preclude the application of measures … necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."[366] The United States sought to rely on this provision. The Court concluded that its limited jurisdiction to decide questions of interpretation and application of the 1955 treaty extended to:

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regional dispute settlement mechanisms: Challenges, Options and Opportunities", International Centre for Trade and Sustainable Development and Geneva International Academic Network, ICTSD Dialogue on the Mexico Soft Drinks Dispute: Implications for Regionalism and for Trade and Sustainable Development, 30 May 2006, on file with author, 4-6.

362 *Mexico – Tax Measures on Soft Drinks and other Beverages*, note 54 above, para 78.

363 *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment*, note 156 above.

364 Ibid, 180-181, para 37.

365 Ibid, 181, para 39.

366 Article XX(1)(d) of the treaty, see ibid, 178-179, para 32.

> "… the determination whether action alleged to be justified under [the essential security interest exception] was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law."[367]

Whilst the precise manner in which the Court applied the relevant rules of treaty interpretation drew criticisms from some members of the Court,[368] the interpretation adopted by the Court appears to have been broadly consistent with the rules of treaty interpretation contained in the *Vienna Convention on the Law of Treaties*, 1969, and in particular with Article 31(3)(c) of the Convention.[369] It is submitted that had the matter come before a panel under the WTO Agreement via Article XXI of GATT 1994, it would, notwithstanding the views of the Appellate Body in *Mexico – Tax Measures on Soft Drinks and other Beverages*, have been required to reach a similar conclusion.[370] Article XXI of GATT 1994 will be considered in detail in Chapter 6.

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367 Ibid, 182-183, para 42.

368 See, in particular, the Separate Opinions of Judge Higgins, ibid, 237, paras 45-46; Judge Kooijmans, ibid, 261-262, paras 48-52, and Judge Buergenthal, 278-283, paras 20-32.

369 For an analysis of the decisions applying the rule in Article 31(3)(c) of the Vienna Convention see McLachlan, note 331 above (the consideration of the rule in the *Oil Platform Case* is assessed at 306-309).

370 One significant difference between the relevant provision of the 1955 treaty between the United States and Iran *and* Article XXI:(b) GATT 1994 is an additional subjective element in the GATT provision. Nonetheless such a subjective element may not preclude the requirement of consideration of the issues considered by the International Court of Justice and there is no equivalent subjective element in Article XXI:(c). In relation to Article XXI:(c) of GATT 1994, consider the following hypothetical scenario offered by Professor John Jackson:

> "… [S]uppose you have a situation of ethnic cleansing (without calling it genocide, although in some cases it may really amount to genocide). Suppose such a situation of ethnic cleansing is not even of the sort as lethal as we have recently seen. One could argue strongly that it is really a dramatic violation of human rights to send a population to the borders of other states or corral them in a particular territory. Then suppose the United Nations imposes trade measures against a country that is engaging in the ethnic cleansing – an embargo and other measures of restricting trade of all kinds. The question becomes: how do you get compliance with those trade measures? A lot of countries will probably comply, but there are the rogue states that will not, and their actions undermine what the others are doing. It undermines the pressure that can be exerted, and it also creates a situation in which those rogue states are profiting from a sort of monopoly because the ones that are withholding trade now are at a disadvantage, making it even more valuable for smugglers, financial flows, and a whole series of related activities. Does there arise at any point some kind of right on the part of the states that are complying to defend against a WTO case?"

– Jackson, note 179 above, viii-ix.

The Appellate Body in the passages reproduced above may have intended to indicate possible implied limitations on the applicable law before panels and the Appellate Body.[371] A difficulty with such an approach, given the limited textual guidance given by the WTO Agreement on applicable law, is that any attempt to interpret the WTO Agreement to restrict the applicable law runs the risk of leaving panels and the Appellate Body incapable of applying rules of general international law in the ways that, as Pauwelyn has shown,[372] past decisions have employed such rules.

More significantly, such a narrow interpretation may render it impossible to construe obligations under the WTO Agreement consistently with rules of general international law, for example, prohibiting aid or assistance in relation to violations of peremptory norms or requiring due diligence in seeking to prevent such violations. The consequences of such a narrow interpretation of applicable law in relation to disputes under the WTO Agreement will be even more significant if the norms prohibiting aid or assistance and requiring prevention are themselves peremptory, as they appear to be.[373]

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371 See, for example, the various textual arguments advanced by Trachtman, Marceau and Pauwelyn, note 349 above. Compare the approach of the panel in *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/R, 7 October 2005, para 7.15.

372 Pauwelyn, Conflict of Norms in Public International Law, note 1 above, Chapter 8.

373 It is submitted that in interpreting the relevant provisions of the DSU in order to determine the applicable law, panels and the Appellate Body should reject two untenable propositions (that pull in quite different directions): (i) That the parties to the WTO Agreement generally intended that panels and the Appellate Body have jurisdiction to resolve disputes regarding non-WTO rules of international law even though the parties to a dispute raised before a panel had not consented, outside of the WTO context, to any form of jurisdiction to resolve disputes involving such non-WTO rules; and (ii) that the parties intended panels or the Appellate Body not to have jurisdiction to resolve disputes that would otherwise undermine the validity or operation of the WTO Agreement. In particular it is untenable to assert that the parties to the WTO Agreement intended that panels or the Appellate Body could not assess whether their decisions would be consistent with peremptory norms or obligations under the Charter of the United Nations. Compare Judge *ad hoc* Lauterpacht's consideration of peremptory norms in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, note 155 above, 440, para 100; and the consideration of UN Charter obligations by the International Court of Justice in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992*, ICJ Reports 1992, 114, 126, para 42. In relation to the *Lockerbie* decision, see Joost Pauwelyn, "Human Rights in WTO Dispute Settlement" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 5 above, 205, 212. For other factors relevant to assessing the scope of applicable law in relation to claims under the WTO covered agreements, see Pauwelyn, How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits, 37 Journal of World Trade, 997,

(c) The Approach of the International Law Commission Study Group on Fragmentation of International Law

Having addressed some of the "negative aspects" associated with conflicts between rules of international law, it remains to consider the "positive aspects" considered by Professor McLachlan and the International Law Commission's Study Group on fragmentation of international law. In its general conclusions on the topic, the Study Group gave prominence to the "principle of harmonization":

> "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[374]

The Study Group considered various interpretative techniques that have been developed under international law. These techniques included the maxims *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.

The Study Group emphasised that the *lex specialis* maxim was not restricted in its application to different treaty rules.[375] It also potentially applied, for example, when assessing the interaction of treaty and customary rules. The *lex specialis* maxim was also seen as potentially relevant in cases that did not involve conflict between rules of international law. According to the Study Group:

> "There are two ways in which law may take account of the relationship of a particular rule to [a] general one. A particular rule may be considered an application of a general standard in a given circumstance. The special relates to the general as does administrative regulation to law in domestic legal order. … Or it may be considered as a modification, overruling or a setting aside of the latter. … The first case is sometimes seen as not a situation of normative conflict at all but is taken to involve the simultaneous application of the special and the general standard."[376]

The Study Group also emphasised that even in cases where a particular rule modified, overruled or set aside a general, the general rule remained potentially relevant. According to the Study Group:

> "The application of the special law does not normally extinguish the relevant general law. … That general law will remain valid and applicable and will, in accordance with

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1005-1030, especially 1019-1028 (2003). For more general support for this approach see Orakhelashvili, note 144 above, 492-496; and the separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment of 3 February 2006, paras 9-14.

374 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 408, para 251(5).

375 ILC Study Group Report on Fragmentation, note 1 above, 39, para 66.

376 Ibid, 49 para 88.

> the principle of harmonization … continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."[377]

The Study Group also examined the various forms of "special" (or "self-contained") regimes. As noted above, the Study Group preferred the expression "special" regimes, referring to the term "self-contained" as "misleading" because there was "no support for the view" that the "general law would be fully excluded".[378]

The *lex posterior* principle finds partial expression in Article 30 of the *Vienna Convention on the Law of Treaties*, 1969. According to Article 30, subject to the priority given to the Charter of the United Nations under Article 103 of the Charter, where the parties to two inconsistent[379] treaties are the same, the provisions of the later treaty will generally prevail. The *lex posterior* rule does not, however, apply in cases where there is conflict between treaties that have different parties. In those circumstances, under paragraph 5 of the Article 30, a State that has inconsistent treaty obligations cannot escape its obligations. The article anticipates performance of obligations under one treaty and State responsibility for violation of the other.

Notwithstanding the general utility of these interpretative maxims it appears that they will have limited application in relation to human rights related trade measures. Both maxims are potentially significant in cases of "*intra*-regime" conflict and are designed to achieve interpretative solutions that reflect the intent of the States involved in the conflict. The Study Group of the International Law Commission recognised, however, that such justifications for the application of the maxims did not apply with the same force in cases of "*inter*-regime" conflict. According to the Study Group:

> "… the argument from *lex posterior* or *lex specialis* seems clearly more powerful between treaties within a regime than between treaties in different regimes. In the former case, the legislative analogy[380] seems less improper than in the case of two treaties concluded with no conscious sense that they are part of the 'same project'."[381]

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377 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 409, para 251(9).

378 ILC Study Group Report on Fragmentation, note 1 above, 82 para 152(5).

379 The language employed in Article 30(1) is "successive treaties relating to the same subject matter". It has been argued by some that this means that the Article is inapplicable, for example, to disputes involving rules under a trade treaty and an environmental treaty. See note 338 above for relevant references.

380 An apparent reference to the priority generally given to more recent legislation. [Footnote not in original.]

381 ILC Study Group Report on Fragmentation, note 1 above, 130, para 255. Contrast the application of the *lex specialis* principle by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, note 151 above, 240, para 25. A more nuanced approach was taken in the *Legal Consequences of the*

The Study Group also doubted whether the maxims could be applied in cases of conflict that involved specific rights and obligations and negative affects on third party beneficiaries under the conflicting rules.[382] Rights, obligations, entitlements and the interests of third parties under trade treaties, human rights treaties and general international law are implicated by human rights related trade measures.[383]

The Study Group also considered the relevance of rules and principles of international law having different normative power.[384] Interpretative issues and issues of applicable law associated with forms of hierarchy have been examined above.

The final interpretative principle considered by the Study Group was the "principle of systemic integration". This principle is enshrined in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, 1969. The provision requires that when interpreting a treaty the interpreter shall take "into account, together with the context [of the treaty] … any relevant rules of international law applicable in the relations between the parties". The principle is of importance when addressing potential and actual conflicts between rules of international law. It will be examined in greater detail in Chapter 6.

Construction of a Wall in the Occupied Palestinian Territory – Advisory Opinion, note 167 above, 178, para 106. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, the Court applied international humanitarian *and* international human rights standards. The Study Group's caution regarding the applicability of the lex specialis principle to inter-regime conflicts can be reconciled with these decisions on the basis of the similar principles upon which the two areas international law are based – see Cassimatis, International Humanitarian Law, International Human Rights Law and Fragmentation of International Law, 56 International and Comparative Law Quarterly (2007) forthcoming. Pauwelyn applies the maxims in cases of inter-regime conflict, but note his approach to the maxims – a decision by an international organisation to *recommend* trade measures for human rights purposes against a particular WTO member is treated as *lex specialis* and *lex posterior* relative to the WTO Agreement – Pauwelyn, How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits, note 373 above, 1023.

382 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 410 para 251(10), and 417, para 251(26).

383 In relation to customary human rights and correlative obligations see the text accompanying note 265 in Chapter 2. The integral nature of human rights treaty obligations, see, for example, Second Report on the Law of Treaties by Mr GG Fitzmaurice, Special Rapporteur, Yearbook of the International Law Commission, 1957, Volume II, 16, 54; and general principles of law such as "elementary considerations of humanity" identified by the International Court of Justice in the *Corfu Channel case, Judgment of April 9th, 1949*, ICJ Reports 1949, 4, 22, all appear relevant. See also ILC Study Group Report on Fragmentation, note 1 above, 205, para 407.

384 ILC Study Group Report on Fragmentation, ibid, 166-206.

In his discussion of conflicts between rules of different international organisations Jenks indicated a preference, *inter alia*, for "authoritative decision" as opposed to conflict resolution by a decision-maker situated within one international organisation. The International Law Commission's Study Group appeared to share this preference. In its summary conclusions it made the following observations:

> "Disputes between States involving conflicting treaty provisions should be normally resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had, where appropriate, to other available means of dispute settlement. When the conflict concerns provisions within a single regime … then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen."[385]

Critics of the WTO have argued that in cases involving conflicts between trade rules *and* other rules of international law (such as human rights or environmental rules), if resolution of those conflicts is attempted within the WTO then the trade bias evident in the membership requirements of WTO panels and the Appellate Body will privilege trade rules and values over the competing rules and values.[386]

There appears to be foundation for this concern in the WTO Agreement. Whilst there is no prohibition on international human rights experts being appointed as panel members, the terms of Article 8.1 of the DSU indicate an express preference for trade lawyers.[387] Conditions for appointment to the WTO Appellate Body

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385 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, note 5 above, 417-418, para 251(28).

386 See, for example, Frank Garcia, Symposium: Global Trade Issues in the New Millennium: Building a Just Trade Order for a New Millennium, 33 George Washington International Law Review 1015, 1059 (2001). Compare the following observations (made in a personal capacity) by a legal advisor in the Canadian Department of International Trade:

> "Venturing into unexplored areas such as international humanitarian law and civil wars by WTO dispute settlement bodies signifies the need for a waiver … . International trade specialists lack the tools under the WTO rules to accommodate measures in the face of humanitarian crises. Setting forth the relationship between international trade rules and areas outside the mandate of WTO dispute settlement endangers a result that fails to accord proper reflection of humanitarian and human rights law" – Kevin R Gray, "Conflict Diamonds and the WTO: Not the Best Opportunity to be missed for the Trade-Human Rights Interface" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 5 above, 451, 461.

387 Article 8.1 of the DSU, note 83 above, provides that:

> "[p]anels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a rep-

contained in Article 17.3 of the DSU specifically require expertise "in law, international trade and the subject matter of the [WTO] covered agreements generally". Membership of panels and the Appellate Body has included persons with expertise extending beyond trade law.[388] There is, however, at present no requirement of such additional expertise. This is particularly problematic when human rights or environmental measures are being considered under, for example, Article XX of GATT 1994. Unless efforts are made to formally address the question of the appearance of independence in such cases, rule of law concerns will arise.

A possible response to concerns of a perceived lack of independence in WTO dispute resolution is, where appropriate, to formally involve non-trade institutions in WTO dispute resolution. Virginia Leary has considered an extension to Article XX of GATT that would protect measures designed to address "… the serious violation of a limited number of fundamental labor standards".[389] As a response to concerns about the unilateral nature of measures justified under Article XX and the risk of protectionism, Leary offered the following suggestions:

> "… a clause could be added requiring reference to the ILO conventions and monitoring bodies for interpretation and application of the exception in a concrete case. A GATT panel could then assess whether the claimed exception was permissible under Article XX."[390]

The European Union Council Regulation on trade preferences for developing States,[391] which links trade preferences to respect for human rights, formally

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resentative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."

388 Professors Georges Abi-Saab and JHH Weiler are two examples.

389 Virginia A Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Bhagwati and Hudec, note 95 above, Volume 2, 177, 204. Leary's catalogue of fundamental labour standards corresponds closely to the 1998 ILO declaration – ibid, 221.

390 Leary, ibid, 204-205. Professor Hudec also discusses GATT provisions under which GATT provided for deference in relation to determinations by other international bodies (Article XXI – the United Nations Security Council; and Article XV – the International Monetary Fund) – Robert E Hudec, "GATT Legal Constraints on the Use of Trade Measures against Foreign Environmental Practices" in Bhagwati and Hudec, note ibid above, Volume 2, 95, 123. Leary's proposal appears to involve both adjudicative and legislative jurisdiction being ceded to the ILO. On the potential role of the ILO within the WTO, contrast Article XXIII:2 of GATT 1994, note 129 above, with Article 7(3) of the *Havana Charter for an International Trade Organization*, United Nations Conference on Trade and Employment, Final Act and Related Documents, Havana 1948.

391 Regulation No 980/2005, 27 June 2005, of the European Union Council "applying a scheme of generalised tariff preferences", Official Journal of the European Union L 169/1, 30 June 2005.

requires the European Commission to have regard to the work of the International Labour Organization ("ILO") and other United Nations human rights monitoring bodies when assessing the human rights record of beneficiary States.[392] This regulation is considered in greater detail in Chapters 5 and 7.

The involvement of other non-trade monitoring bodies may, however, bring its own problems.[393] Concerns have been raised, for example, regarding the operation of ILO monitoring procedures.[394] The committee system established to monitor compliance with the global human rights treaties continues to face serious difficulties.[395] Notwithstanding the replacement of the Commission on Human Rights by the Human Rights Council, concerns regarding politicisation persist.[396] In many respects resort to the institution that Jenks probably had in mind when he referred to "authoritative decision" as a means of resolving conflicts, namely the International Court of Justice, would appear to be preferable, not least in order to maintain coherence and the integrity of the international legal system.

6. Conclusion

This chapter has introduced and assessed issues relevant to the interaction of rules and principles of international law that address the protection of human rights and the regulation of international trade. A conception of the international rule of law and related human rights and trade law rules and values were considered. Issues of hierarchy amongst rules of international law, in particular the existence of peremptory norms of international law (including potential obligations to restrict trade in cases of serious breaches of such norms), were analysed.

Forms of direct and indirect interaction between international rules requiring the protection of human rights and the regulation of trade were then considered. The chapter concluded with a consideration of issues of applicable law and interpretative rules and principles that are potentially relevant when assessing actual or potential conflicts of law arising from the taking of human rights related trade measures. This chapter establishes the foundation for the analysis undertaken in subsequent chapters.

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392 Ibid, Article 19(3).

393 See, for example the concerns raised in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, "Linking Trade Regulation and Human Rights in International Law: An Overview" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 5 above, 1, 10-11.

394 Consider, for example, the concerns raised by Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 European Journal of International Law 457 (2004).

395 See, generally Philip Alston and James Crawford (eds), The Future of UN Human Rights Treaty Monitoring, Cambridge University Press, Cambridge, 2000.

396 See, for example, the concerns raised by the Vice-Chairman of the Human Rights Committee in the Foreword to this work.

In this chapter and in Chapter 3 the focus on trade regulation has involved consideration of the WTO Agreement. Not all States are, however, parties to this treaty, and WTO rules do not always apply in full to all parties to the WTO Agreement. The following chapter will focus on human rights related trade measures that are not regulated by, or are subject to limited discipline under, the WTO Agreement.

Chapter 5

Human Rights Related Trade Measures Not Subject to Full World Trade Organization Discipline – Measures Implemented by the European Union and the United States of America

1. Introduction

In Chapter 1 it was noted that State control over imports and exports is recognised under international law and that historically there were few, if any, restrictions on such control. Restrictions began to develop with the negotiation of bilateral treaties regulating international trade.[1] With the negotiation of multilateral trade treaties and with the disciplines on the use of trade measures imposed by the *Marrakesh Agreement Establishing the World Trade Organization* ("the WTO Agreement"),[2] the scope for unilateral trade measures taken by individual States and regional groups (such as the European Union) has been reduced considerably.[3] Notwithstanding these general disciplines imposed by the WTO Agreement, States nonetheless appear entitled to impose trade measures to secure the protection of human rights:

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1 For a brief account of the development of trade relations in Europe (between States but also including customs unions and free trade areas) up to the 20th century, see Michael J Trebilcock and Robert Howse, The Regulation of International Trade, 3rd ed, Routledge, London, 2005, 20-23.

2 Done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994).

3 There were 150 parties to the WTO Agreement as at 11 January 2007. Each of these members is therefore subject to the trade disciplines contained within the WTO Agreement. WTO members are principally States but, as noted in Chapter 1, they also include a number of "separate customs territor[ies] possessing full autonomy in … [their] external commercial relations" – see Article XII of the WTO Agreement, ibid.

- Where non-parties to the WTO Agreement are involved;[4]
- Where (following Article XIII of the WTO Agreement) a State, though a party to the WTO Agreement *vis-à-vis* certain States, is not accepted as a party[5] by a particular State party;[6]
- Where parties to the WTO Agreement confront questions not specifically regulated by the WTO Agreement;[7] and
- Where parties to the WTO Agreement are placed under limited discipline – particularly in the area of trade preferences for developing States.[8] There appears to be scope for linking respect for human rights norms to the granting of preferential access to developed State markets for goods from developing States because the WTO Agreement appears to impose only limited obligations on developed States in relation to trade preferences for developing States.[9]

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4 It was on this basis that the United States was able to annually threaten China's "most favoured nation" rights to access United States markets in the 1990s – see, for example, John H Jackson, William J Davey and Alan O Sykes Jr, Legal Problems of International Economic Relations, 4th edition, West Group, St Paul, 2002, 1028-1033 ("Jackson *et al*"); and Susan C Morris, Trade and human Rights – The Ethical Dimension in U.S. – China relations, Ashgate, Aldershot, 2002.

5 Generally or with respect to particular provisions of the WTO Agreement (including the annexed agreements).

6 A number of States relied, for example, on Article XXXV of the *General Agreement on Tariffs and Trade 1947* (the precursor to Article XIII of the WTO Agreement) in relation to Japan – see GATT, Analytical Index: Guide to GATT Law and Practice, 6th Edition, Geneva, 1995, Volume 2, 1031-1038. Article XIII of the WTO Agreement appears to have been invoked on only eight occasions – see <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#articleXIII>, visited 12 May 2007.

7 Examples include the regulation of investment [although note the WTO *Agreement on Trade-Related Investment Measures*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 2 above], restrictive business practices and government procurement (which is the subject of a WTO "plurilateral" agreement, *ie* an agreement that all WTO members need not be party to – see Article II:3 of the WTO Agreement, ibid).

8 See, for example, Part IV of the *General Agreement on Tariffs and Trade*, 1994, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid; and the so-called "enabling clause" which are discussed in Chapter 7; and the waiver in respect of the Kimberley Process Certification Scheme for Rough Diamonds, which is considered in more detail in Chapter 6.

9 This appears to have been expressly acknowledged in the recitals to the 1971 GATT waiver – see Waivers – Generalized System of Preferences, 25 June 1971, BISD, 18th Supplement, 24 – "[n]oting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are of a temporary nature". This issue is discussed further in Chapter 7.

The second situation listed above relates to the operation of Article XIII of the WTO Agreement. This provision allows States to register objections to, and impose conditions on, the accession of a new party to the WTO Agreement. The law of treaties allows States parties to a treaty, individually or collectively, to impose conditions on their acceptance of other States as parties to the treaty.[10]

The provision equivalent to Article XIII of the WTO Agreement[11] in the *General Agreement on Tariffs and Trade*, 1947,[12] was utilised on a number of occasions in relation to South Africa, apparently in response to that State's apartheid policies.[13] The "once only" quality of such an entitlement to object (*ie* States can only object or impose conditions up to the time of the accession of a new party and do not have the capacity to subsequently vary conditions other than by removing them) reduces the flexibility of this mechanism for justifying unilateral action.

The focus of this chapter will be principally on the first, third and fourth of the above-listed situations. The absence of, or the existence of limited, WTO discipline, particularly in the context of trade with developing States, has coincided with the establishment of a number of mechanisms by the United State and the European Union[14] that link trade relations to respect for human rights. These

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10 The power of parties to a treaty to conditionally accept or to reject States seeking to become party to the treaty is acknowledged in the rules on reservations to treaties. See Articles 20(4)(b) and 21(3) of the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969), 108 parties as at 27 April 2007; and DW Bowett, Reservations to Non-restricted Multilateral Treaties, 48 British Year Book of International Law 67, 86-87 (1976-1977).

11 Article XXXV of the *General Agreement on Tariffs and Trade*, 1947, entered into force on 1 January 1948 through the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, done at Geneva, 30 October 1947, 55 UNTS 308 (1950); reprinted (with subsequent amendments) in World Trade Organization, The Legal Texts, note 2 above, 423.

12 Article XXXV of GATT 1947, ibid.

13 See the 1996 OECD Report, note 1 above, 175; and GATT, Analytical Index, note 15 above, Volume 2, 1036.

14 The European Union will be referred to when referring to the political grouping of western European States that was "founded" *inter alia* upon the European Community by the *Treaty on European Union*, done at Maastricht on 7 February 1992, entered into force 1 November 1993, reprinted in consolidated form in the Official Journal of the European Union, C 321 E/1, 29 December 2006. The term "European Community" will employed when referring to the legal entity that enters into treaties on behalf of the European Union and its member States. On the terms "European Union" and "European Community" and entry into international trade agreements – see AM Arnull, AA Dashwood, MG Ross and DA Wyatt, Wyatt and Dashwood's European Union Law, 4th edition, Sweet and Maxwell, London, 2000, 169-187; and Peter LH Van den Bossche, "The European Community and the Uruguay Round Agreements" in John H Jackson and Alan O Sykes, Implementing the Uruguay Round, Clarendon Press, Oxford, 1997, 23.

mechanisms have been in operation for a number of years and have been subjected to academic scrutiny and criticism.[15] Consideration of these mechanisms and their perceived deficiencies is important for at least two reasons:

a. The United States and European Union mechanisms provide practical examples of different types of human rights related trade measures; and
b. The measures illustrate both general difficulties associated with human rights related trade measures and problems posed by particular types of measures. The measures raise, for example, rule of law concerns of the kind considered in Chapter 4.

Agreements linking trade and human rights in the context of giving trade preferences to developing States will be considered in this chapter and in Chapter 7, which deals with trade, human rights and development. The focus in this chapter will not be the level of development of the "target" States. Rather, it will be on the way in which trade with these target States is conditioned by the protection of human rights in the target State. Indeed, measures such as section 301 of the United States *Trade Act 1974*[16] link trade and human rights without requiring that the target State be a developing State.

The chapter begins with a brief consideration of the international legality of trade measures that are not subject to the disciplines of the WTO Agreement or other treaties incorporating similar rules. This is followed by a brief survey of United States and European Union legislation and regulations that link trade relations with respect for human rights. Treaties entered into by the European Community with non-European Union States will also be considered in this chapter. Treaties such as the successive *Lomé* conventions and the partnership agreement concluded on 23 June 2000 in Cotonou, Benin,[17] are compared with equivalent measures initiated

15 See, for example, in relation to United States measures, Philip Alston, "Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism'" in Lance A Compa and Stephen F Diamond (eds), Human Rights, Labor Rights, and International Trade, University of Pennsylvania Press, Philadelphia, 1996, 71; Jagdish Bhagwati and Hugh T Patrick (eds), Aggressive Unilateralism – America's 301 Trade Policy and the World Trading System, University of Michigan Press, Ann Arbor, 1990; Sarah H Cleveland, Norm Internalization and U.S. Economic Sanctions, 26 Yale Journal of International Law 1 (2001); Joel P Trachtman, "Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 357; and in relation to European Union measures, Lorand Bartels, Human Rights Conditionality in the EU's International Agreements, Oxford University Press, Oxford, 2005; and Philip Alston (ed), The EU and Human Rights, Oxford University Press, Oxford, 1999.

16 See Title 19 United States Code, §2411.

17 The *Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member*

by the United States. The European treaties resemble United States human rights unilateralism in so far as it is essentially the European Union that has demanded (and is demanding) the inclusion of human rights clauses in trade treaties.[18] The *North American Free Trade Agreement* ("NAFTA")[19] "side" treaty entered by the United States, Canada and Mexico[20] that addresses the enforcement of national labour laws will also be considered. Specific criticisms of these various instruments will be considered, followed by some general conclusions as to the operation of these mechanisms.

2. The Legality of Human Rights Related Trade Measures Generally under International Law

It has been asserted that human rights related trade measures that are not subject to the disciplines contained in the WTO Agreement or other trade treaties are nonetheless in violation of general international law. Such claims have been linked to notions of State sovereignty, domestic jurisdiction, the principle of non-intervention in the internal affairs of other States and the prohibition of extra-territorial exercises of jurisdiction. General Assembly resolutions have condemned "unilateral coercive measures".[21] Such measures were also condemned in resolutions adopted by the United Nations Commission on Human Rights.[22] The Human Rights Council adopted (by majority) a resolution in relation to such measures in October 2006.[23]

States, of the other part (the "Cotonou Agreement"), done at Cotonou on 23 June 2000, Official Journal of the European Communities, L 317/3 (2000), entered into force on 1 April 2003. As at 11 August 2005 25 European Union member States and the European Community were parties and 76 developing States were parties.

18 Note Australia's opposition to the inclusion of such a clause in 1997 that resulted in the failure of negotiations to conclude a framework treaty with the European Community. See for example Eibe Riedel and Martin Will, "Human Rights Clauses in External Agreements of the EC" in Alston, The EU and Human rights, note 15 above, 723, 739.

19 Done on 17 December 1992, entered into force on 1 January 1994, reprinted in 32 ILM 289 and 605 (1993).

20 The *North American Agreement on Labor Cooperation*, done on 14 September 1993, entered into force on 1 January 1994, reprinted in 32 ILM 1499 (1993).

21 See, for example, resolution 54/172, adopted on 17 December 1999; resolution 55/110, adopted on 4 December 2000; resolution 57/222, adopted on 18 December 2002; and resolution 61/170, adopted on 19 December 2006.

22 See, for example, resolution 2005/14 adopted during the 61st session of the Commission on 14 April 2005. Thirty-seven predominately developing State members of the Commission voted for the resolution, while 14 predominately developed State members of the Commission voted against the resolution. There were two abstentions.

23 See Human Rights Council resolution 2/14 adopted on 2 October 2006. Thirty-Two predominately developing State members of the Council voted for the resolution, 12 developed State members voted against the resolution. There was one abstention.

As indicated in Chapter 1, it is contended that such claims are often based on general misconceptions regarding international law. Three initial observations will be made in support of this contention. The first is that an analysis of voting patterns on such resolutions of the General Assembly, the Commission on Human Rights and the Human Rights Council indicates that consensus does not exist between developed and developing States in relation to the condemnation of such measures. For example, General Assembly resolution 61/170, which "[r]ejects unilateral coercive measures",[24] was adopted with 131 States in favour with 54 States against.[25] The 54 States which voted against the resolution included the 27 States making up the European Union and the United States, that, as indicated above, have established human rights related trade measures. This lack of consensus stands in the way of the assertion that there exists a general customary prohibition of unilateral coercive measures.

Secondly, an analysis of the terms of these resolutions reveals that they beg an important question, at least when considering unilateral coercive measures used as a response to prior breaches of human rights obligations under general international law. General Assembly resolution 61/170 is typical. In the resolution, the General Assembly:

> "… [u]rges all States to refrain from adopting or implementing any unilateral measures not *in accordance with international law* and the Charter of the United Nations, in particular those of a coercive nature with all their extraterritorial effects, which create obstacles to trade relations among States ... ".[26]

As discussed in Chapter 2, it may not be wrongful for a State to breach its international obligations, when such breach is a lawful countermeasure taken in response to a prior breach of international law. In order to be lawful, a countermeasure must be a proportionate response to the prior breach and must meet the other conditions established under international law.[27] Thus, even if there was consensus in support of a general prohibition of unilateral coercive measures, that would not necessarily mean that trade measures taken as a response to prior breaches of human rights obligations under general international law would be unlawful. In this regard it is important to recall the discussion in Chapter 2 of the uncertainty surrounding the entitlement of non-injured States to take countermeasures.

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24 See para 4 of General Assembly resolution 61/170, adopted on 19 December 2006.

25 For the voting pattern on the resolution – see Official Records of the General Assembly, 61st Session, 81st plenary meeting, 19 December 2006, UN Doc A/61/PV.81, 20-21.

26 See para 1 of resolution 61/170. [Emphasis added.]

27 These were identified by the International Law Commission in its *Articles on States Responsibility* – see Articles 49 to 54 of the *Articles on State Responsibility*, reprinted in the Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, General Assembly Official Records, 56th Session, Supplement Number 10, 56-58.

Thirdly, and more fundamentally, the imposition of trade measures restricting the movement of goods into and out of a State also implicates the sovereignty of the State imposing such measures. The sovereignty, non-intervention and jurisdiction-based claims raised against trade measures for human rights purposes do not appear to justify restrictions on a State's entitlement to control imports into and exports from its territory.[28] Claims that general international law prohibits a State

28 Sir Hersch Lauterpacht made the following observations in 1933:

> "Is there a good reason for assuming that, in the absence of a commercial treaty and without infringing the rules of international law as to the protection of the life and property of aliens, a state is liable for initiating and supporting a boycott of goods from another country? It is difficult to see on what grounds international responsibility could in such cases be based. In the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory. It may – and frequently does – do so under the guise of a protective tariff or of sanitary precautions or in some other manner. The foreign state may treat such an attitude as an unfriendly act and retort accordingly. But it cannot regard it as a breach of international law" – Lauterpacht, Boycott in International Relations, 14 British Year Book of International Law 125, 130 (1933).

Similar conclusions are reached by Sir Arthur Watts and Sir Robert Jennings in Oppenheim's International Law, 9th ed, Longman, London, 1992, Volume I, Part 1, 430-434 – see in particular the references collected at 432-434, footnotes 13 and 14. See also DP O'Connell, International Law, 2nd ed, Stevens and Sons, London, 1970, Volume 1, 301; Lori Fisler Damrosch, Enforcing International Law through Non-Forcible Measures, 269 Recueil des cours 9, 65 (1997); Cleveland, note 15 above, 48-65; and Robert Howse and Donald Regan, The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy, 11 European Journal of International Law 249, 274-279 (2000). Compare FA Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des cours 9, 107 (1964, I).

For opposing arguments, see Stephen C Neff, Boycott and the Law of Nations: Economic Warfare and Modern International Law in Historical Perspective, 59 British Year Book of International Law 113 (1988). Neff addresses the question whether there is a general prohibition of "economic warfare" under international law. He adopts a broad definition of "economic warfare" and the breadth of his definition (which encompasses not just trade measures but also nationalisations, freezing of foreign owned assets and "withdrawal of rights in maritime zones" – ibid, 115) appears to create difficulties for his analysis in light of the distinct legal approaches generally taken in relation to each of these topics. In his consideration of the practice of developed States Neff also relies heavily on the assertion that developed States draw a distinction between economics and politics when addressing the legality of "economic warfare" – ibid, 123-129. In this regard Neff relies on the practice of States under the original GATT – ibid, 127-129. It is submitted, however, that he does not adequately address the absence of GATT disciple in relation to certain trade measures which could be imposed for political purposes, for example, where a GATT party increases an unbound tariff on a product of particular export interest to a target State. Most significantly for the purposes of the current analysis Neff concedes that a prohibition of "economic warfare" would nonetheless *permit* "economic measures in opposition to human rights violations" – ibid, 148. See also Derek W Bowett, International Law and

Economic Coercion, 16 Virginia Journal of International Law 245 (1976) [it appears unclear whether Professor Bowett considered a prohibition of economic coercion to be *lex lata* or simply *lex ferenda*]; Clive Parry, Defining Economic Coercion in International Law, 12 Texas International Law Journal 1, 4 (1977) – who concludes that "[i]t would be difficult to maintain that state *A* must buy state *B*'s sugar crop (or permit its national to do so) or that state *A* must sell state *B* as much oil as it wants (or permit its nationals to do so). But it is not necessarily unreasonable to suggest that the abrupt termination of or interference with an established trade pattern may approach the impermissible and may be capable of adequate enough definition"; and J Dapray Muir, The Boycott in International Law, 9 Journal of International Law and Economics 187, 202-203 (1974) – who observes that "[a]bout all that can be said at present with respect to the status of the boycott under international law is that a number of countries and commentators have suggested that it *ought to be* prohibited by law. But there is a vast gulf between law that is and law that ought to be. … The purpose of affecting the policy of other states insofar as it affects the interests of another is the time-honored and constructive essence of diplomacy. Only if the purpose is one of total annihilation of the target state, combined with the power seriously to compromise its security, could it possibly be deemed illegal as judged by existing practice." [Emphasis in original.]

Professor Brigitte Stern asserts that trade measures imposed in response to conduct abroad may involve impermissible exercises of extra-territorial jurisdiction – Stern, Can the United States set Rules for the World? A French View, 31(4) Journal of World Trade 5, 9 (1997). Professor Stern acknowledges that a State enjoys "discretionary powers to decide who can enter its territory" – ibid, 16. It is submitted that international law recognises similar discretionary powers in relation to the movement of goods. Professor Brownlie has also observed that "[t]he customary law and general principles of law related to jurisdiction are emanations of the concept of domestic jurisdiction and its concomitant, the principle of non-intervention in the internal affairs of other states" – Brownlie, Principles of Public International Law, sixth edition, Oxford University Press, Oxford, 2003, 309. It might therefore be asked how it is that restrictions on trade that do not violate the prohibition on intervention might nonetheless constitute impermissible exercises of jurisdiction. Compare FA Mann, ibid, 15-17 and 30-31. It should be noted that Professor Stern, like Professor Neff, accepts the legality of certain human rights related trade measures – Stern, ibid, 9.

Dr Lorand Bartels offers detailed arguments in support of the view that trade measures may be impermissibly extraterritorial – Bartels, Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights, 36(2) Journal of World Trade 353, 376-391 (2002). Dr Bartels argues that the view "… that trade measures cannot be extraterritorial is problematic for a number of reasons. Specifically, it wrongly assumes that an exercise of legislative jurisdiction is only problematic when it is enforced by means of sanctions, it takes an unduly narrow view of legislative jurisdiction, and it ignores the practice of panels and the Appellate Body" – ibid, 377. According to Dr Bartels, "[t]he first problem with the view that trade measures cannot be extraterritorial … is that it assumes that legislative jurisdiction (determined by the matter regulated by the measure) is only problematic when it is enforced" – ibid. It is submitted that the issue is not so much temporal as qualitative. Enforcement by way of trade restriction appears to be qualitatively differ-

from imposing a politically motivated trade embargo designed to bring about a change in the policies of another State are not supported by consistent State prac-

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ent to enforcement by imposition of civil or criminal liability. This qualitative difference is apparent in the comment *c* to §431 of the Restatement – see American Law Institute, Restatement of the Law Third – The Foreign Relations Law of the United States, American Law Institute Publishers, St Paul, 1987, Volume1, 322-333. According to this comment *enforcement* jurisdiction comprises "… not only orders of a court … but also measures such as … [the denial of the right to engage in export or import transactions], when used to induce compliance with or as a sanction for violation of laws or regulations of the enforcing state …" – ibid, 322. The comment continues, however, to note that enforcement jurisdiction "is not concerned with measures of state policy denying benefits to another state nor with application of general rules, such as a law that refuses entry visas to persons convicted of specified crimes in other states. Imposition of an embargo on trade with a foreign state is not within [§431]; placing an individual on an export blacklist as a sanction for violation of a law or regulation is an assertion of jurisdiction to enforce covered by the section" – ibid, 322-323. A difficulty for Dr Bartels (which he attempts to address, Bartels, ibid, 385-386) and for the last quoted sentence from the Restatement is to reconcile the permissibility of trade embargoes with their view that some trade measures are impermissibly extraterritorial. As noted above, it is submitted that fundamental principles of sovereignty from which the rules governing jurisdiction are derived recognise the freedom of States to control the movements of goods and persons in and out of their territory. Alternatively this freedom might be characterised (at least in relation to the movement of goods) as an entitlement to regulate what a State's own nationals are permitted to purchase – see the views of Professor Lowenfeld, quoted by Dr Bartels, ibid, 385, footnote 129. Once this freedom or entitlement is recognised it appears to undermine claims that trade measures of any sort are impermissibly extraterritorial. Three further points regarding Dr Bartels analysis will be raised. First, he relies on "the practice of panels and the Appellate" to support position that that trade measures can be impermissibly extraterritorial. It is submitted that in assessing the rules of customary international law that are relevant to the interpretation of Article XX of GATT 1994, it would have been appropriate for greater attention to be given to the practice of *States* imposing trade measures in order to influence conduct abroad and on the practice of States, for example, restricting the granting of visas, as noted in the Restatement, to persons based on conduct abroad. Secondly, it is submitted that Dr Bartels analysis is weakened by the limited extent to which he integrates his analysis with the rules regarding intervention, for, as Professor Brownlie has noted, rules regarding jurisdiction are "… emanations … of the principle of non-intervention in the internal affairs of other states", Brownlie, ibid. For Dr Bartels' consideration of the rules governing intervention, see Bartels, ibid, 370 and 385-386. Finally, Dr Bartels concludes his analysis with the observation that Article XX of GATT 1994 "… should apply to save various trade measures designed to promote and protect human rights outside the territory of the regulating Member; in particular, measures targeted at the process and production method of a particular product" – Bartels, ibid, 402. Compare Carlos Manuel Vázquez, Trade Sanctions and Human Rights – Past, Present, and Future, 6 Journal of International Economic Law 797, 813-815 (2003).

tice.[29] The International Court of Justice also appears to have explicitly rejected such claims in its merits decision in the *Nicaragua Case*.[30] The Charter of the United Nations does not appear to prohibit such trade measures.[31] The disciplines

29 The States neighbouring South Africa (the so-called "frontline States"), for example, restricted trade in oil with South Africa in the 1980s, notwithstanding the apparent absence of United Nations authorisation – see Joe Hanlon, "On the Front Line – Destabilisation, the SADCC States and Sanctions" in Mark Orkin (ed), Sanctions Against Apartheid, St Martin's Press, New York, 1989, 173, 185; and Christian J Tams, Enforcing Obligations Erga Omnes in International Law, Cambridge University Press, Cambridge, 2005, 213. India boycotted trade with South Africa in 1946 – see John Dugard, "Sanctions against South Africa – An International Law Perspective" in Orkin, ibid, 113, 120; and Malaysia and Ghana imposed economic sanctions against South Africa in the 1960, Tams, ibid, 90. In 1982 foreign ministers of the non-aligned "G77" expressly affirmed "the legitimacy … of economic sanctions and other measures in the struggle against apartheid, racism, and all forms of racial discrimination and colonialism … [and] emphasized the right of developing countries, individually and collectively, to adopt such sanctions and other measures" – Tams, ibid, 212. For a catalogue of instances where international economic measures were employed last Century, see Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, Economic Sanctions Reconsidered, second edition, Institute for International Economics, Washington, 1990 – Volume 1 (History and Current Policy) and Volume 2 (Supplemental Case Histories). See also Muir, ibid, 188-195; and Tams, ibid, 207-251.

30 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, 14, 126, para 245, and 138, para 276.

31 Articles 2(3) and 2(4) of the United Nations Charter do not appear to prohibit such measures – see, for example, Omer Yousif Elagab, The Legality of Non-Forcible Counter-Measures in International Law, Clarendon Press, Oxford, 1988, 197-201. Article 2(7) of the Charter provides, *inter alia*, that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter". On the scope of domestic jurisdiction, see the Advisory Opinion of the Permanent Court of International Justice with regard to the *Nationality Decrees Issued in Tunis and Morocco (French zone) on 8 November 1921*, Permanent Court of International Justice, Series B Number 4, 1923, 24, where the Court observed that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." The existence of international obligations to ensure respect for human rights (discussed in Chapter 2) therefore restricts the scope of domestic jurisdiction.
The *Declaration of Principles of International Law Concerning Friendly relations and Co-operation among States in Accordance with the Charter of the United Nations*, which was annexed to resolution 2625 (XXV) adopted without vote by the General Assembly of the United Nations on 24 October 1970, addressed the prohibition of intervention. The Declaration provided, *inter alia*, that "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another

imposed on the use of trade measures by the WTO Agreement are discreet treaty based obligations and the *General Agreement on Tariffs and Trade*, 1994 ("GATT 1994"), for example, recognises the entitlement of a State to impose trade measures in a variety of circumstances including when the State considers that its security interests warrant such action.[32]

As noted above[33] human rights related trade measures are not subject to the disciplines of the WTO Agreement where an existing party to the WTO Agreement refuses to accept the establishment of treaty relations between itself and another State that is seeking to accede to the Agreement. This is currently provided for in Article XIII of the WTO Agreement. In the original *General Agreement on Tariffs and Trade*, 1947 ("GATT 1947"), the relevant provision was Article XXXV. On at least five occasions,[34] in relation to South Africa, this capacity for individual parties to GATT 1947 to refuse to accept another State as a party to the treaty appears to have been invoked on human rights related grounds. This treaty practice serves to confirm the existence of a general entitlement to impose human rights related trade measures.

State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." This language was drawn from an almost identical provision in resolution 2131 (XX), adopted by the General Assembly on 21 December 1965, Official Records of the General Assembly, Twentieth Session, Supplement Number 14, 11. Concerns about the terms of this earlier resolution were expressed by some States during the drafting of resolution 2131, see General Assembly, Official Records, Twentieth Session, First Committee, 1421st meeting, 18 December 1965, 430-434, and 1422nd meeting, 20 December 1965, 435-436. The above-quoted provision of the 1970 Declaration was also the subject of some controversy regarding its scope, see the Report of the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly, Official Records, Twenty-First Session, Annexes, Agenda item 87, 22, 72-77; and O'Connell, note 28 above, Volume 1, 313-315. Given the different interpretations given to the relevant provisions of the 1970 Declaration it is extremely difficult to argue that the 1970 Declaration reflects subsequent agreement between the parties to the United Nations Charter regarding an interpretation of the Charter as broadly prohibiting politically motivated trade measures. The above-quoted provision of the 1970 Declaration appears to have influenced a number of subsequent General Assembly resolutions, including, for example, resolution 3281 (XXIX) of 12 December 1974 (proclaiming the *Charter of Economic Rights and Duties of States*) and resolution 61/170, adopted by the General Assembly on 19 December 2006. These resolutions were adopted in the face of opposition from developed States.

32 See Article XXI of GATT 1994, note 8 above. On Article XXI of the *General Agreement on Tariffs and Trade 1947*, see GATT, Analytical Index, note 6 above, Volume 1, 599-610.

33 See the text accompanying note 11 above.

34 India and Pakistan in 1948, Egypt in 1970, Morocco in 1987 and Tunisia in 1990 – see GATT, Analytical Index, note 6 above, Volume 2, 1036.

The domestic jurisdiction and non-intervention claims become even more difficult to sustain if the State objecting to the imposition of trade measures is implicated in the violation of obligations to respect human rights under general international law. As noted in Chapter 2, claims of domestic jurisdiction are no longer accepted as a basis for avoiding scrutiny and legal responsibility for the violation of human rights obligations under international law. Claims based on the principle of non-intervention and the impermissibility of extra-territorial exercises of jurisdiction are considered further in Chapter 6.

The entitlement to control imports and exports is, however, not completely unfettered. As noted in Chapter 2, States imposing trade sanctions may be under specific treaty obligations to avoid the violation of the economic and social human rights of persons within another State.[35]

There also appear to be obligations under general international law that would be violated by certain forms of trade measures. Thus a State that by a trade embargo seeks to destroy a "national, ethnical, racial or religious group" in another State would violate the international prohibition of genocide.

Such a conclusion does not, however, mean that human rights related trade measures are therefore prohibited under general international law. Rather, the legality of such measures appears to depend significantly upon the effect of such measures. It is submitted that trade measures that are focussed on particular human rights violations and that minimise incidental harm will not necessarily violate human rights obligations under general international law even though the measures may have negative consequences for some in the target State.[36] As to when such negative consequences might constitute violations of human rights obligations under general international law, see the discussion of such obligations in Chapter 2.

3. Human Rights Related Trade Measures Not Subject to the Full Disciplines of the WTO Agreement

The United States and the European Union have established various mechanisms for linkage of international trade with the observance of human rights. A number of these measures focus upon the trade preferences that can be given to developing States by parties to the WTO Agreement as authorised exceptions[37] to the "most

35 See, for example, Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8, 12 December 1997.

36 Under municipal rules protecting human rights the provision of remedies for violations of human rights may have negative consequences, for example, for the dependants of the person required to compensate for the human rights violations.

37 See *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, GATT BISD, 26th Supplement, 203 (the so-called "Enabling Clause"). This decision continues in force under the WTO Agreement pursuant to Article 1(b)(iv) of GATT 1994, note 8 above.

favoured nation" principle that would otherwise preclude the giving of such preferences. United States legislation also allows for the imposition of trade sanctions in response to "unfair" practices.[38] The labour side agreement to the NAFTA (which appears to have inspired similar provisions in subsequent free trade agreements

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On the scope of these exceptions, see *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, issued by the panel on 1 December 2003; and the Appellate Body's decision, WT/DS246/AB/R, 7 April 2004, adopted by the Dispute Settlement Body on 20 April 2004. The Indian request for the establishment of a panel, WT/DS246/4, included a complaint regarding the reference to labour rights in the relevant European Union regulation. This aspect of the Indian complaint was not pursued, see paragraph 1.5 of the panel report. India limited its case to complaints regarding the European regulation's preferential arrangements to combat drug production and trafficking. India did, however, reserve its rights in respect of the labour provisions of the regulation. For a consideration of the consistency of the European regulation's reference to labour rights, see Robert Howse, Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences, 18 American University International Law Review 1333 (2003); Lorand Bartels, "The Appellate Body Report in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 463; Gregory Shaffer and Yvonne Apea, "GSP Programmes and Their Historical-Political-Institutional Context" in Cottier, Pauwelyn and Bürgi Bonanomi, ibid, 488; Jane Bradley, "The Enabling Clause and the Applied Rules of Interpretation" in Cottier, Pauwelyn and Bürgi Bonanomi, ibid, 504; and Steve Charnovitz, Lorand Bartels, Robert Howse, Jane Bradley, Joost Pauwelyn and Donald Regan, Internet Roundtable – The Appellate Body's GSP decision, 3 World Trade Review 239 (2004). The Appellate Body accepted that developed States were not required under the enabling clause to treat developing State beneficiaries in an identical fashion (paras 156-176) and contrasted problematic aspects of the European regulation (dealing with preferences to assist particular developing States to combat drug production and trafficking) with procedural aspects of the labour rights provisions (see para 182). The panel and Appellate Body reports in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* will be discussed further in Chapter 7. Dr Bartels reports that apart from the EU and US "no other developed countries link their GSP programmes to conditionalities" – Bartels, note 15 above, 68.

38 See section 301 of the *Trade Act 1974*, Title 19 United States Code, §2411. For a catalogue of United States legislation linking trade and human rights, see Cleveland, note 15 above, 92-102. Measures taken under section 301 against States that are not party to the WTO Agreement are not subject to WTO discipline. On the consistency of section 301 of the United States *Trade Act* with the WTO Agreement, see *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, adopted by the Dispute Settlement Body on 27 January 2000. For a consideration of impact of section 301, see Robert E Hudec, "Thinking about the New Section 301: Beyond Good and Evil" in Bhagwati and Patrick, note 15 above, 113.

entered by the United States[39]) provides for international remedies (which potentially include the suspension of tariff benefits) for non-enforcement of municipal labour standards.

(a) United States – Mechanisms Linking Trade and Human Rights

(i) United States Legislation and Regulations Linking Trade and Human Rights

Both the United States and the European Union have established mechanisms that link trade and human rights in the context of the generalised system of preferences ("GSP") in favour of developing States. A State will be ineligible for trade preferences under the United States GSP Program:

> "… [if] it has not taken or is not taking steps to afford internationally recognised worker rights to workers in the country (including any designated zone in that country)" or "… [if it] has not implemented its commitment to eliminate the worst forms of child labour."[40]

The United States President, however, retains a discretion to maintain a State's beneficiary status under the United States GSP Program notwithstanding labour rights violations where "the President determines" that such status "will be in the national economic interest of the United States …".[41]

When deciding whether to designate a State as a beneficiary under the United States GSP Program, the "President shall take into account – … whether or not such country has taken or is taking steps to afford workers in that country (including any designated zone in that country) internationally recognized worker rights."[42] "Internationally recognized worker rights" are defined for the purposes of the United States legislation in Section 507(4) of the *Trade Act*[43] as including:

> "(A) the right of association;
> (B) the right to organize and bargain collectively;

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39 See Bartels, note 15 above, 75-78. Dr Bartels also refers to the limited number of trade agreements entered into by other States that include labour clauses – ibid, 73-74. See also Steve Charnovitz, "The Labour Dimension of the Emerging Free Trade Area of the Americas" in Philip Alston (ed), Labour Rights as Human Rights, Oxford University Press, Oxford, 2005, 143; and Frank J Garcia, "Integrating Trade and Human Rights in the Americas" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 15 above, 329.

40 See section 502 of the *Trade Act 1974*, Title 19 United States Code §2462(b)(2)(G) and (H).

41 Title 19 United States Code §2462(b)(2).

42 Title 19 United States Code §2462(c)(7).

43 Title 19 United States Code §2467(4).

(C) a prohibition on the use of any form of forced or compulsory labor;
(D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor, as defined in paragraph (6); and
(E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

The section defines the worst forms of child labour in Section 507(6) as:

"(A) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;
(B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes;
(C) the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and
(D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.

The work referred to in subparagraph (D) shall be determined by the laws, regulations, or competent authority of the beneficiary developing country involved."

Similar provisions are found in other United States preference and development assistance legislation.[44]

Businesses and other organisations, including labour and human rights organisations, have the right to petition to seek executive review of the justification for continuing to grant GSP benefits.[45] GSP beneficiaries may lose preferences where United States authorities determine that the State generally or particular industries

44 See the Caribbean Basin Economic Recovery Program, section 212 of the *Caribbean Basin Economic Recovery Act*, Title 19 United States Code §2702(b)(7) and (c)(8); the Andean Region Preference Program, Title 19 United States Code §3202(c)(7) and (d)(8); and the *African Growth and Opportunity Act*, Title 19 United States Code §3703. Each of these provisions so far as they refer to "internationally recognised worker rights", appear to rely on the definition contained in §2467(4). The same definition is also relied upon in the laws regulating the United States Overseas Private Investment Corporation, see Title 22 United States Code §2191a(a)(1). Section 307 of the *Tariff Act 1930*, Title 19 United States Code §1307 prohibits entry into the United States of goods produced by "forced labor or/and indentured labour under penal sanctions." Forced labour is defined as "all work or service which is extracted from any person under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily". See also Title 19 Code of Federal Regulations §12.42 to 12.45. On the operation of Section 307 of the *Tariff Act*, see Raj Bhala, Clarifying the Trade-Labor Link, 37 Columbia Journal of Transnational Law 11, 40-54 (1998-1999).

45 See Jackson *et al*, note 4 above, 1036-1045.

have developed to a point where trade preferences are no longer considered justified.[46]

Section 301 of the United States *Trade Act* differs from the above legislation and European regulation in that it authorises trade sanctions against exports from *any* State to the United States, *ie* it is not simply focussed on trade with developing States. Section 301(b) provides that where the United States Trade Representative "determines … that … an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce … and action by the United States is appropriate", the Trade Representative is authorised to impose trade restrictions considered appropriate.[47] Any decision of the Trade Representative is subject to direction by the United States President.[48] The term "unreasonable" is defined in section 301(d)(3) and includes acts, policies or practices that constitute:

> "a persistent pattern of conduct that –
> (I) denies workers the right of association,
> (II) denies workers the right to organize and bargain collectively,
> (III) permits any form of forced or compulsory labor,
> (IV) fails to provide a minimum age for the employment of children, or
> (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers."[49]

The section goes on to provide that the United States Trade Representative, when applying these labour standards is to have regard, *inter alia*, to "… the level of economic development of the foreign country."[50]

(ii) United States Treaty Linkage of Trade and Human Rights

The NAFTA, which, when compared with the European Union, establishes a relatively modest degree of regulatory integration, deals with labour rights in a side treaty.[51] Under this treaty, Canada, Mexico and the United States agree to enforce

46 This removal of preferences is often referred to as "graduation" – see, for example, Jackson *et al*, ibid, 1192-1193.

47 Title 19 United States Code §2411(b).

48 Ibid.

49 Title 19 United States Code §2411(d)(3)(B)(iii).

50 Title 19 United States Code §2411(d)(3)(C)(i)(II).

51 The *North American Agreement on Labour Cooperation*, note 20 above.

their existing labour laws[52] and to ensure that remedies under these laws are accessible.[53]

A complex international dispute resolution system under the side agreement can be initiated where a party alleges "a persistent pattern of failure" by another party "to effectively enforce" certain of its labour standards.[54] This procedure may result in the establishment of an arbitral panel that can authorise the imposition of sanctions against a NAFTA party that is not enforcing its labour standards.[55] This enforcement mechanism, which can lead to the imposition of fines[56] and the suspension of tariff benefits,[57] applies only to "the enforcement of a Party's occupational safety and health, child labor or minimum technical labor standards."[58] The dispute resolution procedures (and potential sanctions) do not apply to non-enforcement by a party of its laws on freedom of association or collective bargaining.[59] Subsequent free trade agreements entered into by the United States have included provisions similar to those contained in the NAFTA labour side agreement.[60]

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52 Article 3 of the side agreement, ibid, provides, *inter alia*, that:

> "Each State party shall promote compliance with and effectively enforce its labor law through appropriate government action…"

53 Article 4 of the side agreement, ibid, provides, *inter alia*, that:

> "1. Each party shall ensure that persons with a legally recognised interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the party's labor law …".

54 See Article 27(1) of the side agreement, ibid.

55 Although parties are given a margin of appreciation in relation to enforcement, see the definition of when a party has failed to "effectively enforce" its relevant labour standards in Article 49(1) of the side agreement, ibid.

56 The fines may be used "… to improve or enhance the labor law enforcement in the Party complained against, consistent with its law" – see paragraph 3 of Annex 39 of the side agreement, ibid; and Virginia A Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2, Legal Analysis, 177, 208.

57 See, in particular, Annex 41B of the side agreement, note 20 above.

58 Article 27 of the side agreement, ibid.

59 Leary, note 56 above, 208, contrasts this feature of the treaty with the observation that freedom of association is "the most fundamental of all labor standards".

60 Bartels, note 15 above, 76-78. As noted by Dr Bartels, subsequent free trade agreements entered by the United States have in some respects differed from the NAFTA labour side agreement. The United States – Chile Free Trade Agreement, done at Miami on 6 June 2003, for example, does not exclude disputes regarding non-enforcement of national laws protecting freedom of association and collective bargaining from the treaty's dispute resolution procedures – see Articles 18.2:1(a), 18.6:6, 18.8 and 22.16. The various free trade agreements entered by the US are accessible at <http://www.ustr.gov/Trade_Agreements/Section_Index.html>, visited 23 February 2007.

(b) European Union – Mechanisms Linking Trade and Human Rights

(i) European Union Regulations Linking Trade and Human Rights

European Union regulations supplement European Union member States' laws in providing labour standards within the Union.[61] Each member of the Union is a party to the *European Convention on Human Rights* ("ECHR") and most of the other Council of Europe human rights treaties. Though the European Community has been held by the European Court of Justice to be constitutionally unable to become a party to the ECHR,[62] "… the Amsterdam Treaty formalizes the fact that the acts of the Council, Commission, and Parliament are reviewable by the European Court of Justice in cases in which violations of human rights are alleged."[63] In 2001 the European Union drafted its own charter of fundamental rights[64] and the proposed "Treaty establishing a Constitution for Europe" that was negotiated in 2004 provides for the "European Union" to accede to the ECHR.[65]

The European Union deals with denial of trade preferences under its GSP program in response to human rights violations in Council Regulation No 980/2005.[66] Article 16(1) of the regulation allows for the temporary withdrawal "in respect of all or certain products" of trade preferences in favour of a "beneficiary country" where there are:

> "(a) serious and systematic violations of principles laid down in the conventions listed in Part A of Annex III, on the basis of the conclusion of the relevant monitoring bodies; [or]

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61 Article 68(2) of the *Treaty establishing the European Coal and Steel Community* has been described as containing a "social clause" – Jean-Marie Servais, The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress? 128 International Labour Review 423, 424 (1989).

62 *Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] European Court Reports I-1759, paras 35 and 36. The decision is commented upon by Giorgio Gaja, 33 Common Market Law Review 973 (1996). The position will change (for the "European Union") if the 2004 treaty to establish a European constitution comes into force – see note 176 in Chapter 2 and accompanying text.

63 Philip Alston and JHH Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights" in Alston, The EU and Human Rights, note 15 above, 3, 40.

64 Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000, reprinted in 40 ILM 266 (2001). See generally Steve Peers and Angela Ward (eds), The European Union Charter of Fundamental Rights, Hart Publishing, Oxford, 2004.

65 See Andrew Clapham, Human Rights Obligations of Non-State Actors, Oxford University Press, Oxford, 2006, 180-189.

66 Official Journal of the European Union, L 169/1, 30 June 2005. This regulation is to apply until 31 December 2008.

(b) export of goods made by prison labour; …"

Part A of Annex III of the regulation sets out the following treaties:

"1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination Against Women
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. Convention concerning Minimum Age for Admission to Employment (No 138)
9. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)
10. Convention concerning the Abolition of Forced Labour (No 105)
11. Convention concerning Forced or Compulsory Labour (No 29)
12. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100)
13. Convention concerning Discrimination in Respect of Employment and Occupation (No 111)
14. Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)
15. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98)
16. International Convention on the Suppression and Punishment of the Crime of Apartheid."

Article 19(3) of the regulation provides that the European Commission, when undertaking an investigation as whether to recommend the temporary withdrawal of GSP benefits, is required to seek "the available assessments, comments, decisions, recommendations and conclusions of the relevant supervisory bodies of the UN, the ILO and other competent international organisations". Not all International Labour Organization ("ILO") and United Nations supervisory bodies depend, for their supervisory competence regarding particular States, on formal adherence by those States of the above-listed treaties.[67] It therefore seems clear that the temporary withdrawal mechanism under the regulation might nonetheless operate in

67 Under the ILO's freedom of association procedure adherence to the relevant treaties is not required for the relevant committee to exercise its supervisory functions. The Human Rights Council and the special procedures established by the former Commission on Human Rights also do not depend on State adherence to particular treaties in order to exercise supervisory functions. See the discussion in Chapter 2.

respect GSP beneficiaries that have not adhered to each or any of these treaties.[68] This conclusion is supported by the reference in Article 16 to the violation of the "principles"[69] of these treaties and the threshold requirement that violations must be "serious and systematic".[70] "[S]erious and systematic violations of the principles laid down" in the treaties appear to correspond to violations of obligations under general international law identified in Chapter 2.

Article 19 of the regulation sets out the procedures to be followed by the European Commission when it is considering whether to recommend temporary withdrawal of GSP benefits. These procedures include notification requirements and a duty to provide the beneficiary State with an opportunity to participate in any investigation prior to a decision by the Commission to recommend temporary withdrawal.[71] There is also provision for a six month period following the making of such a recommendation to allow the beneficiary State to make the necessary commitments to conform to the treaties set out in Annex III. As noted above, Article 19(3) of the regulation requires the European Commission seek information from "relevant supervisory bodies of the United Nations, the ILO and other competent international organisations". Paragraph 3 goes on to provide that information provided by such supervisory bodies:

> "… shall serve as the point of departure for the investigation as to whether temporary withdrawal is justified for the reason referred to in point (a) of Article 16(1). The Commission may verify the information received with economic operators and the beneficiary country concerned."[72]

The European Union regulation also includes a "special incentive arrangement for sustainable development and good governance" which offers, *inter alia*, positive trade incentives to GSP beneficiaries that respect international human rights standards. According to Article 9(1) of the regulation:

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68 Contrast Article 9 of the Regulation No 980/2005, note 66 above, which addresses special incentive arrangements that will be discussed further below, and essentially requires developing States that seek such additional preferences to ratify, or to commit to ratify, and effectively implement the treaties set out in Annex III of the regulation.

69 Presumably this is intended to distinguish underlying *principles* from the technical *rules* contained in the treaties.

70 This language is similar to threshold requirements for the procedures established by the former Commission on Human Rights discussed in Chapter 2 (see the text accompanying note 286 in Chapter 2).

71 Under Article 20(4) of Regulation No 980/2005, note 66 above, it appears to be the European Union Council that makes the decision to temporarily withdraw trade preferences.

72 Preambular paragraph 7 of the regulation, ibid, expressly refers the ILO's 1998 "Declaration of Fundamental Principles and Rights at Work."

> "The special incentive arrangement for sustainable development and good governance may be granted to a country which:
>
> (a) has ratified and effectively implemented the conventions listed in Part A of Annex III, and
>
> …
>
> (d) gives an undertaking to maintain the ratification of the conventions and their implementing legislation and measures and which accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified, and
>
> (e) is considered as a vulnerable country as defined in paragraph 3 [of Article 9]."[73]

Developing States that request such special incentive arrangements must, *inter alia*:

– provide "comprehensive information" on their ratification of the treaties referred to in Annex III,[74] "national legislation" and "the measures" they have taken "to effectively implement the provisions of the conventions and [their] … commitment to accept and fully comply with the monitoring and review mechanism envisaged in the relevant conventions and related instruments";[75] and
– provide "administrative cooperation" by allowing the European Commission to "conduct Community administrative and investigative cooperation missions in … [in the beneficiary States], in order to verify the authenticity of documents or the accuracy of information relevant for granting the benefit of the [GSP] arrangements …".[76]

Article 11(4) of the regulation provides that if the European Commission decides not to allow additional preferences under the special incentives arrangement to a developing State, the Commission "shall explain the reasons if that country so requests".

Developing States may be denied preferences generally or to particular industries where it has been determined that they have reached a level of economic

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73 The reference to "vulnerable" countries appears designed to comply with the report of the Appellate Body in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 37 above, paras 155-176.

74 All States receiving additional preferences under the special incentive arrangements were required to be parties to the specified human rights treaties by 31 December 2006 – see Article 9(2) of Regulation No 980/2005, note 66 above.

75 Article 10(2) of the regulation, ibid.

76 Article 17(2)(c), ibid.

development warranting removal of preferences.[77] Safeguard measures are also provided for under the regulation.[78]

(ii) European Union Treaties Linking Trade and Human Rights

Article 6 of the *Treaty of European Union* proclaims that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law …".[79] Article 7 of the treaty also provides that any member of the Union violating human rights in a "serious and persistent" way can have its rights under the treaty suspended.[80]

The European Union, in its external relations with other States, has been attempting since the 1980s to reach agreements on the insertion of human rights clauses in its cooperation and association treaties.[81] Treaties with Eastern European, Mediterranean and Asian States have included general human rights clauses in which the parties recognise that the human rights referred to in the Universal Declaration of Human Rights, the Helsinki Final Act and the Charter of Paris for a New Europe "constitute an essential element" of the treaties.[82] The treaties also generally include clauses allowing parties to suspend, in whole or in part, performance under the treaties where there has been a failure to fulfil obligations under the treaties.[83]

Similar articles were contained in the fourth *Lomé* treaty which provided for economic and other cooperation between the European Union and African, Caribbean and Pacific ("ACP") States. *Lomé IV* was superseded by the *Cotonou Agreement*, which came in to force on 1 April 2003.[84] The *Cotonou Agreement* regulates trade, development and finance arrangements between the European Union and ACP States.

The preamble of the *Cotonou Agreement* includes reference to major human rights instruments and Article 9(2) provides that "[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU partnership,

77 Preambular paragraphs 6, 10 and 16, and Articles 3, 12(7) and 14 of the regulation, ibid.

78 See Articles 21-23, ibid.

79 The *Treaty on European Union*, note 14 above.

80 Ibid.

81 For a general assessment of these treaties, see Bartels, note 15 above; and Riedel and Will, note 18 above.

82 See Bartels, ibid, 22-31; and Riedel and Will, ibid, 728-730.

83 Bartels, ibid, 29-31; and Riedel and Will, ibid, 729-730.

84 The *Cotonou Agreement*, note 17 above. The *Cotonou Agreement* was the subject of a WTO waiver, see the decision of the WTO Ministerial Conference, European Communities – The ACP-EC Partnership Agreement, decision of 14 November 2001, WT/L/436. Instances where measures were taken under *Lome IV* or the *Cotonou Agreement* in response to human rights related concerns are collected by Bartels, ibid, 249-251.

shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement."

There are numerous other references to human rights in other provisions of the treaty. Article 50, which is found in the chapter of the treaty entitled "Trade Related Areas", provides as follows:

> "Trade and Labour Standards
> 1. The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment.
> 2. They agree to enhance cooperation in this area, in particular in the following fields:
>   – exchange of information on the respective legislation and work regulation;
>   – the formulation of national labour legislation and strengthening of existing legislation;
>   – educational and awareness-raising programmes;
>   – enforcement of adherence to national legislation and work regulation.
> 3. The Parties agree that labour standards should not be used for protectionist trade purposes."

Article 96 provides for partial or full suspension of the *Cotonou Agreement* on account of failure "to fulfil an obligation stemming from respect for human rights …".[85] Unlike the earlier *Lomé* treaties, the *Cotonou Agreement* includes a compulsory arbitration clause in order to deal with disputes regarding the interpretation of the treaty.[86]

(c) Academic Assessments of United States and European Union Linkage Mechanisms

In a review of United States legislative schemes linking trade and labour rights, Professor Philip Alston identified a number of serious weaknesses in the United States legislation.[87] These weaknesses are summarised and expanded upon below.

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85 Bartels, note 15 above, 30, points out that Article 96 specifies that suspension "would be a measure of last resort" and that suspensions "shall be revoked as soon as the reasons for taking them have disappeared". Dr Bartels also emphasises the proportionality assessment required under Article 96, namely that measures taken in response to violations must be "proportional to the violation", ibid.

86 See Article 98 of the Cotonou Agreement, note 17 above.

87 See Philip Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above.

The European Union linkage mechanisms will be compared in order to determine to what extent they avoid the identified weaknesses.

(d) Weaknesses in United States Legislation and European Union Instruments

1. The human rights standards applied in United States legislation are not clearly defined.[88] An example of this weakness is the definition of "internationally recognized worker rights" in section 507(4) of the *Trade Act* 1974, which extends to "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[89] There is no international consensus on whether universal international standards exist in these areas. The lack of clear definitions creates uncertainties in the application of the standards.[90] This uncertainty is compounded by other weaknesses in the United States system.

The uncertainty in the definitions of labour standards in United States legislation can be contrasted with the approach to labour standards in European Union instruments. The European Union's GSP regulation[91] refers specifically to the main global human rights treaties[92] and core ILO conventions. European Union bilateral trade and development treaties and the successive *Lomé* agreements lack detailed definitions of international human rights standards.[93] The *Cotonou Agreement* is much more specific in its reference to particular ILO standards.

2. Even if the human rights standards were defined with clarity, the standards selected are not always those that are recognised under international law.[94] For

88 Professor Alston, ibid, 75 and 78, observes that "… the U.S. legislation does not contain detailed standards" and later refers to the "… extraordinary vagueness of U.S. worker rights legislation."

89 Title 19 United States Code §2467(4)(E). A similar definition applies in relation to section 301 of the *Trade Act* 1974.

90 Professor Alston gives the example of the refusal by the United States GSP Committee to treat attacks on labour leaders as potential violations of labour related human rights notwithstanding ILO jurisprudence to the contrary – Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 77-78.

91 See the text accompanying note 66 above.

92 Although in the WTO Committee on Trade and Development, Pakistan drew attention to the absence of the *Convention on the Rights of Migrant Workers* from the list of human rights treaties referred to in EC regulation 980/2005 – see WTO Committee on Trade and Development, Note on the Meeting of 4 October 2006, WT/COMTD/M/59, para 19. None of the 27 members of the EU appear to be parties to this treaty.

93 See the discussion of such treaties in Barbara Brandtner and Allan Rosas, "Trade Preferences and Human Rights" in Alston, The EU and Human Rights, note 15 above, 699; and Riedel and Will, note 18 above.

94 According to Professor Alston "[i]t is difficult to escape the conclusion that the United States is, in reality, imposing its own, conveniently flexible and even elastic, standards upon other states. The effect is that states are being required to meet standards

example, the labour rights referred to in United States legislation include rights that do not form part of customary international law. In relation to non-customary rights that are set out in particular treaties, these rights have been applied in relation to States that are not party to the relevant treaty. Critics[95] of the United States approach have also noted that the United States enforces standards that it has not itself accepted by way of treaty obligation.[96]

Whilst concerns of European Union double standards have been raised, particularly in relation to demands made of States seeking admission to the European Union,[97] European Union member States all appear to be parties to the relevant international instruments protecting labour related human rights. The United States, by contrast, has not generally assumed obligations under these instruments.[98]

3. Concerns have also been raised about the absence of rights that, relative to those listed in United States legislation, have a stronger normative basis that warrants their inclusion within the United States legislation. Discrimination in employment has been cited in this regard.[99] The European Union instruments set out above appear to avoid this criticism.

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that are not formally binding upon them by virtue either of treaty or of customary international law" – Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 79.

95 Professor Alston observes that "[t]he argument that the United States should not apply standards to other states that it has failed to ratify itself was a favorite refrain of countries that were the targets of U.S. human rights criticism or sanctions in the 1970s and 1980s, and was advanced with particular gusto by the then socialist countries of Eastern Europe" – ibid, 85-86. Contrast Professor Bhagwati's discussion of "unrequited" trade concessions, Bhagwati, "Aggressive Unilateralism: An Overview" in Bhagwati and Patrick, note 15 above, 1, 15-30.

96 Cleveland, who generally defends United States legislation linking trade and human rights, concedes that "[t]he United States' failure to ratify and execute international human rights instruments that it purports to enforce has been a major structural weakness of U.S. unilateral sanctions efforts. … The United States for fifteen years has purported to protect … 'internationally recognized worker rights,' such as the freedom to associate, organize, and bargain collectively and the prohibition against forced labor, despite the fact that the United States has ratified only one of the ILO conventions defining these rights" – Cleveland, note 15 above, 70.

97 See, for example, Alston and Weiler, note 63 above, 15 and 28-29.

98 For example, almost all of the 27 current members of the European Union are parties to the 16 treaties listed in Annex III of Council Regulation No 980/2005, note 66 above. The United States is a party to only two of the eight of the ILO treaties corresponding to the standards in United States GSP legislation.

99 Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 75.

4. An excessive degree of discretion is accorded to the United States government in determining whether or not trade sanctions should be imposed in response to human rights infringements.[100] At least three specific criticisms flow from this general concern.

(a) Independent review of United States Executive action is not generally available because the courts in the United States appear to regard the Executive's assessments made under the relevant legislation to be non-justiciable.[101] Thus, for example, even where the legislation on its face does not allow for the consideration of the "need" to protect United States industry, an Executive decision made on protectionist grounds may not be reviewed.
There appears to be greater potential for judicial review of European Union decisions under European GSP regulations.[102] Review of European Union decisions under treaties linking trade and human rights, however, appears more problematic.[103] Both the NAFTA labour side agreement and the *Cot-*

100 Ibid, 81-82.

101 See *International Labor Rights Education and Research Fund v Bush*, 752 F. Supp. 495, 497 (United States District Court, District of Columbia, 1990); affirmed on appeal by majority but for different reasons, 954 F. 2d 745 (Court of Appeals, District of Columbia Circuit, 1992) – referred to in Cleveland, note 15 above, 82-83.

102 Judicial review by the Court of First Instance of the European Communities is provided under paragraph 4 of Article 230 of the *Treaty Establishing the European Community*, done at Rome on 25 March 1957, entered into force on 1 January 1958. The treaty has been subsequently amended and the consolidated text is reprinted in the Official Journal of the European Communities, C 325/33, (2002). Council Regulation No 980/2005, note 66 above, provides that the regulation "is directly applicable in all Member States". For a general account of review via Article 230, see, for example, Arnull, Dashwood, Ross and Wyatt, note 14 above, 223-242. An exporter established outside of the European Union that has entered into export contracts may be able to satisfy the strict standing requirements applied under Article 230. An example of a reference under former Article 177 (now Article 234) of the *Treaty Establishing the European Community* that involved a corporation registered outside of the European Union that was seeking to challenge an interpretation of a Council regulation is *Bosphorus Hava Yollari Turizm ve Ticaret SA v Minister for Transport, Energy and Communications, Ireland*, Case C-84/95, [1996] European Court Reports I-3953.

103 The "common foreign and security policy" pillar of the European Union is not subject to judicial scrutiny by the European Court of Justice – see Article 47 of the *Treaty Establishing the European Community*, ibid. The Court, however, does appear competent to review the authority of the Community to enter into treaties – see, for example, *Portuguese Republic v Council of the European Union*, Case C-268/94, [1996] European Court Reports I-6177. The question whether review extends to the legality of decisions made under treaties is rendered less significant for the *Cotonou Agreement*, note 17 above, by the presence of an arbitral provision in the treaty.

onou Agreement represent improvements upon this position to the extent that they provide independent dispute resolution procedures.[104]

(b) The application of the standards is alleged to be subject to political manipulation, whether for reasons of United States foreign policy or at the behest of domestic, often protectionist, constituencies.[105] "Due process" concerns with the United States legislation often appear to be related to questions of political manipulation.[106] As discussed further below, similar concerns have been raised *vis-à-vis* the European Union, for example in its relations with China.

(c) It has been observed that the application of trade sanctions under United States legislation has lacked consistency and predictability.[107] This may be a consequence of the political manipulation referred to in (b) above. European Union institutions administering linkage proposals have been accused of a lack of transparency in their monitoring and reporting on the conduct of third States.[108] In the absence of transparency it is more difficult to assess consistency or predictability.[109]

5. Concerns have been raised about the appropriateness of particular trade sanctions given that one of the avowed purposes of linkage, namely the improvement of the conditions of persons abroad, may not be achieved.[110] The general form of this criticism is that trade sanctions hurt the most vulnerable in the target coun-

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104 Although Dr Bartels reports that there has been a "shift" in European Community policy away from including dispute settlement procedures in association agreements – Bartels, note 15 above, 133-134. Dr Bartels argues that this may be required in order to ensure compliance with European Community law – see, ibid, 169-227.

105 Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 82 and 84-85.

106 See, for example, Alston, ibid, 81-82.

107 Ibid, 81.

108 Alston and Weiler, note 63 above, 13-14.

109 The EU has been accused of policy incoherence in the area of development assistance. One example cited has been the dumping of subsidised European Union beef in West Africa undermining the commercial viability of West African livestock and meat processing enterprises being assisted by European Union development programs – see Bruno Simma, Jo Beatrix Aschenbrenner and Constanze Schulte, "Human Rights Considerations in the Development Co-operation Activities of the EC" in Alston (ed), The EU and Human Rights, note 15 above, 571, 621.

110 According to Professor Bhagwati:

> "In Bangladesh, the threat to exports when the Harkin bill on banning products using child labor was being considered by the U.S. Congress led to the discharge of female children in textiles, who were often forced instead into prostitution by destitute parents"

– Bhagwati, Afterword: The Question of Linkage, 96 American Journal of International Law, 126, 132 (2002).

try. This "perversity" criticism[111] is an important issue for any regulatory scheme, trade, human rights or otherwise. It will be considered further below.

6. Two types of specific criticism have been directed at the damage done by United States unilateral measures to the development of international legal standards. Professor Alston has noted the potential damage that United States unilateral linkage measures may do to existing mechanisms for the protection of human rights.[112] In particular, he suggests that the United States linkage measures may undermine ILO efforts to promote respect for human rights.[113] The United States measures have been applied in cases without regard to well-developed ILO jurisprudence and create confusion as to the content of the norms being applied.[114] In contrast the European Union's GSP regulation provides in Article 19 that the European Commission is to have regard to:

> "[t]he available assessments, comments, decisions, recommendations and conclusions of the relevant supervisory bodies of the UN, the ILO and other competent international organisations. These shall serve as the point of departure for the investigation as to whether temporary withdrawal [of GSP benefits] is justified … ."[115]

A second criticism of United States unilateralism is the general claim that unilateralism undermines the multilateral trading system.[116] Whilst United States unilateralism has been linked to the eventual acceptance during the Uruguay Round of

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Contrast the assessment of the position in Pakistan offered by Emilie M Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 International Organization 593, 610-611 (2005).

111 See Brian A Langille, Eight Ways to think about Labour Standards, 31(4) Journal of World Trade 27, 28 and 35-36 (1997).

112 Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 80.

113 Ibid.

114 Compare what Brian Langille describes as the "jeopardy thesis" – see Langille, note 111 above, 28 and 35. Alston has subsequently argued that the 1998 ILO Declaration has had similar negative consequences. For Professor Alston's and opposing views expressed in the European Journal of International Law, see note 241 in Chapter 2.

115 Resolution No 980/2005, note 66 above. Article 11 of the regulation (which addresses the procedure for taking special incentive measures for "vulnerable" developing States) is in similar terms. Compare Article 45 of the NAFTA labour side agreement, note 20 above.

116 See, for example, the discussion of concerns regarding unilateralism in the WTO panel report in *United States – Sections 301-310 of the Trade Act 1974*, note 38 above, paras 7.86 to 7.91.

a WTO agreement to protect intellectual property rights,[117] the WTO Agreement is hostile to unilateral measures. Unilateral trade measures as a response to alleged breaches of the WTO Agreement are implicitly rejected in Article 23:1 of the *Dispute Settlement Understanding*. Opposition to trade measures as a unilateral response to non-trade policy concerns has been strongly expressed in a number of different contexts.[118] Notwithstanding this criticism, unilateralism for non-trade policy purposes is specifically countenanced under the WTO Agreement, for example under Articles XIX, XX and XXI of GATT 1994. These provisions will be considered in Chapter 6.

It can be argued that, of the concerns catalogued above, all but the last two are design flaws that bear no necessary relation to human rights related trade measures. Changes can be made to instruments and institutions in order to address these concerns. The potential for economic protectionist abuse appears, however, to justify more detailed consideration of the measures implemented by United States and European Union.[119]

Critics of the United States legislation have pointed to the protectionist motivations behind the enactment of some of the United States laws.[120] In addition, decisions made under United States legislation, that was designed to enhance respect for human rights abroad, appear to have been significantly influenced by considerations unrelated to human rights. Under section 402 of the *Trade Act 1974* (the so-called Jackson Vanik Amendment),[121] non-market economy States that are

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117 See, for example, Jackson *et al*, note 4 above, 962-963; and Amy S Dwyer, "Trade-Related Aspects of Intellectual Property Rights" in Terence P Stewart (ed), The GATT Uruguay Round – A Negotiating History (1986-1994), Kluwer, The Hague, 1999, Volume IV, The End game (Part 1), 465, 495-496.

118 In an environmental context, see, for example, the submissions summarised in the Appellate Body's report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, adopted by the Dispute Settlement Body on 6 November 1998, reprinted in 38 ILM 121 (1999), paras 41 and 78.

119 In the absence of foreign trade retaliation, the negative consequences of unilateral trade measures appear to be felt principally by foreign producers (including employees and their dependants) and local consumers. Foreign producers do not vote and consumers rarely organise effectively to displace the influence of protectionist producer lobbies. Political economists might therefore predict exactly the types of shortcomings identified above.

120 See the discussion of concerns about protectionism in Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 84-85. For a description of the protectionist lobbies in the United States and their support for United States trade unilateralism, see Helen Milner, "The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision" in Bhagwati and Patrick, note 15 above, 163, 172.

121 Title 19 United States Code §2432.

not parties to the WTO Agreement can be denied most favoured nation ("MFN")[122] access to United States markets on account of human rights violations. Under Section 402, President Clinton, in his first term, linked China's MFN status to its human rights record. This approach required China to annually face the prospect of losing MFN access to the United States market if the United States President determined that China was not making sufficient progress in efforts to protect human rights. In 1994, President Clinton announced that he was "delinking" China's continuing MFN status from its human rights record. The President expressly acknowledged that other, non-human rights, issues and interests influenced his decision:

> "I am … moving to delink human rights from the annual extension of most favoured nation trading status for China. That linkage has been constructive during the past year, but I believe, based on our aggressive contacts with China in the past several months, that we have reached the end of the usefulness of that policy, and it is time to take a new path towards the achievement of our constant objectives. We need to place our relationship in to a larger and more productive framework … . [T]he question … is not whether we continue to support human rights in China but how can we best support human rights in China *and advance our other very significant issues and interests*. I believe we can do it by engaging China."[123]

At least two non-human rights issues have been identified as having influenced the President's decision to "delink" China's trade privileges and human rights:

> "First, the U.S. wanted Chinese assistance in persuading North Korea not to develop nuclear weapons and to permit inspections of its nuclear facilities by the International Atomic Energy Agency. Second, the U.S. did not want to lose large orders placed in the U.S. by the Chinese Government and corporations, particularly those for aircraft."[124]

Similarly, the European Union has been described as being "torn between its moral ambitions and its economic interests" in relation to its policy towards China.[125] According to another observer of the European Union's external human rights policies:

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122 MFN treatment is now referred to under the relevant United States legislation as "normal trade relations".

123 See 1994 Westlaw 209851, #1 (White House) – quoted in Jackson *et al*, note 4 above, 1029-1030. [Emphasis added.]

124 Jackson *et al*, ibid, 1030. See also Morris, note 4 above, 133-138.

125 Manfred Nowak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU" in Alston (ed), The EU and Human Rights, note 15 above, 687, 688-689 [quoting Martine Fouwels, The European Union's Foreign and Security Policy and Human Rights, 15 Netherlands Quarterly of Human Rights 294, 324 (1997)].

> "[t]he economics of the European Community are never very far from the surface as the foreign policy on human rights is executed. But the EU rarely admits that trade concerns affect human rights foreign policy with a State such as China."[126]

Acknowledgement of protectionist and other non-human rights motivations does not automatically exclude any justification for human rights related trade measures. Again, design flaws in linkage mechanisms may intensify the competition between human rights concerns and commercial interests. The Clinton Administration's linkage of China's trade preferences with human rights has been questioned on the grounds that it made little sense to subject the trade of such an important trading partner to an annual "all or nothing" review process.[127]

More fundamentally it can be argued that protecting the human rights of *foreigners* always risks being subordinated to the economic interests of nationals (who generally vote). Professor Alston has observed that:

> "[h]uman rights legislation is rarely motivated by purely altruistic concerns. Thus, even if it were possible to demonstrate convincingly that the worker rights programs have been driven by varied motives, some of which are undeniably protectionist, this fact would not of itself discredit them."[128]

The above comparison of United States and European Union linkage mechanisms indicates that European Union mechanisms avoid some of the criticisms levelled at United States measures. The European Union's GSP regulation, for example, allows suspension of GSP benefits only where there have been "serious and systematic violations of the principles" laid down in global human rights treaties and suspension is linked to established international supervision procedures.[129]

The concern that trade sanctions imposed for human rights purposes might actually harm the victims of the targeted human rights violations appears to be addressed by the positive incentives found in the European Union's GSP regula-

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126 Andrew Clapham, "Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?" in Alston (ed), The EU and Human Rights, ibid, 627, 646. Dr Lorand Bartels concludes an assessment of reliance upon human rights clauses in EU cooperation treaties with the following observations:

> "… the reason for the selective application of human rights clauses is essentially geopolitical. As such, the most likely impact of initiatives to improve procedural aspects of the human rights clauses would be to increase the visibility of the EU's double standards. While the result could be a less selective application of the clauses, this is far from certain" – Bartels, note 15 above, 40.

127 Jackson *et al*, note 4 above, 1030-1031.

128 Alston, Labor Rights Provisions in U.S. Trade Law – 'Aggressive Unilateralism', note 15 above, 84-85. [Footnote not reproduced.]

129 Compare Article 16(1) of regulation 980/2005, note 66 above, with Title 19 United States Code §2467(4). See also Brandtner and Rosas, note 93 above, 713-721.

tion.[130] It has been argued that efforts to improve respect for human rights are enhanced by trade measures that employ *both* positive and negative incentives.[131] The United States measures considered above display an almost exclusive reliance on sanctions. The European mechanisms utilise sanctions only for systematic and serious violations of principles derived from the major human rights treaties and include incentives for developing State trading partners to protect human rights. The *Cotonou Agreement's* trade and labour clause[132] includes a commitment to "enhance cooperation … on the enforcement of adherence to national legislation and work regulation."

Concerns have nonetheless been expressed regarding the transparency of European Union human rights monitoring.[133] The United States State Department model for country reports has been advocated for Europe as a means by which to

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130 Although, in common with all trade preference schemes, as general tariffs are negotiated down, so incentive measures also diminish in terms of the benefits that they offer. Dr Bartels has argued that the approach of the Appellate Body in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 37 above, will make it difficult to justify the *removal* of preferences under the Enabling Clause, see Bartels, "The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programmes", note 37 above, 484. For a defence, albeit tentative, of the removal of benefits, see Charnovitz in Charnovitz *et al*, note 37 above, 249. In addition, Article XX of GATT 1994 may apply in respect of such measures. See Chapter 6 for an analysis of the potential application of Article XX and Chapter 7 for a consideration of the role of Article XX in the context of the generalised system of preferences.

131 An empirical analysis of trade preference agreements undertaken by Hafner-Burton, note 110 above, concluded that in relation to preferential trade agreements that condition the availability of trade preferences on respect for human rights, beneficiary States "are systematically more likely to decrease repression" than are comparable States in the absence of such agreements – 606 and 618-620. Barbara Brandtner and Allan Rosas conclude their review of European Union trade preference measures with the following observations:

> "… the 'stick', whether used in the context of bilateral agreements (ex-Yugoslavia in 1991) or in the context of unilateral acts (Myanmar in 1996), is more likely to be resorted to if fundamental rights and values are at stake – and if there has been a *serious* human rights violation. However, the combination of 'sticks and carrots' … and emphasis on 'more carrots' [referring to the European Union's special incentive GSP arrangements] … make it easier to bring in a wider range of human rights" – Brandtner and Rosas, note 93 above, 721. [Emphasis in original.]

More generally, Hufbauer *et al*, note 29 above, suggest that "success [in achieving the aims of sanctions] is more often achieved when the target country conducts a significant proportion of its trade with the [State imposing the sanctions]" – Volume 1, 99-100.

132 Article 50 of the *Cotonou Agreement*, note 17 above.

133 Alston and Weiler, note 63 above, 13-14.

render European Union human rights scrutiny more open and transparent.[134] Concerns can also be raised in relation to uncertainties regarding the existence of independent appeal rights for States denied trade privileges and the degree of discretion accorded to European Union decision makers. The dispute resolution procedure in Article 98 of the *Cotonou Agreement* goes some way to address these types of concerns.

Independent third party scrutiny *via* the panel procedure provided for under the NAFTA labour side agreement would overcome many of the due process concerns expressed above in relation to United States legislation linking trade and human rights. The parties to the side agreement commit themselves to "… ensure that [their] … labor laws and regulations provide for high standards."[135] A significant difference between the NAFTA labour side agreement and the *Cotonou Agreement* is the narrower focus of the NAFTA side agreement on the enforcement of existing national standards as opposed to minimum international standards.

The NAFTA labour side agreement does, however, offer some support for international labour standards more generally. The side agreement provides that the objectives of the agreement include the promotion "to the maximum extent possible" of enumerated labour principles set out in Annex 1 of the Agreement.[136] Annex 1 lists each of the core labour standards identified by the ILO including the "elimination of discrimination in employment", which does not generally appear in the United States legislation considered above. Annex 1 extends beyond the core rights to include minimum employment standards, illness and injury compensation, and the protection of migrant workers. The side agreements commitment to international standards is, however, subject to an important limitation. The opening paragraph of Annex 1 provides that the "guiding principles in the Annex "do not set common minimum standards for … [the Parties'] domestic law."[137] It should also be recalled that the side agreement excludes freedom of association and collective bargaining from scope of the agreement's dispute resolution panel procedure.[138] This omission significantly undermines the scope of the NAFTA labour side agreement.

4. Conclusion

Human rights related trade measures are not, in principle, prohibited under international law. Obligations to respect human rights under general international law and

134 See, for example, Clapham, note 126 above, 669-671.

135 See Article 2 of the *North American Agreement on Labour Cooperation*, note 20 above.

136 Ibid, Article 1(b).

137 Ibid, Annex 1.

138 Ibid, Article 36(2)(b). Note also that the dispute resolution procedure under the side agreement only applies in respect of failures to enforce labour standards that are "trade-related", see, for example, Article 29 and the definition of "trade-related" in Article 49.

human rights treaties do appear to restrict the entitlement of States to impose such trade measures. The WTO Agreement and other trade treaties also place limits on when such measures can be imposed. The United States and the European Union employ various mechanisms linking trade and human rights. Serious concerns have been raised in relation to features of the United States and European Union instruments. Trade treaties entered by the United States and European Union have sought to link trade and human rights and appear to have avoided some of the problems afflicting their other instruments.

Concerns, however, remain which appear serious enough to warrant careful consideration of additional multilateral regulation and discipline. But proposals for additional regulation ought to be based on a clear understanding of the impact of existing regulation. Attention will now be turned to existing multilateral regulation of international trade so far as it impacts on human rights related trade measures.

Chapter 6

Human Rights Related Trade Measures under the Marrakesh Agreement Establishing the World Trade Organization

1. Introduction

This chapter examines how trade measures imposed to secure respect for human rights might be justified under existing provisions of the *Marrakesh Agreement Establishing the World Trade Organization* ("the WTO Agreement").[1] The chapter is important for two reasons. First, it will demonstrate that the existing provisions of the WTO Agreement do provide some basis for legally justifying human rights related trade measures under the WTO Agreement. The identification of the precise types of trade measures countenanced is an important aim of this book. The second reason that this chapter is important is that consideration of calls for reform regarding human rights related trade measures can only be properly undertaken once the contours of the existing WTO rules that impact on such measures have been carefully mapped out.

Examination of the impact of existing WTO rules on trade measures with a human rights focus will proceed on the following basis. The analysis will begin with a consideration of the WTO most favoured nation ("MFN") and non-discrimination rules. It will identify the obstacles that these rules pose for human rights related trade measures. One significant obstacle is that posed by the phrase "like products", which appears in a number of provisions of the WTO Agreement.[2] Once the question of "like products" and related questions have been addressed, the focus of the chapter will move to an examination of the following areas of WTO discipline:

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1 Done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994).

2 In the *General Agreement on Tariffs and Trade 1994*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid, there are at least 10 references to the term – Articles I, III:4, IV:1(a), VI:1(b)(i), VI:4, IX:1, XI:2(c), XIII:1, XVI:4.

- The regulation of subsidies and dumping;
- The rights of a party to the WTO Agreement to invoke WTO dispute resolution mechanisms when any benefit accruing to the party under the WTO Agreement is being nullified or impaired or where the attainment of any objective of the WTO Agreement is being impeded;
- The entitlement to take safeguard action;
- The exception for trade measures taken for security purposes;
- The general exceptions to WTO obligations that find their principal expression in Article XX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994");
- Waivers of obligations under the WTO Agreement; and
- Technical barriers to trade and the regulation of product labelling standards.

Whilst subsidies rules and the dispute resolution system offer potential legal justifications for human rights related trade measures, it is the general exceptions in Article XX of GATT 1994, in particular Article XX, paragraphs (a) and (b), that offer the greatest potential for justifying such trade measures under the WTO Agreement. Given the importance of Article XX, it will be subjected to the closest scrutiny.

2. Most Favoured Nation Obligation and National Treatment – Obstacles in the way of Human Rights Related Trade Measures

In a 1952 report of a "Panel on Complaints",[3] consideration was given to a complaint by Norway and Denmark that the application of a Belgian law was inconsistent with provisions of the original *General Agreement on Tariffs and Trade* ("GATT 1947").[4] The Belgian law in question imposed a 7.5% levy on products purchased by government bodies in Belgium where the products "originated in a country whose system of family allowances did not meet specific requirements."[5] Belgium did not apply the levy to products from GATT parties adjudged by Belgium to have systems of family allowance requiring the payment of contributions to the systems by manufacturers within those parties. The complainants argued that if the levy was not payable in respect of products from some GATT parties, the MFN principle in Article I:1 of GATT 1947 required the unconditional granting of the same benefit to all other GATT parties. The panel in paragraph 3 of its report observed that:

3 *Belgian Family Allowances (Allocations Familiales)*, adopted on 7 November 1952, GATT BISD, First Supplement, 59.

4 Entered into force on 1 January 1948 through the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, done at Geneva, 30 October 1947, 55 UNTS 308 (1950).

5 *Belgian Family Allowances (Allocations Familiales)*, note 3 above, 59, para 1.

> "[t]he consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowance and those which have a different system or no system at all, and made the granting of the exemption dependent on certain conditions."[6]

In its recommendation in paragraph 8 of its report, the panel made the following observation:

> "The Panel felt that the legal issues involved in the complaint under consideration are such that it would be difficult for the CONTRACTING PARTIES[7] to arrive at a very definite ruling. On the other hand, it was of the opinion that the Belgian legislation on family allowances was not only inconsistent with the provisions of Article I (and possibly those of Article III, paragraph 2), but was based on a concept which was difficult to reconcile with the spirit of the General Agreement …".[8]

The *Belgian Family Allowances Case* illustrates the obstacles posed by the MFN and national treatment obligations contained in Articles I and III of the GATT 1994. Under Article I, products from a party to the WTO Agreement must enjoy the same advantages, favours, privileges or immunities enjoyed by like products from other States. The approach taken by the panel in *Belgian Family Allowances Case* appears to require, for example, that there be no differentiation between products from different States on the basis of whether or not their manufacturers respect international human rights standards.

A similar approach has been taken under Article III (the national treatment provision). Whilst deference is accorded to States to allow them to differentiate between *domestically* produced goods for a range of regulatory purposes,[9] GATT jurisprudence appears to preclude the consideration of production or processing methods as a means of differentiating between locally produced and imported

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6 Ibid, 60.

7 For the use of capitals, see Article XXV:1 of GATT 1994, note 2 above. [Footnote not in original.]

8 *Belgian Family Allowances (Allocations Familiales)*, note 3 above, 61.

9 See generally Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, The World Trade Organization – Law, Practice, and Policy, 2nd ed, Oxford University Press, Oxford, 2006, 236-241; Robert E Hudec, GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, 32 International Lawyer 619 (1998); and Robert Howse and Elisabeth Tuerk, "The WTO Impact on Internal Regulations – A Case Study of the Canada – EC Asbestos Dispute" in Gráinne de Búrca and Joanne Scott (eds), The EU and the WTO – Legal and Constitutional Issues, Hart Publishing, Oxford, 2001, 283.

products.[10] Perhaps the clearest statement of this interpretation of Article III is found in the unadopted panel report in *United States – Taxes on Automobiles*.[11] At paragraph 5.54 the panel concluded that:

> "… Article III:4 does not permit treatment of an imported product less favourable than that accorded to a like domestic product, based on factors not directly relating to the product as such."[12]

On the policy supporting this conclusion, the panel observed that:

> "… this limitation on the range of domestic policy measures that may be applied also to imported products reflected one of the central purposes of Article III: to ensure the security of tariff bindings. Contracting parties could not be expected to negotiate tariff commitments if these could be frustrated through the application of measures affecting imported products subject to tariff commitments and triggered by factors unrelated to the products as such. If it were permissible to justify under Article III less favourable treatment to an imported product on the basis of factors not related to the product as such, Article III would not serve its intended purpose."[13]

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10 Apart, that is, from measures such as sanitary regulations governing, for example, the preparation of food. Both the *Agreement on the Application of Sanitary and Phytosanitary Measures* (Article 5.2 and Annex A) and the *Agreement on Technical Barriers to Trade* (Annex 1), refer to "processes and production methods." These agreements, however, appear to be limited in their application to such processes, *etc*, that potentially impact on the characteristics of the product. Both Agreements are annexures to (see Annex 1A) and integral parts of the WTO Agreement, note 1 above.

11 GATT Document DS31/R, 11 October 1994; reprinted in 33 ILM 1397 (1994).

12 This ruling follows similar rulings in the two unadopted Tuna Dolphin panel reports – *United States – Restrictions on Imports of Tuna*, BISD, 39th Supplement, 155, reprinted in 30 ILM 1597 (1991) (the "*First Tuna Dolphin Case*"), and 33 ILM 842 (1994) (the "*Second Tuna Dolphin Case*"); and appears to have been effectively endorsed in the panel report in – *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD, 39th Supplement, 208, paragraph 5.19. The ruling in the *Malt Beverages Case* on this point was cited with approval in the WTO panel report in *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, adopted by the Dispute Settlement Body on 23 July 1998, para 14.113. See the discussion of the relevant cases in Robert E Hudec, "The Product-Process Doctrine in GATT/WTO Jurisprudence" in Marco Bronckers and Reinhard Quick (eds), New Directions in International Economic Law – Essays in Honour of John H Jackson, Kluwer, The Hague, 2000, 187.

13 *United States – Taxes on Automobiles*, note 11 above, para 5.53.

On this approach measures that attempt to differentiate between imported and domestic products based on whether the particular imported product was produced in violation of labour related human rights, or was produced by an entity implicated in a violation of human rights, would fall foul of the national treatment requirement.[14] The products would remain "like products"[15] notwithstanding that some were associated with human rights violations, and human rights related trade restrictions would contravene Article III of GATT 1994 and equivalent provisions of other agreements set out in the annexes to the WTO Agreement.[16]

The "product/process distinction" has been the subject of academic criticism[17]

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14 In the context of human rights related measures, see, for example, Gabrielle Marceau, WTO Dispute Settlement and Human Rights, 13 European Journal of International Law, 753, 807-813 (2002); and Christine Breining-Kaufmann, "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 95, 108-109.

15 On the interpretation of the term "like product" in Article III:2 – see the Appellate Body's report in *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, adopted by the Dispute Settlement Body on 1 November 1996, 19-34. On the interpretation of the term in Article III:4, see *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 16 February 2001, adopted by the Dispute Settlement Body on 5 April 2001 ("the *Asbestos Case*"), paras 84-103. Human rights related trade measures are more likely to fall within the scope of Article III:4 and a differentiation between products based on respect for human rights standards would fall foul of the product/process doctrine.

16 See, for example, Article XVII of the *General Agreement on Trade in Services*, which is an annexure to (see Annex 1B) and an integral part of the WTO Agreement, note 1 above.

17 See, for example, Robert Howse and Donald Regan, The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy, 11 European Journal of International Law 249, 274-279 (2000). Professors Howse and Regan argue, *inter alia*, that the product/process distinction lacks textual support, ibid, 254. Professor Jackson has responded that "the very word 'product' … is text upon which [the product/process distinction] … could be justified" – John H Jackson, Comments on Shrimp/Turtle and the Product Process Distinction, 11 European Journal of International Law 303-304 (2000). Professors Howse and Regan also attack the policy justification of protecting tariff bindings – Howse and Regan, ibid, 263-264. They note, *inter alia*, that Article III applies to measures affecting goods even in the absence of tariff bindings and that the concern to protect tariff bindings could be addressed by non-violation complaints, ibid. Whether the parties to the WTO Agreement consider non-violation complaints an adequate form of protection of tariff bindings in the face of process based regulations is unclear. The practice of parties to the WTO Agreement is relevant to the interpretation of the treaty where such practice "establishes the agreement of the parties regarding" the treaty's interpretation – see Article 31(3) of the *Vienna Convention on the Law of Treaties*, done at Vienna on

and the Appellate Body's decision in the *Asbestos Case*[18] raises doubts as to the importance of the distinction when assessing whether measures are consistent with Article III of GATT 1994.[19] Notwithstanding these criticisms and doubts, human

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23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969); although compare Article IX:2 of the WTO Agreement, ibid. In his consideration of the product/process distinction, Professor Hudec emphasised the support of GATT parties for the *First Tuna Dolphin Case* – Hudec, note 12 above, 200. Professor Hudec also noted that the United States (the only State in the GATT Council in 1992 to speak against the panel report in the *First Tuna Dolphin Case*) had "adopted the product-process doctrine as part of its complaint against Canada" in the *Canadian Periodicals Case* – Hudec, ibid, 217. In light of the views of interested third States expressed in the *First Tuna Dolphin Case*, note 12 above, paras 4.2, 4.7, 4.12, 4.17 and 4.27, and the *Second Tuna Dolphin Case*, note 12 above, paras 4.5, 4.19, 4.23, and 4.28, regarding the relevance of Article III, and in light of the apparent absence of any State that supports the consideration of foreign production or processing methods in determining whether products are "like" for the purposes of Article III, the possibility of establishing agreement between the parties regarding the product/process distinction cannot be excluded. It should be noted, however, that the views of third States expressed on Article III in the *Tuna Dolphin* cases do not appear to have been uniform.

For additional references in support of or challenging the product/process distinction, see Hudec, ibid, 189-190, footnote 6. Professor Jackson observed in 2000 that "the product-process distinction will probably not survive and perhaps *should* not survive" – The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights, Remarks by John H Jackson, 94 American Society of International Law Proceedings 222, 224 (2000). [Emphasis in original.]

18 See the *Asbestos Case*, note 15 above, para 100.

19 According to Professors Howse and Tuerk:

> "… the [Appellate Body] … has made it clear that even where *products* are in a close enough competitive relationship to be considered 'like', members of that class or group of 'like' products may still be distinguished in regulation, provided that the result is not less favourable treatment, understood as protection of domestic production. This in effect blunts, without explicitly repudiating, the product/process distinction – the much criticised idea, found in the unadopted *Tuna/Dolphin* panels, that process-based trade restrictions can never be considered as internal regulations consistent with the National Treatment standard of Article III. Even if products that have different process and production methods are considered to be like under Article III:4, … regulatory distinctions may be made between them, on *any* grounds, provided the result is *non-protectionist*"

– Howse and Tuerk, note 9 above 297-298. [Italics in original and footnote not reproduced.]

According to the Appellate Body in both the *Asbestos Case*, ibid, para 97 and *Japan – Taxes on Alcoholic Beverages*, note 15 above, 16, the proscription of protection in Article III requires "equality of competitive conditions for imported and domestic products in relation to domestic products". If the interpretation of the Appellate Body's report offered by Professors Howse and Tuerk is correct then consistency with Article III appears to depend, in part, on whether a national regulation continues to allow the production process in question in the regulating State and local products continue

rights related trade measures appear unlikely to satisfy the requirements of Article III.[20]

Similarly, restrictions on the importation of goods on the grounds that they had been produced in violation of labour related human rights, or had been produced by an entity implicated in human rights violations, would amount to quantitative restrictions that would be caught by Article XI of GATT 1994. In the absence of any alternative justification, restrictions of this kind would be GATT inconsistent.

Attention will now be turned to possible justifications under the WTO Agreement for measures that may otherwise violate Articles I, III and XI of GATT 1994.

3. Subsidies and Dumping

(a) Introduction

Notwithstanding the provisions of Articles I and III of GATT 1994,[21] parties to the WTO Agreement are entitled to impose anti-dumping and countervailing duties on certain imports entering their territory. In addition, the WTO Agreement prohibits certain types of subsidies offered by governments. The operation of the WTO dumping and subsidy rules was briefly described in Chapter 3. The relevant rules are found in Articles VI and XVI of GATT 1994, the agreements on subsidies[22] and

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to be produced in accordance with that process. If so, consistency with Article III is possible. If not, then violation of Article III appears more likely. It is difficult to see how such an approach would assist an argument that human rights related trade measures have been imposed consistently with Article III of GATT 1994.

In addition, Professors Howse and Regan emphasise that "[i]n defending process-based measures, we are not defending every measure that makes some reference to processing method. In particular, we are not defending what we shall call 'country-based' measures, such as a prohibition on the importation of tuna from any country that allows dolphin-unfriendly tuna fishing. Under such a 'country-based' measure, the importability of any particular shipment of tuna depends not on how that tuna itself was caught, but rather what country it is from. This is discrimination along national lines; it is *prima facie* illegal under Article III; and if it is to be legal it requires justification under Article XX. … So what we refer to as 'process-based' measures are what would standardly be referred to as origin-neutral process-based measures" – Howse and Regan, note 17 above, 252. See also Breining-Kaufman, note 14 above, 108-109; and Gabrielle Marceau, "The WTO Dispute Settlement and Human Rights" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 181, 217-219.

20 See the discussion in notes 17 and 19 above.

21 On the relationship between these articles and articles dealing with dumping and subsidies, see GATT, Analytical Index: Guide to GATT Law and Practice, 6th ed, Geneva, 1995, Volume 1, 249-250.

22 The *Agreement on Subsidies and Countervailing Measures*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 1 above.

dumping,[23] and a number of WTO ministerial declarations and decisions.[24] There are also provisions dealing with subsidies in the *Agreement on Agriculture*.[25]

The dumping and subsidies regimes have been suggested as potential sources of legal justification for human rights related trade measures. The following analysis will demonstrate that under existing WTO rules, *dumping*, which involves non-governmental conduct, does not extend to practices such as the suppression of human rights standards by a manufacturer of goods for export. Anti-dumping duties, therefore, cannot be levied in an importing State on imported goods on the grounds that the manufacturer of those goods suppressed, for example, the freedom of association of its employees.

The WTO rules regulating *subsidies*, which involve governmental, as opposed to non-governmental, conduct, may, however, provide some legal justification for human rights related trade measures. In the case of an exporting State that formally suppresses labour-related human rights standards in a specific geographic area, for example, in "export processing zones", existing rules regulating prohibited and actionable subsidies would appear to be potentially applicable. The discussion of subsidies will conclude with the consideration of a number of difficulties faced by efforts to justify human rights related trade measures under the WTO subsidies regime.

(b) Dumping

It was noted in Chapter 3 that those who drafted of the International Trade Organization Charter in the 1940s distinguished between four different forms of dumping.[26] Of relevance to attempts to justify human rights related trade measures is the difference between "social" and "price" dumping. According to Professor Jackson:

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23 The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid.

24 See the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, which are reproduced in World Trade Organization, The Legal Texts, note 1 above, 397.

25 See, for example, Articles 1, 9 and 13 of the *Agreement on Agriculture*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 1 above.

26 Price, service, exchange rate and social dumping – see John H Jackson, World Trade and the Law of GATT, Bobbs Merrill, Indianapolis, 1969, 404.

> "'[s]ocial dumping' referred to the use of prison or sweated labor to produce goods which could therefore be sold at very low prices."[27]

The trade negotiators in the 1940s decided not to regulate social dumping and focussed instead exclusively on price dumping.[28] Safeguard measures were seen as an alternative and short-term method to deal with social dumping.[29]

The focus in the original GATT upon price dumping is reflected in GATT 1994 and in the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Agreement on Dumping"). As noted in Chapter 3, an essential requirement in the identification of dumping is the requirement that the imported goods be "introduced into the commerce of another country at less than … [the] normal value [of the imported products]."[30] For the purposes of the imposition of anti-dumping duty it is necessary to calculate the "dumping margin". The "dumping margin" is determined by a comparison between the price of the goods in the importing State and one of three possible reference points:

– "… the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country …",[31] or in the absence of such a comparable price;
– "… a comparable price of the like product when exported to an appropriate third country, provided that this price is representative …;"[32] or
– "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[33]

The focus of each of these reference points is the *actual* price of goods that are comparable to the imported goods.[34] The reference to actual prices of compara-

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27 Ibid. Professor Jackson goes on to note that the delegates drafting the International Trade Organization Charter "had particularly in mind Japanese practices of producing with low price labor, government subsidies and manipulating exchange rates, and the German practice of dumping to prevent the establishment of the chemical industry in other countries" – ibid, footnote 9.

28 Ibid, 405.

29 GATT, Analytical Index, note 21 above, Volume 1, 222.

30 Article 2 of the *Agreement on Dumping*, note 23 above; the equivalent provision in GATT 1994 is Article VI:1.

31 Article 2.1 of the *Agreement on Dumping*, ibid.

32 ibid, Article 2.2.

33 Ibid.

34 Compare Article VI:1 of GATT 1994, and Articles 2(d) and 2.4 of the 1967 and 1979 Agreements on Implementation of Article VI, respectively – see the Kennedy Round *Agreement on Implementation of Article VI*, done at Geneva 13 June 1967, BISD, 15th Supplement, 24, and the Tokyo Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, done at Geneva, 12 April 1979, BISD, 26th Supplement, 171. Note in particular Article 2.2.2 *Agreement on Dumping*, ibid.

ble goods would therefore appear to preclude attempts to create a notional price that reflects supposed increased costs of labour, for example, when labour related human rights are respected.

It is possible that a State seeking to impose anti-dumping duty could attempt to inflate the profit component of the constructed price in order to reflect lower costs due to the suppression of labour-related human rights and thus increase the dumping margin. The *Agreement on Dumping* provides, however, that in the determination of a constructed price "the amount for profit … shall not exceed the profit normally realised by other exporters or producers on sale of the like product in the domestic market of the country of origin."[35] The dumping margin could not therefore be inflated where profit margins prevailing in the relevant industry of the country of origin do not reflect lower labour costs secured through human rights violations.

(c) Subsidies

There appears to be more scope for countervailing duty action or challenge through the WTO dispute settlement system in relation to the suppression of labour related human rights. Countervailing duty action appears possible in respect of States that formally suppress labour related human rights in specific geographic regions within their territory in order to enhance exports. So-called "export processing zones" have been established in a number of developing States.[36]

Article 1 of the WTO *Agreement on Subsidies and Countervailing Measures* ("*Agreement on Subsidies*") provides that a subsidy shall be deemed to exist if "… there is a financial contribution by a government or any public body within the territory of a member …". This includes where "a government provides goods or services other than general infrastructure …".[37] Income or price support is also deemed to be a subsidy.[38] The *Agreement on Subsidies* distinguishes between three different types of subsidy:

– prohibited subsidies;
– actionable subsidies; and
– non-actionable subsidies.

Article 3 of the *Agreement on Subsidies* addresses prohibited subsidies. Prohibited subsidies include "… subsidies contingent in law or in fact … upon export performance, including those illustrated in Annex I …" of the agreement.[39] Annex I

35 Article 2.2.2(iii) of the *Agreement on Dumping*, ibid.

36 See the report of the Organisation for Economic Co-operation and Development, Trade, Employment and Labour Standards, OECD, Paris, 1996, 99-101, ("1996 OECD Report").

37 Article 1.1(a)(1)(iii) of the *Agreement on Subsidies*, note 22 above.

38 Article XVI:1 of GATT 1994, note 2 above.

39 Article 32.8 of the *Agreement on Subsidies*, note 22 above, provides that "[t]he Annexes of this Agreement constitute an integral part thereof."

of the *Agreement on Subsidies* is entitled "Illustrative List of Export Subsidies." Paragraph (d) of the Annex characterises the following as an export subsidy:

> "The provision by governments or their agencies either directly or indirectly through government–mandated schemes, … of services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive … services for use in the production of goods for domestic consumption … ."

Article 4.7 of the *Agreement on Subsidies* provides that where a measure is found to be a prohibited subsidy, a panel considering the measure "shall recommend that the subsidising member withdraw the subsidy without delay." If a subsidy is not prohibited it may still, however, be subject to countervailing duty proceedings.[40]

The 1996 report of the Organisation for Economic Co-operation and Development entitled "Trade, Employment and Labour Standards",[41] identifies the "income or price support" provisions of the *Agreement on Subsidies* as possible avenues for the linking of trade and human rights under the existing subsidies rules. The 1996 OECD Report concludes that:

> "[i]t is unclear how any measure to *reduce* core labour standards could constitute *income* 'support'. It is also difficult to envisage how the criterion of 'price support' could be satisfied, given that non-enforcement of core standards is not a governmental measure that supplies assistance to firms or producers through regulation of prices."[42]

The interpretative note to Article XVI[43] supports the suggestion that "price support" involves *direct* government support of prices and would not extend to the non-enforcement of labour standards.[44]

An alternative argument not considered in the OECD report is that countervailing duty may be levied against products manufactured in export processing

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40 See, for example, GATT, Analytical Index, note 21 above, Volume 1, 251; and John H Jackson, William J Davey and Alan O Sykes Jr, Legal Problems of International Economic Relations, 4th Edition, West Group, St Paul, 2002, 776 ("Jackson *et al*").

41 The 1996 OECD Report, note 36 above.

42 Ibid, 172. [Emphasis in original.]

43 Interpretative note 2 to paragraph 3, *Ad Article XVI*; reprinted in World Trade Organization, The Legal Texts, note 1 above, 484.

44 Against this conclusion it may be noted that the Second Report of the Group of Experts on "Anti-Dumping and Countervailing Duties" indicated that the Experts "… agreed that the word 'subsidies' covered not only actual payments, but also measures having an equivalent effect" – quoted in GATT, Analytical Index, note 21 above, 1995, Volume 1, 239. This statement indicates that what qualifies as a subsidy extends beyond actual government payments. It does not, however, offer any justification for a liberal interpretation of what constitutes "price support."

zones in cases where governments suppress labour-related human rights in such zones thus providing an *indirect* form of service assistance. It is arguable that this would involve the "indirect" provision through a "government mandated scheme" of labour "services" on "terms more favourable" than those prevailing in areas outside the zones,[45] and would thus come within the terms of Annex I(d) of the WTO *Agreement on Subsidies*.

The 1960 GATT Working Party illustrative list of subsidies did not include practices equivalent to those referred to in Annex I(d) of the WTO *Agreement on Subsidies*.[46] The 1979 Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*[47] also contained an illustrative list of "export" subsidies. Paragraph (d) of this list is similar to paragraph (d) of Annex I of the WTO *Agreement on Subsidies*.[48] The 1979 list covered the "delivery" by governments of "services for use in the production of exported goods" on favourable conditions. It will be recalled that Annex I(d) of the WTO *Agreement on Subsidies* refers to the favourable "provision" by governments "directly or indirectly" of "services for use in the production of exported goods." The reference to "provision … indirectly" therefore appears to be an expansion upon the terms of the equivalent provision in the Tokyo Round agreement. The words "directly or indirectly" appear to have been first inserted in the Uruguay Round draft text of 20 December 1991[49] and were apparently included to "clarify" the position in the Tokyo Round agreement.[50]

The ordinary meaning of the words used in Annex I(d) suggests that the services in question must be provided *by a government* and the provision of labour by workers would not therefore be covered. This conclusion is supported by the terms

45 This argument is only available in cases where a government suppresses labour standards in export processing zones, lowering them below the level prevailing in other parts of the same country.

46 The 1960 list is reproduced in Jackson, World Trade and the Law of GATT, note 26 above, 385.

47 Done at Geneva on 12 April 1979, reprinted in BISD, 26th Supplement, 56.

48 Paragraph (d) of Annex to the Tokyo Round agreement, ibid, referred to:

> "[t]he delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters."

49 The so-called "Dunkel Draft Text", reproduced in Terrence P Stewart (ed), The GATT Uruguay Round: A Negotiating History (1986-1992), Kluwer, Deventer, 1993, Volume III, Documents, 457.

50 Patrick J McDonough, "Subsidies and Countervailing Measures" in Stewart, ibid, Volume I, Commentary, 803, 888.

of Articles 1.1(a)(1)(iii) and 14(d) of the *Agreement on Subsidies* that both refer to the provision of services *by a government*.[51]

Nonetheless, the presence of the word "indirect" in Annex I(d) of the WTO *Agreement on Subsidies* leaves open the possibility that, provided the subsidy is also "specific" (discussed below), government suppression[52] of labour related human rights in an export processing zone would qualify as an export subsidy.[53] This has additional significance because under the *Agreement on Subsidies* parties to the WTO Agreement are required not to maintain export subsidies.[54] Developing States are required to phase out export subsidies within eight years of the entry into force of the WTO Agreement. "Least-developed countries" are exempted from this phase out requirement.[55]

The WTO *Agreement on Subsidies* requires that for a government subsidy to be actionable, the subsidy must be "specific."[56] Specificity is addressed in Article 2 of the agreement. Article 2.2 provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." The formal suppression of labour

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51 Compare also proposed United States regulations put forward in 1989 which were again specifically addressed to services provided by governments – see John H Jackson, William J Davey and Alan O Sykes Jnr, Legal Problems of International Economic Relations, 3rd Edition, West Publishing, St Paul, 1995, 802. See also the account of the negotiations on the definition of subsidy during the Uruguay Round in John Croome, Reshaping the World Trading System – A History of the Uruguay Round, 2nd ed, Kluwer, The Hague, 1999, 172-173. Only two WTO panel reports appear to specifically consider Annex I(d) – *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, 17 May 1999, adopted by the Dispute Settlement Body, as modified by the Appellate Body report, on 27 October 1999, and (in the same dispute) the *Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, 26 July 2002. In these reports the panels were considering complaints under the *Agreement on Agriculture*, and the *Agreement on Subsidies* was only indirectly relevant. Further, the panels were considering the provision by the Canadian government of "products" and not "services". The reports do not appear to rule out the interpretation of Annex I(d) being currently considered.

52 It is not clear whether this interpretation of the *Agreement on Subsidies* would only extend to formal legislative suppression of labour related human rights or would extend to non-enforcement of standards notionally applicable.

53 It would appear that the contingency requirement in Article 3 of the *Agreement on Subsidies*, note 22 above, would also be satisfied – see panel report in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, note 51 above, para 5.154.

54 See Article 3.2 of the *Agreement on Subsidies*, ibid.

55 Article 27.2 and Annex VII of the *Agreement on Subsidies*, ibid.

56 Article 1.2 of the *Agreement on Subsidies*, ibid.

related human rights within an export processing zone would meet this specificity requirement. Paradoxically, general suppression throughout a State of labour standards would appear to preclude the finding of a subsidy covered by the *Agreement on Subsidies* due to the lack of specificity.

Before countervailing duty can be imposed on subsidised products, the importing State must establish that the subsidy has caused or threatens "material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."[57] Any countervailing duty imposed cannot exceed the level of subsidisation.[58]

Calculation of the amount of countervailing duty based on suppression of labour related human rights standards raises certain difficulties, but comparisons with labour costs in other parts of the exporting State could provide some basis for calculation. Another practical difficulty arises where low labour related human rights standards in an export processing zone are not formally suppressed but are simply not enforced with the same vigour as in other parts of the exporting State. Allowing a countervailing duty action in such circumstances raises significant evidentiary difficulties. How is a countervailing duty authority to assess the consistency of enforcement of human right related labour standards in a developing State? The WTO *Agreement on Subsidies* includes detailed provisions designed to improve the fairness of national countervailing duty actions.[59] Many of these rules appear capable of application to countervailing duty proceedings brought in respect of non-enforcement of labour standards in export processing zones. It is difficult, however, to imagine any State being able to emulate the monitoring of the International Labour Organization ("ILO") and reliance on the conclusions of ILO investigations would appear to be a sensible alternative.

In addition to problems of proof, there are a number of other practical problems that would confront attempts to justify human rights related trade measures *via* the subsidies regime. In many States countervailing duty actions may be initiated by non-governmental entities. The risks of protectionist capture of anti-dumping and countervailing duty procedures have long been recognised.[60] Protectionist concerns are to some extent addressed by the procedural requirements of the *Agreement on Subsidies* that are designed to ensure the fairness of countervailing duty actions. For the purposes of this chapter, however, protectionist concerns are not directly relevant given that consideration is now being directed at what the existing provisions of the WTO Agreement currently allow by way of human rights related trade measures.[61]

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57 Article VI:6(a) of GATT 1994, note 2 above.

58 Article 19.4 of the *Agreement on Subsidies*, note 22 above.

59 Articles 11 to 23 of the *Agreement on Subsidies*, ibid.

60 See Jackson, World Trade and the Law of GATT, note 26 above, Chapter 16.

61 Whilst the risk of serious protectionist abuse flowing from a particular interpretation of the WTO Agreement could be relied upon in interpreting the Agreement "in light of its object and purpose", given the fairness guarantees noted above it seems unlikely

From a human rights perspective it may be noted that prohibition of, and countervailing duty actions directed at, government suppression of labour related human rights in export processing zones are limited in a number of ways. First, only government sanctioned labour rights violations in export processing zones are targeted. Labour rights violations outside the specific zones would not be the subject of subsidy complaint.

Secondly, the focus of countervailing duty action would be against particular products associated with the suppression of labour related human rights. A focus upon particular "tainted" products was considered in Chapter 4.

Thirdly, countervailing duty action is unavailable, notwithstanding suppression of labour related human rights, in the absence of proof of actual or threatened "material injury" caused by the importation of "tainted" products. The existence of a prohibition of export subsidies reduces the significance of this limitation on the imposition of duties on subsidised products.

The tolerance of export subsidies used by least developed countries remains an anomalous feature of existing WTO rules when viewed from a human rights perspective.[62] This point serves to illustrate the distinctly commercial focus of existing WTO rules on subsidies and the difficulties in enlisting such commercially oriented rules for non-commercial purposes.

4. WTO Dispute Resolution – Nullification or Impairment of Members' Benefits under the WTO Agreement or Impeding Attainment of Any Objective of the WTO Agreement

In the general discussion of international trade rules in Chapter 3, reference was made to the potential for justifying human rights related trade measures *via* Article XXIII of GATT 1994. As noted in Chapter 3, Article XXIII:2 provided the basis for the elaborate dispute resolution mechanisms that developed in the context of GATT 1947. The Uruguay Round negotiations supplemented Article XXIII with the *Understanding on Rules and Procedures Governing the Settlement of Disputes*[63] ("DSU"). The DSU effectively applies the rules contained in Article XXIII of GATT 1994, as developed in GATT practice, to the WTO Agreement and all its annexed agreements.[64] The DSU also sets out the formal procedures for the establishment and operation of panels and the WTO Appellate Body.

Article XXIII:1 of GATT 1994 still sets out the basic requirements for successful reliance on WTO dispute settlement. Under GATT 1994 a party to the

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that an interpretation of the *Agreement on Subsidies* allowing suppression of labour related human rights to be treated as a subsidy would increase significantly the risk of protectionist abuse.

62 See Article 27.2 of the *Agreement on Subsidies*, note 22 above.

63 Annexed to (see Annex 2) and an integral part of the WTO Agreement, note 1 above.

64 With modifications for particular agreements – see Articles 3.1 and 1.2 of the DSU, ibid.

WTO Agreement that seeks to successfully rely on WTO dispute settlement must show that:

> "… [a] benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any other situation."

Thus, where a party to the WTO Agreement believes that the attainment of any objective of GATT 1994 is being impeded by the existence of a situation, even where it does not involve a violation of the GATT, the dispute resolution procedures under Article XXIII and the DSU can be invoked. It was suggested in 1946, during the negotiation of the provision equivalent to GATT Article XXIII in the International Trade Organization ("ITO") Charter, that an objective of the Charter could "possibly" be nullified or impaired "… where exports were underselling another exporting country's products because of substandard labour conditions".[65]

As noted in Chapter 3, in 1953 the United States tried unsuccessfully to have inserted into the GATT 1947 a "fair" labour article that was along similar lines to Article 7 of the ITO Charter:

> "The contracting parties recognize (1) that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit, and (2) that unfair labor conditions (ie, the maintenance of labor conditions below those which the productivity of the industry and the economy at large would justify), particularly in production for export, may create difficulties in international trade which nullify or impair benefits under this Agreement. In matters relating to labor standards that may be referred to the Contracting Parties under Article XXIII, they shall consult with the International Labour Organization."[66]

Following the rejection by other GATT parties of this proposed amendment to the GATT 1947, the United States asserted that the existing procedure for bringing complaints under the GATT (Article XXIII) could be invoked in cases of trade

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65 Jackson, World Trade and the Law of GATT, note 26 above, 168.

66 Set out in Commission on Foreign Economic Policy [United States], Staff Papers Presented to the Commission on Foreign Economic Policy, February 1954, Washington, 437-438. For an account of the circumstances surrounding the United States proposal, see Elissa Alben, Note – GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link, 101 Columbia Law Review 1410, 1432-1440 (2001).

problems that were caused by competition resulting from "unfair" labour standards.[67]

Notwithstanding this support for attempts to justify human rights related trade measures *via* Article XXIII, there are at least three obstacles in the way of an attempt to justify such measures in this manner. First, the drafting history and the practice of GATT parties weaken the argument that Article XXIII provides a basis for justifying human rights related trade measures. Secondly, the interpretation given to Article XXIII by GATT and WTO panels and the WTO Appellate Body appear to limit the possibility that GATT Article XXIII (and equivalent provisions) could be applied in relation to violations of human rights. Finally, the DSU appears to further restrict reliance on Article XXIII (and equivalent provisions) as a means to justify such trade measures.

(a) Drafting History and Practice of GATT Parties

The link between the words "the attainment of any objective of the Agreement is being impeded" in Article XXIII:1 and "substandard labour conditions" was only made tentatively in 1946 at the first session of the Preparatory Committee of the International Conference of Trade and Employment. At this stage, the Preparatory Committee was not drafting the GATT but was focussed instead on the more comprehensive Charter of the proposed international trade organisation, which was to address not just tariffs and related trade issues, but also "irregularity or fear of irregularity in … employment."[68] When the GATT was negotiated in 1947, its focus was narrower and consequently its objectives appear narrower than the

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67 Commission on Foreign Economic Policy, ibid, 438. The relevant United States Staff Paper makes the following observations on the rejection of the clause proposed by the United States:

> "Whilst this clause was not agreed to because of the unwillingness of countries to define what 'unfair' competition is prior to seeing specific cases, it was made clear that the existing procedure for bringing complaints under GATT (Article 23) could be invoked in the case of a trade problem that was caused by competition on the basis of 'unfair' labor standards. This interpretation was reiterated by Assistant Secretary of State Waugh before the GATT Contracting Parties in September 1953" – Labor Standards and International Trade, 433, 438.

68 Jackson, World Trade and the Law of GATT, note 26 above, 41. Professor Jackson describes four factors that the United States identified in its 1945 proposal for an "International Trade Organization" as inhibiting international trade. According to Professor Jackson, in addition to the factor quoted above, the United States proposal listed "(1) Restrictions imposed by governments; (2) Restrictions imposed by private combines and cartels; (3) Fear of disorder in the markets for certain primary commodities…" – Jackson, ibid. The United States proposals of 1945 appear to have been reflected in the 1946 United States draft Charter considered by the Preparatory Committee established by the United Nations Economic and Social Council in 1946. The Economic and Social Council's resolution establishing the Preparatory Committee called on the Committee, *inter alia*, to prepare a draft charter. This resolution was moved by the United States. See Preparatory Committee of the United Nations

"objectives" of the ITO Charter. It is not clear, however, whether the objectives of the GATT are so narrow as to preclude reliance on Article XXIII in order to respond to damage caused by "unfair labour standards".

GATT/WTO practice could also be referred to in support of the argument denying linkage under Article XXIII. Notwithstanding the position of the United States in 1953, no State appears to have formally invoked Article XXIII and GATT/WTO dispute resolution procedures in response to "unfair labour standards". That the argument may not have been formally invoked in over 50 years of GATT/WTO practice appears to be significant. However, non-invocation alone is insufficient to establish an agreement of GATT parties that Article XXIII does not allow for trade and labour linkage.[69] Further evidence is required in order to establish the reasons why GATT parties have not invoked Article XXIII in relation to labour standards. There appears to be no conclusive evidence that GATT parties agreed that Article XXIII was unavailable as a response to "unfair" labour standards. Certainly from the United States perspective (given its statement in September 1953) it would appear to be impossible to argue that such an agreement involving *all* GATT parties has ever been reached.[70]

There may in fact have been significant subsequent practice in support of interpreting Article XXIII as providing some justification for human rights related trade measures. The United States appears to have asserted that in 1953 GATT parties made it "clear" that Article XXIII "could be invoked in the case of a trade problem that was caused by competition on the basis of 'unfair' labor standards."[71] If this assertion by the United States is correct then it may well be that the practice of GATT parties in 1953 manifested their agreement to allow Article XXIII to be raised in response damage caused by "unfair" labour standards.

Uncertainty surrounding whether Article XXIII extends to "unfair" labour standards appears to parallel similar uncertainty as to whether Article XXIII is available as a response to restrictive trade practices. In addition to its provisions relating to "fair labour standards",[72] the ITO Charter also sought to regulate restric-

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Conference on Trade and Employment, Report of the First Session, London 1946, 3, 42 and 52.

69 Under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*, note 17 above, "… any subsequent practice in the application of … [a] treaty which establishes the agreement of the parties regarding its interpretation …" is relevant in interpreting the treaty.

70 The United States apparently still considers it has the right to invoke Article XXIII in such circumstances – see the 1996 OECD Report, note 36 above, 175.

71 See note 67 above. Some (ambiguous) support for this contention can also be found in the Working Party Report – Organizational and Functional Questions, adopted 28 February, and 5 and 7 March 1954, BISD, 3rd Supplement, 231-252, paragraphs 27 to 32.

72 See Article 7 of the *Havana Charter for an International Trade Organization*, United Nations Conference on Trade and Employment, Final Act and Related Documents, Havana 1948.

tive business practices.[73] Both labour standards and restrictive business practices, however, failed to find a place in the provisions of GATT 1947.[74]

In 1958 the GATT contracting parties appointed a group of experts to study and report on restrictive business practices in international trade.[75] In their report,[76] which was adopted in 1960, the experts were divided on the role of Article XXIII. The majority did not believe that they were "competent to judge" whether Article XXIII could be relied upon in response to restrictive business practices.[77] The minority considered that Article XXIII was potentially applicable.[78] They appear to have based their conclusion on the 1958 decision of the Contracting Parties (appointing the group of experts) which recognised that restrictive business practices may "…

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73 See Chapter V of the *Havana Charter for an International Trade Organization*, ibid.

74 With the potential exception of Article XX – see the discussion below.

75 Resolution of the Contracting Parties on 5 November 1958, BISD, 7th Supplement, 29.

76 Restrictive Business Practices – Arrangements for Consultations, adopted 2 June 1960, BISD, 9th Supplement, 170-179.

77 Ibid. The position of the majority (experts from Austria, Canada, Germany, Japan, the Netherlands, Switzerland, the United Kingdom and the United States) was set out in the report at para 8:

> "The majority felt that, as experts on restrictive business practices rather than on the legal aspects of GATT, the Group were not competent to judge whether restrictive business practices were a matter that would be deemed to fall under any specific provisions of GATT – for example, whether the provisions of Article XXIII would be applicable. However, the majority were convinced that, regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which would have to be made without adequate factual information about the restrictive practice in question, with consequent counter-productive effects on trade."

The majority explained their opposition to any multilateral approach to resolving problems arising from restrictive business practices in para 7.

78 Ibid, para 18. The minority (experts from Denmark, France, Norway and Sweden) drafted a proposal for consultations between GATT parties to resolve disputes over damage caused by restrictive business practices. In relation to Article XXIII the minority made the following observations:

> "[t]he minority have drafted their proposal in order that it should, to the greatest possible extent, contribute to the achievement of voluntary settlements. If, unfortunately, no such settlement can be reached the question arises whether the damaged contracting party may refer the matter to the CONTRACTING PARTIES. The minority hold the view that in such cases the provisions of paragraph 2 of Article XXIII are applicable. According to the first part of this paragraph the CONTRACTING PARTIES shall, when matters are referred to them, make appropriate recommendations to the contracting parties concerned. While referring to these provisions, the minority advise against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2" – ibid.

frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement …".

On 18 November 1960, the GATT Contracting Parties[79] adopted a decision on consultations in relation to restrictive business practices, but that decision did not refer to Article XXIII.[80] It did, however, repeat the claim that such practices may frustrate the benefits of tariff commitments, disciplines in relation to quotas or otherwise interfere with the objectives of the GATT. If it is possible to raise disputes over restrictive business practices under Article XXIII, it is difficult to see why the same reasoning cannot be applied to disputes over "unfair" labour standards.

(b) Panel and Appellate Body Interpretations of Article XXIII

A second obstacle in the way of justifying human rights related trade measures *via* GATT Article XXIII relates to panel and Appellate Body interpretations of the terms of Article XXIII itself. The normal way in which Article XXIII:2 is invoked is *via* Article XXIII:1(a) where nullification or impairment of a party's benefits under the GATT occurs due to breach of the agreement by another party. As has been already noted, the GATT did not include specific labour related obligations such as those found in Article 7 of the ITO Charter. Article XXIII:1(a) therefore does not appear to be relevant to attempts to justify human rights related trade measures *via* Article XXIII.

Efforts to justify such trade measures could, however, be based on Article XXIII:1(b), which applies to so-called "non-violation nullification or impairment". Article XXIII:1(b) does not require a party seeking relief to establish a *violation* of the GATT provided that the measure in question nullifies or impairs a benefit accruing to it under the GATT.

The 1990 panel report in *European Economic Community – Payments and Subsides Paid to Processors and Producers of Oil Seeds and Related Animal Feed Proteins*[81] observed that:

> "… the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement … as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by

79 Acting under Article XXV of GATT 1947, note 4 above.

80 Restrictive Business Practices – Arrangements for Consultations, adopted on 18 November 1960, BISD, 9th Supplement, 28-29.

81 Adopted on 25 January 1990, BISD, 37th Supplement, 86.

> another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement."[82]

The WTO Appellate Body report in the *Asbestos Case*[83] approved of an earlier WTO panel report that concluded that Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".[84] The Appellate Body appeared to accept[85] the view expressed by the earlier panel report that the reason for this caution was "straightforward":

> "[m]embers negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[86]

The panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), summarised the requirements of Article XXIII:1(b) in the following terms:

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."[87]

The requirement of a government measure has been given a broad construction and has been held to extend to non-financial measures.[88] It is possible that government

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82 Ibid, para 144. [Footnotes not reproduced.] The second part of the above quotation was cited approvingly by the WTO Appellate Body in its report in the *Asbestos Case*, note 15 above, para 185.

83 *The Asbestos Case*, ibid, para 186.

84 *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted by the Dispute Settlement Body on 22 April 1998, para 10.37.

85 The *Asbestos Case*, note 15 above, para 186.

86 *Japan – Measures Affecting Consumer Photographic Film and Paper*, note 84 above, para 10.36.

87 Ibid, para 10.41. [Footnote not reproduced.]

88 Ibid, paras 10.42 to 10.59. At para 10.38 the panel noted that most cases of non-violation nullification or impairment involved the granting of a government subsidy that undermined the value of a tariff concession. The panel noted, however, that the measure need not be financial:

> "… we do not *a priori* consider it inappropriate to apply the Article XXIII:1(b) remedy to other governmental actions, such as those designed to strengthen the competitiveness of certain distribution or industrial sectors through non-financial assistance. Whether assistance is financial or non-financial, direct or indirect, does not determine whether its effect may offset the expected result of tariff negotiations. Thus, a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset

suppression of labour-related human rights would qualify under this first requirement.

The second requirement of a "benefit" under a WTO agreement[89] may be restrictively interpreted. All but one[90] of the GATT 1947 panel reports dealing with non-violation nullification or impairment involved claims by GATT parties that tariff concessions negotiated under Article II of the GATT were being nullified or impaired by conduct of another GATT party.[91] This requirement appears to encompass all benefits that a GATT party could reasonably anticipate as arising from tariff negotiations.[92]

Restricting Article XXIII:1(b) to benefits related to tariff commitments would restrict the applicability of the remedy to address violations of labour-related human rights. The remedy would only be available where a party to the WTO Agreement suppresses its labour standards in a manner that undermines the reasonable market access expectations flowing from tariff commitments. It would not, for example, extend to labour-related human rights violations in export industries, as these would not affect access to the violating State's markets.

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the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action under Article XXIII:1(b)."

The WTO Appellate Body in its report in the *Asbestos Case*, note 15 above, observed at para 189 that "… [we do not] see merit in the argument that, previously, only 'commercial' measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim cannot be made under Article XXIII:1(b) regarding a 'non-commercial' measure." In this case the Appellate Body accepted that Article XXIII:1(b) could, in principle, apply to French measures pursuing health objectives.

89 For the remainder of this section I will use the expression "WTO agreement" in the sense used by the panel in *Japan – Film*, *ie* to refer to the agreements annexed to the WTO Agreement.

90 The only exception was the panel report in *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L5776, not adopted, finding that Article XXIII:1(b) was applicable in respect of nullification or impairment of benefits under Article I of the GATT – see GATT, Analytical Index, note 21 above, Volume 2, 661-2. The European Community apparently blocked adoption of this report precisely because it involved reliance on Article XXIII:1(b) outside of the context of tariff commitments.

91 It appears that at least two WTO panel reports and one Appellate Body report have addressed Article XXIII:1(b) or an equivalent provision. The panel in *Japan – Film*, note 84 above, and the Appellate Body in the *Asbestos Case*, note 15 above, considered claims of nullification and impairment of tariff concessions. The panel report in *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted by the Dispute Settlement Body on 19 June 2000, considered claims of nullification or impairment of access commitments allegedly given under the "plurilateral" *Agreement on Government Procurement*, annexed (see Annex 4) to the WTO Agreement, note 1 above.

92 *Japan – Film*, note 84 above, paras 10.72-10.81.

Even if the "benefits" under WTO agreements that may be the subject of Article XXIII:1(b) claims extend beyond those related to tariff commitments, it appears difficult to argue that the general protection of labour standards is related to benefits *under* a WTO agreement. The "exceptional" character of the remedy appears to stand in the way of such a construction.[93]

As suggested above, in order to successfully rely on Article XXIII:1(b), it appears necessary for a complainant State to show that the upsetting of the competitive relationship leading to the impairment of benefits "could not reasonably have been anticipated" by the complainant at the time it negotiated the tariff concessions.[94] Assuming that the protection of labour standards could somehow be linked to a benefit under a WTO agreement, it would be necessary to show that any nullification or impairment of this benefit could not reasonably have been foreseen at the time the benefit was secured.[95]

As all WTO benefits were technically secured (at the earliest) at the conclusion of the Uruguay Round negotiations, the factors relevant to the foreseeability of measures could include most post-war developments in relation to human rights. The panel report in the *Asbestos Case*,[96] in its consideration of Article XXIII:1(b), was prepared to consider an ILO convention entered in 1986.[97] On its face, therefore, it may be possible for a party to the WTO Agreement to argue the un-foreseeability of a loss of WTO benefits through the violation of labour-related human rights protected under international law as it stood at the end of the Uruguay Round negotiations. The difficulty remains, however, of showing the nullification or impairment of a benefit *under* a WTO agreement.

The final requirement of Article XXIII:1(b) identified by the WTO panel in *Japan – Film* was the need to show that the nullification or impairment of the ben-

93 See the discussion of this issue by Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 American Journal of International Law, 535, 559 (2001); and by Marceau, note 14 above, 768, and Gabrielle Marceau, A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33(5) Journal of World Trade, 87, 114 (1999).

94 See, for example, the panel report in *Treatment by Germany of Imports of Sardines*, adopted 31 October 1952, BISD, 1st Supplement, 53-59, para 16.

95 Indeed, the test may be that the effect of the measure must be "substantially different from what could reasonably have been foreseen" at the time when the measure was accepted by the complainant – see the Review Working Party on Quantitative Restrictions, referred to in GATT, Analytical Index, note 21 above, Volume 2, 662-663.

96 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, 18 September 2000.

97 Ibid, para 8.295. See also para 8.290. The appeal against the panel's report did not include a challenge to the panel's findings on this point.

efit was caused by the application of the measure.[98] This links with evidentiary and procedural issues discussed further below.

Panels have noted that non-violation complaints do not result in an obligation to withdraw the measure complained of.[99] This difference between violation and non-violation complaints is recognised in Article 26.1(b) of the DSU.[100] Placed in the human rights context it again illustrates difficulties associated with reliance on commercial remedies for human rights purposes.

(c) WTO Dispute Settlement Understanding and Article XXIII

A third class of obstacles to efforts to justify human rights related trade measures *via* GATT Article XXIII (and its equivalents) arises out of the terms of the DSU. One immediate practical obstacle created by the DSU relates to Article XXIII:1(c).[101] This provision, which appears never to have been successfully relied upon, was effectively rendered a "dead letter" by Article 26.2 of the DSU. Whereas the losing party is now generally unable to block adoption of a panel or Appellate Body report due to the requirements of negative consensus found in Articles 16.4 and 17.14 of the DSU, a finding based on Article XXIII:1(c) can still be blocked by the losing party.[102] If the capacity for Article XXIII to be relied upon to address the impairment "… of the attainment of any objective" of a WTO agreement is limited to Article XXIII:1(c)[103] then this feature of the DSU will, in practice, undermine claims that "unfair" labour standards pose a threat to attaining the objectives of the WTO agreements.

Evidentiary requirements of the DSU also appear to create obstacles. The DSU in Article 26.1(a), following the Annex to the 1979 GATT understanding on dispute settlement,[104] requires that for a remedy to be available under Article XXIII:1(b) the complaining party "shall present a detailed justification in support of any complaint" under the article. A claim in relation to human rights appears

98 *Japan – Film*, note 84 above, paras 10.82-10.89.

99 See, for example, working party report on the Australian Subsidy on Ammonium Sulphate, adopted 3 April 1950, BISD, 2nd Supplement, 188-196, para 16.

100 Contrast the terms of Article 3.7 of the DSU, note 63 above.

101 For a discussion of the potential application of the provision – see GATT, Analytical Index, note 21 above, Volume 2, 668-671.

102 Article 26.2 of the DSU, note 63 above, applies the rules and procedures contained in the decision of GATT Contracting Parties of 12 April 1989, BISD, 36th Supplement, 61-67, following the circulation of any report dealing with Article XXIII:1(c). Section G para 3 of this decision maintains the former GATT practice of requiring consensus for adoption of panel reports.

103 As, for example, the unadopted "Report on the Accession of Japan", prepared by the *Ad Hoc* Committee on Agenda and Intersessional Business in February 1953, appeared to assume – see GATT, Analytical Index, note 21 above, Volume 2, 669-670.

104 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted 28 November 1979, BISD, 26th Supplement, 210-218, para 5.

unlikely to lend itself to the types of detailed justification normally presented when non-violation nullification or impairment is claimed in relation to specific tariff concessions.

Reference has already been made to Article 26.1(b) of the DSU that deals with remedies available after a WTO dispute resolution report has been issued. Article 3.7 of the DSU, following on from the 1979 understanding on dispute settlement,[105] provides that:

> "… [i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the … [WTO Dispute Settlement Body] of such measures."[106]

Article 22.4 of the DSU provides that:

> "[t]he level of the suspension of concessions or other obligations authorized by the … [Dispute Settlement Body] shall be equivalent to the level of the nullification or impairment."

It has been noted that the suspension of concessions will have greater impact on smaller trading nations.[107] In the context of the violation of labour-related human rights the most appropriate remedy would appear to be the withdrawal of the human rights infringing measure regardless of whether or not such a measure was "inconsistent with a covered agreement." As noted above, however, there is no WTO obligation to withdraw a measure that does not conflict with the WTO Agreement.[108]

The DSU also prohibits counterclaims. Article 3.10 of the DSU provides that:

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105 Ibid, para 4.

106 See also Articles 22 and 26 of the DSU, note 63 above.

107 See, for example, Jackson *et al*, note 40 above, 336.

108 Article 26.1(b) of the DSU, note 63 above.

> "… [i]t is … understood that complaints and counter-complaints in regard to distinct matters should not be linked."[109]

Related to the question of counterclaims is the issue of how the DSU deals with attempts to link violation of rules of general international law to the performance of WTO obligations. As was noted in Chapter 2, a State, when confronted with a violation of an obligation owed to it[110] under general international law, may be legally entitled to suspend *other* international legal obligations owed to the State perpetrating the original violation.[111] The International Law Commission addressed the law of countermeasures in Articles 22 and 49 to 54 of its *Articles on State Responsibility*.[112] Article 22 provides that "[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with …[Articles 49 to 54 of the *Articles on State Responsibility*]."

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109 Para 9 of the 1979 understanding on dispute settlement, note 104 above, was in identical terms.

110 The language employed in the *Articles on State Responsibility* is "injured State" – see Articles 42 and 49 of the *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission on 9 August 2001, reprinted in International Law Commission, Report on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, General Assembly Official Records, 56th Session, Supplement Number 10. The United Nations General Assembly "took note" of the articles in resolution 56/83, adopted (without vote) on 12 December 2001. It is a controversial issue addressed in Chapter 2 above whether States not qualifying as "injured States" but which seek to vindicate obligations owed to the international community as a whole (*erga omnes*) can invoke the law of countermeasures. The articles leave open that possibility in Article 54. State practice in support of the use by States not directly injured of countermeasures in response to breach of obligations owed to the international community is discussed by the International Law Commission's special rapporteur on State responsibility (Professor James Crawford) in his third report, UN Doc A/CN.4/507/Add.4, paras 391-394. See also Christian J Tams, Enforcing Obligations Erga Omnes in International Law, Cambridge University Press, Cambridge, 2005, 207-251.

111 On the entitlement to use countermeasures under customary international law see, for example, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, ICJ Reports 1997, 7, 55-56, para 83. This point must be distinguished from a similar point of treaty interpretation dealt with in Chapter 2. It was noted in that chapter that debate has occurred over whether treaty rights secured by a treaty which includes a mode for vindicating these rights can be vindicated by relying on some other dispute resolution mechanism. This point is entirely dependent on the terms of the relevant treaty. The countermeasures point has a customary basis, and therefore, has a broader potential application.

112 The *Articles on State Responsibility*, note 110 above.

Based on the customary law of countermeasures, a State may argue that it is entitled to suspend its WTO obligations *vis-à-vis* a State violating human rights obligations under general international law. GATT Article XXIII:1(b) (and its equivalents) still appears to create difficulties for this argument. Even though suspension of GATT obligations might not be wrongful, as recognised in Article 22 of the *Articles on State Responsibility*, Article XXIII:1(b) of the GATT would still appear to allow the parties affected by any suspension to seek relief under the DSU.[113]

Germany invoked the customary law of countermeasures in 1974 in order to justify measures taken against Iceland that were contrary to the requirements of GATT 1947. The German measures (which were opposed by Iceland), however, do not appear to have been subjected to further GATT scrutiny.[114]

Article 23 of the DSU appears to preclude the reliance on the general law of countermeasures *in response to* alleged violations *of* the WTO Agreement.[115] This conclusion is supported by two of the State responsibility articles. Article 55 provides that the *Articles on State Responsibility*:

> "… do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

113 It is also interesting to reflect on how the preclusion of "wrongfulness" under the Articles on State Responsibility impacts on a "failure … to carry out … obligations" referred to in Article XXIII:1(a) of GATT 1994, note 2 above.

114 GATT, Analytical Index, note 21 above, Volume 2, 718-719. See also Lorand Bartels, Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights, 36(2) Journal of World Trade 353, 399 (2002).

115 The DSU may therefore constitute a "self-contained" or "special" regime similar to that recognised in *United States Diplomatic and Consular Staff in Tehran, Judgment*, 1CJ Reports 1980, 3, 40, para 86 – see Bruno Simma, Self-Contained Regimes, 16 Netherlands Yearbook of International Law, 111 (1985); PJ Kupyer, The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law? 25 Netherlands Yearbook of International Law, 227, 251-252 (1994); and Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law, 17 European Journal of International Law 483, 519-523 (2006). Compare Pauwelyn, note 93 above, 542 footnote 51; and International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi ("ILC Study Group Report on Fragmentation"), UN Doc A/CN.4/L.682, 13 April 2006, 87-91.

The provisions of the Article XXIII and the DSU appear to qualify as "special rules of international law".[116] Article 50(2) of the *Articles on State Responsibility* provides that:

> "[a] State taking countermeasures is not relieved from fulfilling its obligations:
> (a) under any dispute settlement procedure applicable between it and the responsible State; …"[117]

The German invocation of the general law of countermeasures in its dispute with Iceland in 1974 raised a different issue. Germany was not invoking the law of countermeasures *in response to a violation of its rights under GATT 1947*. The German invocation was instead a response to a dispute with Iceland over fisheries jurisdiction. Article 23 of the DSU and Articles 50 and 55 of the *Articles on State Responsibility* do not directly address this scenario.

As discussed in Chapter 4, Mexico also invoked the general law of countermeasures in its defence against a complaint brought by the United States in 2004 alleging that Mexico had violated its obligations under the WTO Agreement. Mexico, like Germany in 1974, sought to rely on the law of countermeasures in respect of alleged violations of non-WTO obligations. Mexico alleged that the United States had committed a prior breach of its obligations under *North American Free Trade Agreement* that entitled Mexico to rely on the law of counter-measures. As discussed in Chapter 4 the Appellate Body expressed scepticism regarding the existence of jurisdiction, under the DSU, to "adjudicate non-WTO disputes".[118]

As discussed in Chapter 4, it seems clear that WTO panels and the Appellate Body only have *jurisdiction* to hear complaints of alleged violation of the WTO "covered agreements".[119] But it has also been argued that, in hearing such complaints, WTO panels and the Appellate Body are not authorised to give rules of general international law direct application.[120] Instead it has been suggested that rules of general international law may only be relevant to the interpretation of the

116 See the International Law Commission's commentary to the *Articles on State Responsibility*, note 110 above, 357.

117 Compare *United States Diplomatic and Consular Staff in Tehran, Judgment*, note 115 above, 28, para 54.

118 Mexico – Tax Measures on Soft Drinks and other Beverages, WT/DS 308/AB/R, para 56. See also para 78.

119 See Marceau, note 93 above, 109-115.

120 See for example, Joel P Trachtman, The Domain of WTO Dispute Resolution, 40 Harvard International Law Journal 333, 342-343 (1999); and John O McGinnis, The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO, 44 Virginia Journal of International Law 229, 266-268 (2003). See other references collected by Pauwelyn, note 93 above, 561, footnote 175.

covered agreements in accordance with the rules of treaty interpretation[121] such as the rule set out in Article 31(3)(c)[122] of the *Vienna Convention on the Law of Treaties*, 1969 ("*Vienna Treaty Convention*").

The terms of Articles 3.2 and 19.2 of the DSU have been invoked in support of such arguments. According to these articles, recommendations and rulings of the WTO Dispute Settlement Body, panels and the Appellate Body cannot "add to or diminish the rights and obligations provided in the covered agreements." It has been asserted that the direct application of general rules of international law may potentially add to or diminish WTO rights and obligations.

It was argued in Chapter 4 that there are serious difficulties confronting any interpretation of the DSU that denies a panel or the Appellate Body the capacity, in appropriate circumstances, to consider obligations under non-WTO rules, in particular obligations of a peremptory character and obligations under the Charter of the United Nations. Joost Pauwelyn has, for example, challenged such restrictive interpretations of Articles 3.2 and 19.2 of the DSU.[123] He contends that while the WTO Agreement limits the claims that panels and the Appellate Body may hear, it does not equally restrict the defences that are capable of being raised in response to such claims.[124] Thus rules of general international law may be validly raised as defences to claims of violation of the WTO covered agreements. Pauwelyn argues

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121 Jonathan I Charney, Is International Law Threatened by Multiple International Tribunals? 271 Recueil des cours, 101, 219 (1998). Cited in Pauwelyn, ibid.

122 Article 31(3)(c) of the *Vienna Convention*, note 17 above, provides that "any relevant rules of international law applicable in the relations between the parties" to a treaty is to be taken into account when interpreting the treaty.

123 Pauwelyn, note 93 above, 564-7.

124 Ibid, 562 and 577. As noted in Chapter 4, it is on the basis of the distinction between claims (for which WTO *jurisdiction* is restricted to the WTO "covered agreements") and defences (where the *applicable law* is not so restricted) that Pauwelyn has argued that the Appellate Body in *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R, 6 March 2006, adopted by the Dispute Settlement Body on 24 March 2006, should not be construed as ruling out consideration of non-WTO defences. Pauwelyn has pointed to paras 44 and 54 of the report where the Appellate Body appears to emphasise that Mexico had not presented its case as one of conflict between obligations under the *North American Free Trade Agreement* and the WTO Agreement. Had Mexico run its case in this way it would have raised directly the issue of applicable law. Pauwelyn therefore construes the Appellate Body as confining its decision to the issue of jurisdiction and it is in this sense that he reads the references in paras 56 and 78 to the non-adjudication of non-WTO disputes – see Pauwelyn "Choice of Jurisdiction: WTO and regional dispute settlement mechanisms: Challenges, Options and Opportunities", International Centre for Trade and Sustainable Development and Geneva International Academic Network, ICTSD Dialogue on the Mexico Soft Drinks Dispute: Implications for Regionalism and for Trade and Sustainable Development, 30 May 2006, on file with author, 4-6.

that rules of *jus cogens*[125] and subsequent developments in general international law[126] raised by a respondent may be taken into account by panels and the Appellate Body when addressing alleged violations of the WTO covered agreements. Similarly, Pauwelyn argues that panels and the Appellate Body should entertain defences alleging *inter se* modification of the terms of a covered agreement.[127]

Acceptance of Pauwelyn's interpretation would potentially expand the relevance of human rights norms to adjudication by WTO panels and the Appellate Body. A number of international human rights norms have, for example, been recognised as rules of *jus cogens*.[128] As argued in Chapter 4, the serious consequences of violation of such rules[129] and associated interpretative principles appear to require that WTO rules are interpreted consistently with such peremptory norms. Even though human rights treaties do not generally require the taking of trade measures in order to secure respect for human rights,[130] the potential for conflict between trade and human rights obligations under general international law is nonetheless significant.[131] Issues of potential conflict will be considered further in Chapter 7. Issues of treaty interpretation will be considered further below.

Before leaving the general law of countermeasures there is one, more limited, argument that might be usefully considered. Acceptance of the view that the

125 Pauwelyn, note 93 above, 565.

126 Ibid, 570. Pauwelyn's approach does not necessarily require the replacement of a WTO rule by a new rule of general international law. Whilst Pauwelyn advocates a liberal interpretation of what constitutes "conflict" between different rules of international law (see 550-552), he recognises that a prior WTO rule may prevail as *lex specialis* – see, for example, 570.

127 Ibid, 547-550. *Inter se* modification of a treaty (which is distinct from amendment) is dealt with in *Vienna Treaty Convention*, note 17 above, Article 41.

128 See the discussion on Chapters 2 and 4.

129 According to Article 53 of the *Vienna Treaty Convention*, note 17 above, a treaty is void if it conflicts with a rule of *jus cogens*. There is no provision for severance although see the references in note 141 in Chapter 4.

130 Exceptions to this general observation include treaties suppressing trade in slaves. Compare the Kimberley Process Certification Scheme for Rough Diamonds – Decision of 15 December 2006, WT/L/676, 19 December 2006; and the "Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar" considered in note 278 in Chapter 4. The Kimberley Scheme is discussed further below. For the background to the Burma resolution, see Francis Maupain, "Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience" in Philip Alston (ed), Labour Rights as Human Rights, Oxford University Press, Oxford, 2005, 85.

131 Recall the obligations discussed in Chapter 4, such as those set out in Article 41 of the *Articles on State Responsibility*, note 110 above, obligations of due diligence regarding the prevention of violation of particular peremptory norms and obligations not to aid or assist a State it violating its obligations under international law. Note also the consequences of adopting a broad view of conflict of norms.

applicable law before a panel or the Appellate Body includes non-WTO law does not necessarily mean that the general law of countermeasures is *included* amongst that non-WTO applicable law. It may be open for a panel or the Appellate Body to conclude that parties to the WTO Agreement intended to abandon their entitlement to invoke the general law of countermeasures to justify trade measures otherwise caught by the WTO Agreement.[132] Article 23 of the DSU and the prohibition of counter-claims in Article 3.10 might be seen as supporting this interpretation.[133] Rather than relying exclusively on the law of countermeasures, a State seeking to respond with trade measures against an alleged violation of non-trade rules of international law (including human rights violations) may have to justify its measures under provisions such as Article XX of GATT 1994.[134] Article XX will be subjected to detailed consideration below.

(d) Article XXIII and Inter-Agency Consultations

As noted in Chapter 3, the question of consultation between the WTO and the ILO has been controversial. Article XXIII:2 specifically provides that the Contracting Parties "may consult with … the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary." There is thus a legal basis for WTO/ILO consultations. The presence of the political will amongst contracting parties to carry on such consultations is another question.[135] The panel in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*[136] did, however, consult with the World Health Organization following an understanding reached between the parties to that dispute that such a consultation could occur.[137]

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132 See Lorand Bartels, note 114 above, 393-402; Michael J Hahn, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, 12 Michigan Journal of International Law 558, 603-604 and 617 (1991).

133 See, for example, the argument advanced by the panel in *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/R, 7 October 2005, para 7.15.

134 Compare the United States response in its fisheries jurisdiction dispute with Canada in the 1980s with the German response referred to above – see *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD, 29th Supplement, 91. Another possible reason addressed in Chapter 2 why counter-measures might not be available in the case of violation of human rights obligations under general international would be that the State seeking to rely on the law of countermeasures was not an "injured" State.

135 See, for example, Virginia A Leary, The WTO and the Social Clause: Post-Singapore, 8 European Journal of International Law 118 (1997).

136 Adopted on 7 November 1990, BISD, 37th Supplement, 200; reprinted in 30 ILM 1122 (1991).

137 GATT, Analytical Index, note 21 above, Volume 2, 689.

(e) Conclusions on Linkage via Article XXIII

The possibility of justification of human rights related trade measures *via* GATT Article XXIII and its equivalents cannot be excluded. Considerable obstacles to such linkage, however, exist. Attempts to rely on Article XXIII (or its equivalents) to protect human rights are required to show that a denial of human rights "nullifies or impairs" a "benefit" under a WTO agreement or impairs the attainment of an "objective" of a WTO agreement. Various difficulties in satisfying either of these requirements have been identified. A party to the WTO Agreement that does successfully establish the impairment of an objective of a WTO agreement may find that the respondent State is entitled to block the adoption of any panel or Appellate Body report.

In common with the position on justification of such measures *via* subsidies rules and rules on safeguards (to be dealt with below), there are likely to be anomalous consequences arising from justification *via* Article XXIII, at least when viewed from a human rights perspective. Amongst the problematic features of the commercial remedies available *via* Article XXIII is that they are ultimately tied to the extent of a nullification or impairment of benefits under a WTO agreement. They are not sensitive to the severity of any human rights violations. There appears to be no mechanism under WTO rules for expanding liability under Article XXIII (or its equivalents) beyond the scope of the WTO benefits that have been nullified or impaired. Only when measures under GATT Articles XX and XXI are considered will the possibility of broader ranging trade sanctions become apparent.

5. Safeguards

As already noted on a number of occasions, during the drafting of the ITO Charter, Sub-Committee D of the Havana Conference's Third Committee considered that "social dumping", which included exporting goods produced by "sweated labor",[138] was "… covered for short-term purposes" by the equivalent of GATT Article XIX dealing with safeguard measures.[139] The sub-committee considered that longer-term solutions could be secured by Article 7 of the ITO Charter, in combination with the articles of the Charter on dispute resolution.[140] This link between concerns over "social dumping" and the potential role of safeguard measures justifies the consideration of safeguard measures under the WTO Agreement in order to determine the extent to which the various WTO safeguard provisions might be utilised to justify human rights related trade measures.

The view that "social dumping" was "covered" by safeguard measures can be contrasted with other views as to the focus of Article XIX of GATT 1994. Article

138 Jackson, World Trade and the Law of GATT, note 26 above, 404.

139 United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948, Reports of Committees and Principal Sub-Committees, Interim Commission for the International Trade Organization Doc No ICITO I/8, 84 ("Havana Reports").

140 Ibid.

XIX, unlike GATT Article VI on dumping,[141] does not condemn the conduct of exporters whose exports trigger the application of safeguard measures. According to Professors Jackson, Davey and Sykes:

> "'Safeguards' measures are available under certain conditions to respond to *fairly* traded imports, while more extensive counter-measures are permitted to respond to imports that are 'dumped', subsidised or *otherwise considered to be in violation of international rules of conduct*."[142]

Notwithstanding this observation, provided the WTO requirements for the imposition of safeguard measures are satisfied, imports implicated in the violation of labour-related human rights may be subject to safeguard measures. But as the above quotation implicitly recognizes, the violation of labour related human rights has no particular legal significance under the provisions of the WTO Agreement regulating safeguards. "Social dumping" may be "covered" by WTO safeguards rules but it is not a specific target of those rules.

The following analysis will demonstrate that the WTO safeguards rules have limited utility as a means of justifying human rights related trade measures. There appear to be three important issues in relation to safeguard measures that impact on potential justification of human rights related trade measures. The first issue is the general *availability* of safeguard measures. When can a party to the WTO Agreement impose safeguard measures? The second issue is *selectivity*, *ie* whether safe-

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141 Article VI:1 of GATT 1994, note 2 above, provides, *inter alia*, that:

> "[t]he contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be *condemned* if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." [Emphasis added.]

142 Jackson *et al*, note 40 above, 604. [Emphasis added.] See also Appellate Body report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, adopted by the Dispute Settlement Body on 12 January 2000, para 94, where the following observations were made:

> "The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account." [Underlining added.]

guard measures can be selectively imposed on imports from particular parties to the WTO Agreement or must be applied on a most favoured nation, non-discriminatory, basis. The third issue relates to the *intensity* of the safeguard measures. This issue involves a consideration of the entitlement of parties to the WTO Agreement that are affected by safeguard measures to take retaliatory measures and the duration of safeguard measures. These issues of *availability*, *selectivity* and *intensity* will be addressed further below.

The WTO Agreement deals with safeguards in Article XIX of GATT 1994 and the *Agreement on Safeguards*.[143] There are also safeguard provisions in the *Agreement on Textiles and Clothing*[144] and the *Agreement on Agriculture*.[145] The general WTO rules on dispute resolution apply to disputes involving safeguard measures.[146]

(a) Availability of Safeguard Measures

Article XIX:1(a) of the GATT 1994 sets out the basic rules in relation to safeguards:

> "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

Paragraph 2 of Article XIX imposes an obligation on a party to the WTO Agreement intending to impose safeguard measures to notify and consult in relation those measures. Article 12 of the *Agreement on Safeguards* requires a party intending to impose safeguards measures to notify the WTO Committee on Safeguards.

Article 2.1 of the *Agreement on Safeguards* makes clear that a party to the WTO Agreement seeking to impose safeguard measures need not show an absolute increase in imports.[147] An increase in imports "relative to domestic production" is sufficient, provided the other conditions for safeguard measures are met.

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143 Annexed to (see Annex 1A) and an integral part of the WTO Agreement, note 1 above.

144 Annexed to (see Annex 1A) and an integral part of the WTO Agreement, ibid. Articles 2, 6, 8 and the Annex refer to safeguard measures.

145 The *Agreement on Agriculture*, note 25 above. Article 5 deals with safeguard measures.

146 See Article 14 of the *Agreement on Safeguards*, note 143 above.

147 Note, however, that where there has been no absolute increase in imports States affected by safeguard measures are entitled, following 30 day consultation period,

Articles 3 and 4 of the *Agreement on Safeguards* imposes basic minimum requirements on parties to the WTO Agreement in relation to how safeguard determinations are to be made and on what will constitute "serious injury" and the "threat" of serious injury. The *Agreement on Safeguards* allows safeguard measures to be imposed in respect of exports of developing State parties in more limited circumstances and is more liberal in allowing developing States to resort to safeguard measures.[148]

One reason that WTO safeguard rules lack utility as a means of securing protection of human rights is that safeguard measures, like subsidy and countervailing duty measures, are only applicable when the industry that a party to the WTO Agreement is seeking to protect *via* safeguard action is suffering or is likely to suffer "serious injury". Indeed, the level of injury required in order to take safeguard measures is higher than that which would trigger subsidy and dumping action (which only require "material injury").

The focus of safeguard action (and subsidies and dumping action) is first and foremost on local industry and not labour or other human rights conditions in an exporting nation. Even the most appalling human rights violations in an exporting nation will not justify WTO safeguard action unless a local industry is suffering or is likely to suffer serious injury.[149] The prospects of justifying human rights related trade measures through the use of commercially oriented safeguard measures are therefore significantly limited.

(b) Selectivity of Safeguard Measures

Parties to the original GATT undermined the legal regulation of safeguard measures in two principal ways. First, developed States, rather than relying on Article XIX to address serious injury to domestic producers caused by imports, instead often prevailed upon other parties to GATT 1947, whose exports were causing or threatening serious injury, to agree to so-called voluntary restraint agreements. These agreements had the effect of limiting exports and thus avoiding injury to the domestic producers of the parties seeking such agreements. Such arrangements, in so far as they involved government action to restrict exports, were violations of GATT Article XI,[150] but the absence of any party with an interest to challenge the agreements meant that such agreements were never challenged under the original

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to suspend the "… the application of substantially equivalent concessions." In cases where there has been an absolute increase in imports, States affected by safeguard measures must wait 3 years before suspension of equivalent concessions can occur – see Articles 8.2 and 8.3 of the *Agreement on Safeguards*, ibid.

148 See Article 9 of the *Agreement on Safeguards*, ibid.

149 It also appears anomalous that a State with inefficient industries might be able to take safeguard measures in response to human rights violations but a State with more efficient industries may be unable to take similar measures.

150 Jackson *et al*, note 40 above, 604.

GATT.[151] The arrangements were also inherently selective. The WTO *Agreement on Safeguards* seeks to eliminate such "grey area" measures.[152]

A second way in which GATT parties ignored Article XIX of GATT 1947 was in relation to the selective imposition of safeguard measures. Whilst the matter was not entirely free from doubt, the better view appears to have been that the original GATT did require that safeguard measures be imposed on an MFN consistent, non-discriminatory, basis.[153] Notwithstanding this, significant trading nations imposed safeguard measures selectively on imports from certain GATT parties, but not on like products from other parties.[154]

Efforts to address selectivity in relation to safeguards in the Uruguay Round negotiations resulted in a compromise solution. Article 2.2 of the *Agreement on Safeguards* provides that "safeguard measures shall be applied to a product being imported irrespective of its source." Article 5.2 of the *Agreement on Safeguards* addresses selectivity in relation to the imposition of quotas. It allows a limited departure from the MFN principle in Article 5.2(b). The *Agreement on Safeguards* says nothing further on selectively applied safeguard measures that do not involve quotas.

In relation to the justification of human rights related trade measures, the original GATT's apparent commitment to MFN and non-selectivity, meant that a measure targeting particular imports produced, for example, in violation of labour related human rights standards, could not be imposed consistently with Article XIX unless like products from other exporting parties were also subjected to the same measures. The "like product" criterion for the purposes of MFN is not significantly different to the "like product" requirement of GATT Article III.[155] Production and processing methods therefore appear to be excluded when assessing whether products are "like" for the purposes of MFN and non-selectivity. A State seeking to impose safeguard measures against goods the production of which involved the violation of labour related human rights standards would be required to impose similar measures against "like" goods even though they were untainted by the violation of such standards.

The extent to which the WTO Agreement tolerates some degree of selectivity may allow some justification for targeted measures. The conditions imposed by Article 5.2(b) before a quota can be selectively applied, however, do not lend themselves to attempts to apply safeguard measures in response to human rights

151 Ibid.

152 See Article 11 on the *Agreement on Safeguards*, note 143 above.

153 Jackson, World Trade and the Law of GATT, note 26 above, 564-565; GATT, Analytical Index, note 21 above, Volume 1, 520.

154 Cases involving the United Kingdom and Norway are referred to in GATT, Analytical Index, ibid.

155 See the discussion at the beginning of this chapter and decisions such as *Belgian Family Allowances (Allocations Familiales)*, note 3 above; and the *Asbestos Case*, note 15 above.

violations in the exporting State party. For example, selectivity is only allowed under the paragraph if "… imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned …". Thus, selective application of safeguard quotas is precluded in the absence of disproportionate increase in exports from a WTO member in which labour related human rights standards are violated. The internal protective focus of selective safeguard measures is unsuited to an externally oriented concern for human rights.

(c) Intensity of Safeguard Measures

Article 5.1 of the *Agreement on Safeguards* provides that "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment …". Article 7 limits the period in which safeguard measures can operate. Article 7.1 provides that "[a] Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment." The paragraph goes on to require that the period is not to "… exceed four years, unless it is extended …" in accordance with the terms of the *Agreement on Safeguards*. Article 7.3 provides an absolute limit of eight years for any safeguard measures. Article 7.4 requires the progressive liberalisation of safeguard measures, while Article 7.5 limits the reapplication of safeguard measures once they have expired.

The entitlement of parties to the WTO Agreement that are affected by safeguard measures imposed by another party to respond is enshrined in Article XIX:3 of GATT 1994 and Article 8 of the *Agreement on Safeguards*. Subject to certain technical conditions, "… affected exporting Members shall be free … to suspend … the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove."[156] There were no disapprovals under Article XIX:3(a) of GATT 1947,[157] nor do there appear to have been any under Article 8.2 of the *Agreement on Safeguards*.

The *Agreement on Safeguards*, however, includes one significant limitation on retaliation not found in the original GATT. Article 8.3 provides that:

> "[t]he right of suspension [of substantially equivalent concessions or other obligations under GATT 1994] shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement."

In relation to justification of human rights related trade measures *via* safeguard measures, the notion that a WTO member must "pay" for any safeguard measure

156 Article 8.2 of the *Agreement on Safeguards*, note 143 above.

157 GATT, Analytical Index, note 21 above, Volume 1, 528.

that affects other members by effectively giving up concessions of equivalent value to the safeguard, operates as a disincentive to the use of safeguards. It is unlikely that the human rights of foreign workers will weigh heavily in assessments of whether to impose safeguard measures, particularly where powerful domestic constituencies may be affected by retaliatory suspension.[158] The extent to which the WTO *Agreement on Safeguards* limits the right of affected exporting States to retaliate may *slightly* increase the prospects of the safeguards rules being used to justify human rights related trade measures.

Finally, the temporary nature of safeguard measures, implied in the original GATT[159] and express in the WTO *Agreement on Safeguards*, limits their utility as a means by which to pressure parties to the WTO Agreement to address human rights violations in their export industries. Thus, a State inclined to impose safeguard measures, must not only comply with the strict[160] requirements for safeguard relief including the requirements on selective safeguards, and prepare itself for the prospects of retaliation, but must also only impose such measures for a limited period regardless of whether any human rights improvements have occurred. This "extraordinary remedy"[161] therefore has limited utility as a means of justifying human rights related trade measures.

6. Security Exceptions

There is one general exception in GATT 1994 that arguably has already been the basis for justification of human rights related trade measures. In 1991 the European Community invoked Article XXI of GATT 1947 in relation to the conflict in the Socialist Federal Republic of Yugoslavia.[162] The European Community's concerns no doubt included the human rights violations then occurring in the Balkans. GATT parties also took trade measures against Southern Rhodesia in 1966

158 As suggested by Professor William J Davey (in a general discussion GATT dispute settlement), a State affected by safeguard measures would be well served by targeting retaliatory suspension at politically powerful industries in the State imposing the safeguard measures – Davey, Dispute Settlement in GATT, 11 Fordham International Law Journal 51, 100-101 (1987).

159 GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition, 1995, Volume 1, 522.

160 For example, the Appellate Body has noted that serious injury in Article XIX involves "… a much higher standard of injury than the word 'material'" in the material injury test for the purposes of dumping and subsidies law – see the Appellate Body report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, adopted by the Dispute Settlement Body on 16 May 2001, para 124.

161 Appellate Body report, *Argentina – Safeguard Measures on Imports of Footwear*, note 142 above, para 93.

162 GATT, Analytical Index, note 21 above, Volume 1, 604.

following United Nations Security Council resolution 232.[163] Whilst there appears to have been no formal GATT discussion of these measures this was probably because such measures were "… so clearly authorized under GATT as to require no debate."[164]

Article XXI, however, has not served as the basis for general justification of human rights related trade measures. Most cases involving the invocation of Article XXI have involved serious breakdowns of international relations often involving actual or potential armed conflict.[165]

The presence of Article XXI in GATT 1994 reflects a balance between the need to give States an exit when they consider their national security threatened,[166] and the need to ensure that the security exceptions are not abused in a way that would undermine the foundations of the GATT. Reliance on Article XXI in only the most serious cases of threats to national security has been the way that most GATT parties have sought to maintain this balance.

Article XXI of GATT 1994 (headed "Security Exceptions") specifically provides that:

> "[n]othing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or the materials from which they are derived;

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163 Jackson, World Trade and the Law of GATT, note 26 above, 751 and footnote 23.

164 Ibid, 751.

165 Such as occurred in respect of the dispute over the Falklands (*Malvinas*) Islands – GATT, Analytical Index, note 21 above, Volume 1, 603; and the dispute between the United States and Nicaragua in the 1980s – see the un-adopted panel report *United States – Trade Measures Affecting Nicaragua*, L/6053, available via <http://gatt.stanford.edu/page/home>, visited 13 May 2007. On these disputes, see Hahn, note 132 above, 573-577 and 607-610; Wesley A Cann Jr, Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism, 26 Yale Journal of International Law 413, 473-477 (2001); and Olivia Q Swaak-Goldman, Who Defines Members; Security Interest in the WTO? 9 Leiden Journal of International Law 361, 365-368 (1996). There have, however, been exceptions. Sweden, for example, sought to justify quotas imposed on certain footwear under Article XXI – see GATT, Analytical Index, ibid, Volume 1, 603.

166 It has been noted that to not give this exit would be foolish given that States that feel that their national security is threatened are likely to respond even where the response is GATT inconsistent – see Jackson, World Trade and the Law of GATT, note 26 above, 748. See also the discussion of the need for balance in GATT, Analytical Index, ibid, Volume 1, 600.

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

Almost identical provisions are found in Article XIV *bis*[167] of the *General Agreement on Trade in Services*[168] and Article 73 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[169]

There are at least three aspects of Article XXI that appear to be of significance to the question of potential justification of human rights related trade measures *via* the article. The first relates to the actual structure of the article. It differs significantly from the WTO provisions dealing with subsidies and safeguard measures considered above. There are also significant differences between Article XXI and Article XX, the other general exception to WTO discipline. These differences have potential consequences for efforts to justify human rights related trade measures *via* Article XXI.

The second aspect of Article XXI that appears to be of significance is the justiciability of invocations of Article XXI. If a State can invoke Article XXI whenever it has serious concerns about human rights violations without fear of panel or Appellate Body scrutiny of its justification then this appears significant.

The third feature of Article XXI is the potential for WTO remedies against a State invoking Article XXI. The issue of remedies appears relevant even if it is accepted that the actual invocation of the article is non-justiciable. If, for example, a State invoking Article XXI can be made to pay a price in terms of lost trade concessions then this has potential importance when considering the use of Article XXI to justify human rights related trade measures.

(a) Structural Differences between Article XXI and Other WTO Provisions

Article XXI does not rely on disciplines such as those found in the WTO rules regulating dumping, countervailing or safeguard measures.[170] Article XXI does

167 The only material difference between this article and Article XXI of GATT 1994 appears to be the inclusion in paragraph 2 of Article XIV *bis* of the *General Agreement on Trade in Services* of an obligation to inform the Council for Trade in Services "… of measures taken under paragraphs 1(b) and (c) and of their termination."

168 The *General Agreement on Trade in Services*, note 16 above.

169 Annexed to (see Annex 1C) and an integral part of the WTO Agreement, note 1 above.

170 A similar point is made in relation to Article XX by Alben, note 66 above, 1422-1423.

not restrict States to the use of measures proportional to any actual or threatened "material" or "serious" injury. Trade measures taken under Article XXI are not formally linked to any nullification or impairment of benefits *under* WTO agreements. Article XXI is directed at national security concerns that extend *beyond* concerns about trade relations.

Article XXI also lacks the discipline present in the other general exception to WTO obligations, GATT Article XX. The opening paragraph of Article XX (the "*chapeau*") imposes both MFN and national treatment disciplines on measures taken for the non-trade policy purposes identified in Article XX.[171] Article XXI has no equivalent provision.

The absence of such limitations on measures taken under Article XXI means that the article has the potential to provide broad justification for trade measures imposed for human rights purposes. Whether this potential is realisable depends upon the justiciability of invocations of Article XX and the potential for WTO authorised remedies against measures taken under Article XXI. These questions will now be considered.

(b) Justiciability of Invocations of Article XXI

Perhaps the most controversial question raised in relation to Article XXI is the competence of WTO bodies to scrutinise a State's invocation of Article XXI. There appears to be no consensus amongst States party to the WTO Agreement on this question.[172] Two views appear to be held by States. The first is that the invocation of Article XXI by a State is simply non-justiciable before a WTO body. Ghana, for example, argued in 1961, that under Article XXI "… each contracting party was the sole judge of what was necessary in its essential security interest."[173] Similarly, in 1985, following its imposition of a complete trade embargo against Nicaragua, the United States opposed Nicaragua's efforts to establish a GATT panel, *inter alia*, on the grounds that the United States was invoking Article XXI:(b)(iii) and that "… this provision left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests. A panel could therefore not address the validity of, nor the motivation for, the United States'

171 Jackson, World Trade and the Law of GATT, note 26 above, 743.

172 Nor does there appear to be academic consensus – compare, for example, Hahn, note 132 above, and Hannes L Schloemann and Stefan Ohlhoff, 'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 American Journal of International Law 424 (1999), who argue that invocations of Article XXI are justiciable although "judicial restraint" is required; with Raj Bhala, National Security and International Trade Law: What the GATT Says, and What the United States Does, 19 University of Pennsylvania Journal of International Economic Law 263 (1998), who suggests that reliance on Article XXI is only subject to political constraints.

173 GATT, Analytical Index, note 21 above, Volume 1, 600.

invocation of Article XXI:(b)(iii).”[174] The United States ultimately consented to the establishment of a GATT panel once agreement was reached to limit the panel’s terms of reference in the following manner – “… the panel cannot examine or judge the validity of or motivation for the invocation of Article XXI(b)(iii) by the United States …”.[175] There is also support for the non-justiciability of invocations of Article XXI in the negotiating history of the equivalent of Article XXI in the Charter of the ITO.[176]

The non-justiciability of invocations of Article XXI does not, however, mean that WTO dispute resolution procedures are completely excluded. As the report of the panel in the dispute between the United States and Nicaragua in 1986 illustrates, there is still potential for dispute resolution procedures to operate.[177] This will be discussed further below. Another possible discipline against misuse of a non-justiciable Article XXI is the political awareness[178] that unjustifiable reliance on the provision encourages other States to do likewise and thus undermine the multilateral trading system.

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174 Panel report *United States – Trade Measures Affecting Nicaragua*, note 165 above, para 1.2.

175 Ibid, para 1.4. See generally Jackson, World Trade and the Law of GATT, note 26 above, 749-750.

176 See the comments of the representative of the United States in the Verbatim Report of the 33rd meeting of Commission A of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, 24 July 1947, UN Doc E/PC/T/A/PV/33, 26-27; and GATT, Analytical Index, note 21 above, Volume 1, 606. Compare, however, Hahn’s assessment of the drafting history of Article XXI – Hahn, note 132 above, 565-569.

177 The remedies available via these procedures also appear to offer some discipline against unjustified reliance on Article XXI – “The only adequate recourse for a party damaged by another’s ‘security’ action is to utilize the complaint procedures, such as Article XXIII, ‘nullification and impairment’” – Jackson, World Trade and the Law of GATT, note 26 above, 748. Compare Hahn’s arguments against allowing a non-violation complaint in relation to invocations of Article XXI – Hahn, ibid, 616-617. It is submitted that if invocations of Article XXI are held to be non-justiciable then that would improve the prospects of a successful non-violation complaint. Conversely, it is difficult to envisage a successful non-violation complaint where invocation of Article XXI has been held to be both justiciable and justified in the circumstances.

178 Compare the comment of the Chairman of Commission A of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the 33rd meeting, note 176 above, 21. Professor Hudec recounted that “[i]t has been said that the GATT’s only defense against protectionist abuse of Article XXI has been the power of collective laughter against obviously bogus claims” – Hudec, “GATT Legal Constraints on the Use of Trade Measures against Foreign Environmental Practices” in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2, 95, 148.

The alternative to the non-justiciability position described above is one that would *allow* WTO review of the legality of *invocations* of Article XXI, albeit according considerable deference to the State invoking the article.[179] The panel in *United States – Trade Measures Affecting Nicaragua* expressly left open the question when they observed that "[t]he Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by … [the panel's] mandate."[180]

There appears to be some, albeit ambiguous, support for justiciability in two GATT disputes involving the invocation of Article XXI. In 1949 a dispute arose between Czechoslovakia and the United States over a United States system controlling export licensing. Czechoslovakia complained of violations of Articles I and XIII of GATT 1947 and sought a decision under Article XXIII.[181] The Contracting Parties rejected Czechoslovakia's claims without giving formal reasons.[182]

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179 As suggested by the language of Article XXI of GATT 1994, note 2 above – "[n]othing in this Agreement shall be construed … to prevent any contracting party from taking action which *it considers* necessary for the protection of its essential security interests …". [Emphasis added.] See also the discussion by the International Court of Justice of Article XXI of the 1956 *Treaty of Friendship, Commerce and Navigation* between the United States and Nicaragua in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, 14, 116, para 222 and 141-142, para 282. For an assessment of the relevance of this judgment to the interpretation of Article XXI, see Schloemann and Ohlhoff, note 172 above, 442-443, footnote 104. Judge Kooijmans in his separate opinion in *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment*, ICJ Reports 2003, 161, referred to a "margin of discretion to be left to governmental authorities", although the provision he was there considering, like the clause considered by the Court in the *Nicaragua Case*, did not include the words "which it considers …" – ibid 259-260, para 44. Judge Kooijmans distinguished between the assessment that a State's essential security interests are at risk on the one hand, and the determination that the measures taken were necessary to protect those interests on the other. On the first issue Judge Kooijmans left open the possibility of limited justiciability – "The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an 'abuse of authority') is a judicial ban appropriate" – ibid. Compare Joel P Trachtman, "Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 19 above, 357, 372.

180 Panel report *United States – Trade Measures Affecting Nicaragua*, note 165 above, para 5.3.

181 GATT, Analytical Index, note 21 above, Volume 1, 602.

182 Article XXI United States Export Restrictions, decision of 8 June 1949, BISD, 2nd Supplement, 28. See also Hahn, note 132 above, 569-571; and Schloemann and Ohlhoff, note 172 above, 432-433.

Sweden introduced an import quota system on certain footwear in 1975 and, invoking Article XXI, argued, *inter alia*, that the "decrease in domestic production [of footwear] has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy." In the GATT Council, "[m]any representatives … expressed doubts as to the justification of these measures under the General Agreement. Many delegations reserved their rights under the GATT …".[183] The Swedish measures were apparently terminated in 1977.[184]

The jurisprudence of the International Court of Justice offers no clear answer, at least in relation to Article XXI:(b) of GATT 1947. Non-justiciability and auto-interpretation arguments have not been generally endorsed by the Court.[185] As noted above, however, the Court implied in its 1986 judgment in the *Nicaragua Case* that the language of Article XXI:(b) of GATT posed "purely a question of subjective judgment" for the State seeking to invoke the provision.[186] The approach adopted by Judge Kooijmans probably best reconciles the competing considerations. It will be recalled that he left open the possibility of judicial scrutiny where a State's evaluation of its essential security interests was "… patently unreasonable (which might bring us close to an 'abuse of authority')".[187] It should also be recalled that words "*it considers*" do not appear in paragraph (c) of Article XXI.

If the invocation of Article XXI is justiciable then it is likely that an attempt to justify human rights related trade measures under Article XXI would be challenged in all but the most serious cases of systematic or widespread violations of human rights. Cases of systematic or widespread violations should rise to the level of threats to international peace and security and could thus be the subject of the Security Council's powers under Chapter VII of the United Nations Charter and would fall under GATT Article XXI:(c). The possibility of Charter obligations (*ie* not to aid or assist a State violating its obligations under the Charter), discreet from Chapter VII, was considered in Chapter 4. Measures intended to fulfil such obligations might also fall under Article XXI:(c).

Measures directed at human rights violations that were not systematic or widespread could be challenged on the grounds that they could not *reasonably*

183 GATT, Analytical Index, note 21 above, Volume 1, 603. See also Hahn, ibid, 578.

184 Ibid.

185 See, for example, *United States Diplomatic and Consular Staff in Tehran, Judgment*, note 115 above, 19-20, paras 36-38; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, note 179 above, 433-435, paras 93-97; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, 233-234, para 13.

186 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ibid, 141-142, para 282.

187 *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment*, note 179 above, 183, para 44.

be considered to implicate the "essential security interests" of the State taking the measures.[188]

(c) WTO Remedies Available Against Article XXI Measures

The third aspect of the debate surrounding Article XXI concerns the remedies available to parties to the WTO Agreement that are adversely affected by measures justified under Article XXI. The *travaux* to GATT 1947[189] and the practice of GATT parties[190] supports the potential availability of GATT remedies even assuming the non-justiciability of the invocation of Article XXI. This point is illustrated by the panel report in *United States – Trade Measures Affecting Nicaragua*.[191] Notwithstanding the panel's inability, due to its limited terms of reference, to assess the United States justification for reliance on Article XXI, the panel nonetheless considered the claims made by Nicaragua, which included a non-violation nullification/impairment complaint under Article XXIII and a request for waivers under Article XXV. The panel made it clear that as Nicaragua was essentially raising a non violation complaint, the panel was unable to recommend that the United States withdraw the embargo.[192] Nonetheless, non violation complaints under Article XXIII (and other equivalent WTO provisions) can result in the authorisation of the withdrawal equivalent concessions in retaliation for the initial (Article XXI) measure.[193]

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188 Article XXI:(b) of GATT 1994, note 2 above. See Sarah Cleveland, "Human Rights, Sanctions and the World Trade Organisation" in Francesco Francioni (ed), Environment, Human Rights and International Trade, Hart Publishing, Oxford, 2001, 199, 229-233. Professor Damrosch has suggested, in oral remarks on 14 March 2002 at the annual conference of the American Society of International Law, that a State may be entitled to ban the export of military or other equipment, for example, implicated in the commission of torture. Allowing reliance on Article XXI in such cases appears to allow reconciliation of WTO obligations with the obligations of States under the rules such as those enshrined in Articles 16 and 41 of the *Articles on State Responsibility*, note 110 above, which were discussed in Chapter 4.

189 Verbatim Report of the 33rd meeting of Commission A of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, note 176 above, 25-29; and GATT, Analytical Index, note 21 above, Volume 1, 606.

190 As illustrated by the establishment of panel to hear Nicaragua's complaints against the United States that culminated in the report – *United States – Trade Measures Affecting Nicaragua*, note 165 above. Nicaragua appears to have blocked the adoption of the report – GATT, Analytical Index, ibid, Volume 1, 608.

191 *United States – Trade Measures Affecting Nicaragua*, note 165 above.

192 Ibid, para 5.8. Nicaragua's submissions under Articles XXIII and XXV were ultimately rejected by the panel – see paras 5.10, 5.11 and 5.13. See Cann, note 165 above, 481-482.

193 Para 3 of the WTO *Understanding on Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which forms part of GATT 1994 (see Article 1(c) of GATT 1994, note 2 above), provides that a WTO member that considers that

This conclusion is important in relation to efforts to justify human rights related trade measures under Article XXI. If the target State is entitled to seek the withdrawal of concessions it has at least the potential to impose a cost on the State imposing the measures. The Nicaraguan request for an Article XXV waiver was designed to allow other States to give Nicaragua trade preferences nullifying the effect of the United States embargo. Again, such a remedy has the potential to undermine the utility of human rights related trade measures justified under Article XXI.[194]

(d) Conclusions on Linkage via Security Exceptions

Article XXI is rarely relied upon. When it has been, it has usually been in cases of serious disruptions in international relations. In such serious cases Article XXI appears available to justify trade measures designed to protect human rights.[195] The limited discipline imposed by Article XXI enhances its potential human rights application

Reliance on Article XXI in circumstances that fall short of threats to international peace and security, however, raises a number of difficulties. Reliance on Article XXI may be justiciable. If it is justiciable, a panel or the Appellate Body may rule that measures that link trade and human rights are not authorised under Article XXI. If the invocation of Article XXI is found to be non-justiciable, there is still the prospect of remedies being sought by the target State. These remedies could involve WTO sanctioned retaliation against the Article XXI measure, or the sanctioning of other measures designed to insulate the target State from the Article XXI measure. These remedies may seriously undermine the effectiveness of a human rights related trade measure justified under Article XXI.

7. General Exceptions – Article XX GATT 1994 and Equivalent Provisions

(a) Introduction

Article XX of GATT 1994, the "General Exceptions" provision, is potentially the most significant GATT provision for addressing human rights related trade measures. In general terms, the Article allows certain non-trade policy concerns to override trade rules contained in the GATT.

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benefits under GATT 1994 are being nullified or impaired by the waiver may invoke Article XXIII dispute settlement.

194 For a discussion of the factors likely to influence the effectiveness of economic sanctions, see Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, Economic Sanctions Reconsidered, second edition, Institute for International Economics, Washington, 1990 – Volume 1, History and Current Policy, 91-105 and 114.

195 See the issues raised in relation to Article XXI and human rights in Marceau, note 14 above, 789 footnote 115 and 791.

Those who drafted Article XX recognised both the need for such a provision and the risk of its abuse. A balance or "equilibrium"[196] was established between trade and non-trade policies.[197] This balancing has been considered in a number of panel and Appellate Body decisions.[198] Whilst these decisions have generally focussed on environmental protection policies and trade, the approaches taken by panels and the Appellate Body shed light on how trade measures imposed for human rights purposes will be assessed under Article XX.

The present analysis of Article XX will focus on the exceptions in Article XX, paragraphs (a) and (b), which appear to be the most significant when considering human rights related trade measures. Brief reference will also be made to paragraphs (d), (e) and (h) of Article XX, which may also apply to human rights related measures.

At least four questions appear to be of importance when considering the relevance of Article XX:(a) and (b) to trade measures designed to secure the protection of human rights:

1. Whether trade measures having human rights purposes can generally be accommodated within paragraphs (a) and (b)?
2. Whether paragraphs (a) and (b) are capable of application to measures targeting human rights violations in States other than the State imposing the trade measures?
3. Whether trade measures taken for human rights purposes are likely to meet the necessity test found in paragraphs (a) and (b)? and
4. Whether such measures are likely to meet the requirements found in the opening clause of Article XX ("the *chapeau*")?

Significant assistance in answering most of the above questions can be derived from the reasoning of the WTO Appellate Body in the *Shrimp Turtle Case*. The approach of the Appellate Body in this case can be usefully contrasted with the

196 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (the "*Shrimp Turtle Case*"), WT/DS58/AB/R, 12 October 1998, adopted by the Dispute Settlement Body on 6 November 1998, para 159.

197 But as noted in Chapter 4 this "equilibrium" casts non-trade policies as exceptions that must in some cases surmount a "necessity" threshold.

198 These have included, under GATT 1947: *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes*, note 136 above; *United States – Restrictions on Imports of Tuna* (complaints of Mexico, and the EEC and the Netherlands – both not adopted), note 12 above; and under the WTO Agreement: *United States – Standards for Reformulated and Conventional Gasoline* (the "*Reformulated Gasoline Cas*e"), WT/DS2/R, 29 January 1996 (panel), and WT/DS2/AB/R, 29 April 1996, adopted by the Dispute Settlement Body on 20 May 1996 (Appellate Body); the *Shrimp Turtle Case*, WT/DS58/R, 15 May 1998 (panel), note 196 above (Appellate Body), *Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, 15 June 2001 (panel), and WT/DS58/AB/RW, 22 October 2001 (Appellate Body); and the *Asbestos Case*, note 96 above (panel), and note 15 above (Appellate Body).

reasons offered by the two GATT 1947 panels in the unadopted reports in the *Tuna Dolphin* litigation.[199] The panel and Appellate Body reports in the *Asbestos Case*[200] also provide guidance as to the scope of the necessity tests in Article XX, and on the relationship between Article XX and Article XXIII:1(b) of GATT 1994.

Based on this jurisprudence it appears that Article XX does offer a significant mechanism for justifying trade measures that respond to violations of international obligations to respect human rights. The interpretation of Article XX adopted in the *Shrimp Turtle Case* imposes limitations on the use of trade measures for non-trade policy purposes, but human rights related trade measures may nonetheless find justification under Article XX.

Before turning to the interpretation of the paragraphs of Article XX, a brief digression appears necessary. Consideration of Article XX requires careful application of rules of treaty interpretation.[201] A number of issues arise, including the relevance of the negotiating history of GATT *1947* to the interpretation of Article XX of GATT *1994* (which is itself an annexure to the WTO Agreement), and the relevance of rules and principles of general international law to the interpretation of Article XX.

Once the position on certain questions of treaty interpretation has been clarified, the approaches of the two GATT 1947 panel reports in the *Tuna Dolphin* litigation and the WTO *panel* in *Shrimp Turtle Case* will be briefly considered to provide background for the consideration of the *Appellate Body* report in the *Shrimp Turtle Case*. This will be followed by general observations on important contrasts between the environmental concerns addressed in the *Tuna Dolphin* and

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199 *United States – Restrictions on Imports of Tuna*, note 12 above. The status of adopted and unadopted panel reports was considered by the WTO Appellate Body in its report, *Japan – Taxes on Alcoholic Beverages*, note 15 above, 14-15:

> "Adopted Panel Reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among GATT members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."

The Appellate Body observed that unadopted reports:

> "… have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO members. A panel could nevertheless find useful guidance in the reasoning of an unadopted Panel Report that it considered to be relevant" – ibid, 15.

On the relevance of GATT 1947 practice and decisions, see also Article XVI(1) of the WTO Agreement, note 1 above, and Annex 1(a), GATT 1994, note 2 above, paragraph 1(b)(iv).

200 See note 198 above.

201 These rules have relevance to each of the provisions of the WTO Agreement already considered in this chapter. The rules of treaty interpretation are being considered here as these issues arise in sharpest focus in the context of Article XX of GATT 1994, note 2 above.

Shrimp Turtle cases, and the concerns that may arise when considering human rights related trade measures under Article XX.

The scope of paragraphs (a) and (b) of Article XX will then be considered, followed by a discussion of the conditions contained in the *chapeau* to Article XX. The relevance of Article XXIII:1(b) to human rights related trade measures that may be justified under Article XX will then be considered. General conclusions will then be offered as to the importance of Article XX of GATT 1994 (and equivalent provisions of other WTO agreements) to the legality of human rights related trade measures.

(b) Article XX of GATT 1994 and Treaty Interpretation

Reference has already been made to the rules of treaty interpretation contained in Articles 31 and 32 of the *Vienna Treaty Convention*.[202] The rules have, on a number of occasions, been recognised as reflecting the rules of treaty interpretation under general international law.[203] There is recognition in Article 3.2 of the DSU that the WTO dispute settlement system serves, *inter alia*, "to clarify the existing provisions of [the covered]…agreements in accordance with customary rules of interpretation of public international law".

In formal terms, when GATT 1994 is being considered, what the treaty interpreter is required to consider are the provisions of the WTO Agreement, which was concluded in 1994 but which reflected, *inter alia*, negotiations which began with the commencement of the Uruguay Round in 1986. As already noted, preparatory works can be considered in the interpretation of a treaty, and thus the negotiations during the Uruguay Round are relevant to the interpretation of Article XX and all other provisions of the WTO Agreement and its annexes. Article XX of GATT 1994, however, is identical in every respect to Article XX of GATT 1947. A question can therefore be raised as to the relevance of the negotiations leading to the adoption of Article XX in GATT 1947 to the interpretation of the equivalent provisions of the WTO Agreement.

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202 See note 13 in Chapter 3 and the text accompanying and note 374 in Chapter 4 and text accompanying.

203 See, for example, *Golder v United Kingdom*, European Court of Human Rights, Series A, Number 18, 1 European Human Rights Reports 524, para 29 (1975); *Kasikili/Sedudu Island (Botswana v Namibia), Judgment*, ICJ Reports 1999, 1045, 1059, para 18; WTO Appellate Body report, – *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, adopted by the WTO Dispute Settlement Body on 12 January 2000, para 80; and *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, adopted by the WTO Dispute Settlement Body on 20 April 2005, paras 158-213.

The negotiations in the 1940s that resulted in the drafting of Article XX can be considered to be part of the context[204] of the WTO Agreement and therefore relevant to the interpretation of Article XX of GATT 1994. Further, a treaty interpreter is entitled to have regard to special meanings given to terms of a treaty provided that this is consistent with the intention of the parties.[205] Article XVI:1 of the WTO Agreement evidences an intention on the part of the parties to the WTO Agreement to maintain continuity with the GATT 1947 "framework".[206]

This approach appears to have been followed in WTO Appellate Body reports. In *United States – Standards for Reformulated and Conventional Gasoline*,[207] the Appellate Body noted that the language of Article XX of GATT 1994 had not changed from its 1947 counterpart.[208] Subsequent Appellate Body reports have made specific reference to the negotiations in the 1940s when seeking to interpret Article XX of GATT 1994.[209]

Despite the common language of the 1947 and 1994 "General Exceptions", Article XX of GATT 1994 does find itself in a different context as part of the WTO Agreement. For example, the preamble to the WTO Agreement differs from the preamble to GATT 1947. According to the general rules of treaty interpretation, the preamble of a treaty forms part of the context that is relevant when other provisions of the treaty are being interpreted.[210] The Appellate Body in the *Shrimp Turtle Case*

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204 According to Article 31(1) of the *Vienna Convention on the Law of Treaties*, note 17 above:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose." [Emphasis added.]

Note also Article 31(2), which provides that:

> "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

205 Ibid, Article 31(4).

206 Article XVI:1 of the WTO Agreement, note 1 above, provides that:

> "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."

207 The *Reformulated Gasoline Case*, note 198 above.

208 Ibid, 29.

209 See, for example, the Appellate Body report in the *Shrimp Turtle Case*, note 196 above, para 157.

210 See Article 31(2) of the *Vienna Convention on the Law of Treaties*, note 17 above.

observed that the preambular language of the WTO Agreement "must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement, in this case, GATT 1994."[211] Thus, in interpreting Article XX of GATT 1994, it is appropriate to have regard to the terms and negotiating history of other parts of the WTO Agreement[212] and to the negotiating history of GATT 1947.

The Appellate Body's consideration of the WTO Agreement's preamble in its report in the *Shrimp Turtle Case* focussed on the inclusion of a commitment to "sustainable development" in the preamble.[213] There was no equivalent commitment in the preamble to the GATT 1947.[214] The Appellate Body emphasised the importance of this variation in the drafting of the WTO Agreement's preamble in justifying the consideration of environmental concerns when interpreting Article XX.[215]

Notwithstanding the apparent failure of the drafters of the WTO Agreement to incorporate any specific reference to human rights in the preamble to the WTO Agreement, nothing in the preamble (or any other provision of the WTO Agreement) justifies the exclusion of human rights concerns when interpreting Article XX. Indeed the preamble can be interpreted as supporting the consideration of human rights standards when interpreting the WTO Agreement. The reference in the GATT 1947 to the objectives of "raising standards of living" and "ensuring full employment" are repeated in the WTO Agreement's preamble. These references appear to reflect the international community's recognition of the importance of trade in securing respect for human dignity. Respect for human dignity underpins international human rights standards.[216] The international community has acknowl-

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211 The *Shrimp Turtle Case*, note 196 above, para 153.

212 One particular agreement that appears to be relevant to the interpretation of Article XX(b) is the *Agreement on the Application of Sanitary and Phytosanitary Measures*, note 10 above. Note also the general interpretative note to Annex 1A of the WTO Agreement, note 1 above, that provides that:

> "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of the other agreement shall prevail to the extent of the conflict."

213 The *Shrimp Turtle Case*, note 196 above, paras 152-153.

214 The Preamble to GATT 1947, note 4 above, instead referred to "… developing the full use of the resources of the world".

215 The *Shrimp Turtle Case*, note 196 above, paras 131 and 153.

216 See, for example, the preambles to the Charter of the United Nations, the Universal Declaration of Human Rights, General Assembly resolution 217A (III), United Nations Document A/810, 71 (1948); the *International Covenant on Economic, Social and Cultural Rights*, annexed to resolution 2200 (XXI) adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976, 993 UNTS 3; and the *International Covenant on Civil and Political Rights*, annexed to the same resolution, entered into force 23 March 1976 , 999 UNTS 171.

edged the relationship between human dignity and the promotion and protection of human rights in the United Nations Charter[217] and other multilateral treaties and instruments including the Universal Declaration of Human Rights[218] and the covenants on economic, social and cultural rights, and civil and political rights.[219] The preamble of the WTO Agreement should be read in this context.[220]

A link between international human rights obligations and the preamble to the WTO Agreement may also arise by virtue of the reference to "sustainable development". If the concept of "sustainable development" has a human rights dimension[221] then that dimension becomes relevant to the interpretation of the WTO Agreement.

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217 See, in particular, the second preambular paragraph and Articles 55 and 56 of the Charter.

218 See the first preambular paragraph of the Universal Declaration of Human Rights, note 216 above.

219 See the first preambular paragraphs of the two covenants, note 216 above.

220 See, for example, Ernst-Ulrich Petersmann, "Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution" in Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 19 above, 29, 45.

221 There are a number of indications that this is indeed the case. The 1992 Rio Declaration on Environment and Development, in Principle 3, expressly refers to the "right to development" – see Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions adopted by the Conference, UN Doc A/CONF.151/26/REV.1, 3, reprinted in 31 ILM 874 (1992). The Rio Declaration would appear to be a critical instrument in relation to the interpretation of the words "sustainable development" in the WTO Agreement. See, for example, the *Shrimp Turtle Case*, note 196 above, para 154. It would therefore be extremely significant if the drafters of the Rio Declaration intended this reference to the "right to development" to refer to the human right to development declared by the General Assembly in 1986 – see General Assembly resolution 41/128 which was adopted on 4 December 1986. At least one State at the time of drafting the Rio Declaration appeared to recognise a possible link between Principle 3 and the 1986 Declaration – see Philippe Sands, International Law in the Field of Sustainable Development, 65 British Year Book of International Law 303, 323-324 (1994). Such a link, which appears to be both substantively and temporally plausible, would have significant implications regarding the relevance of international human rights obligations to the interpretation of the WTO Agreement. Perhaps most significant would be Article 6(3) of the 1986 Declaration on the Right to Development which provides that "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights." The 2002 Johannesburg Declaration on Sustainable Development, A/CONF.199/L.6/Rev.2 and A/CONF.199/L.6/Rev.2/Corr.1, 4 September 2002, though adopted after the negotiation of the WTO Agreement, corroborates other evidence suggesting a link between sustainable development and respect for international human rights obligations. The Declaration, for example, in para 28 refers to the 1998 "ILO Declaration on Fundamental Principles

Treaty interpretation questions have also arisen as to the relevance, when interpreting the WTO Agreement, of rules of general international law and of treaties concluded subsequent to the conclusion of the WTO Agreement. As noted in Chapter 2, Article 31(3) of the *Vienna Treaty Convention* addresses the relevance of agreements and rules of international law that are extrinsic both to the text of the treaty being interpreted and the context of the treaty's conclusion. According to Article 31(3), a treaty interpreter is entitled to have regard, together with the context of the treaty, to the following:

> "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties."

These rules of interpretation appear to provide a means by which to ascertain the "common understanding of the parties [to a treaty] as to the meaning of the terms" of the treaty.[222] Joost Pauwelyn has argued that the reference to "parties" in Article 31(3) refers essentially to all parties to the treaty being interpreted, in this instance the WTO Agreement.[223] He supports this argument both by reference to the terms of the *Vienna Treaty Convention*[224] and the *travaux* to the Convention.[225] On this approach, treaties concluded *subsequent* to the conclusion of the WTO Agreement which do not have the acceptance of all parties to the WTO Agreement are not relevant to the interpretation of the WTO Agreement.[226] The apparent strictness

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and Rights at Work". The Council of the European Union makes the link between sustainable development, the human right to development and other international human rights obligations explicit in Regulation No 980/2005 of 27 June 2005, in paragraph 7 of the preamble – Official Journal of the European Union, L 169/1, 30 June 2005. This regulation will be considered further in Chapter 7.

222 The International Law Commission's commentary to what was would eventually become 31(3)(b) [then Article 27(3)(b)] of the *Vienna Treaty Convention* – reprinted in Yearbook of the International Law Commission 1966, Volume II, 222, para 15.

223 Pauwelyn, note 93 above, 575. For an alternative view, see Marceau, note 14 above, 780-783.

224 In particular, Article 2(1)(g) of the *Vienna Treaty Convention* – see Pauwelyn, ibid, 575.

225 Pauwelyn, ibid, refers International Law Commission's commentary to what became Article 31(3)(b) of the *Vienna Treaty Convention* – see the Yearbook of the International Law Commission 1966, Volume II, 222, para 15.

226 See the panel report in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, adopted by the Dispute Settlement Body on 21 November 2006, paras 7.65-7.72, where the panel appeared to endorse this approach. For criticism of

of this approach is mitigated somewhat by the acknowledgement that the "agreement … of the parties" referred to in paragraphs 3(a) and 3(b) of Article 31 does not require any form of express agreement. As suggested by Pauwelyn, implicit acceptance or acquiescence appears sufficient.[227] In the context of Article 31(3)(c) Pauwelyn observes that:

> "… the requirement is not that all the parties to the WTO treaty must have formally and explicitly agreed, one after the other, to the new non-WTO rule; nor even that this rule must otherwise legally bind all WTO members; but, rather, that this new rule can be said to be at least implicitly accepted or tolerated by all WTO members, in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the WTO term concerned."[228]

The absence of acceptance of a non-WTO treaty by all parties to the WTO Agreement also does not preclude the relevance of such a non-WTO treaty in establishing, for example, that a particular measure is necessary to "protect public morals" in accordance with Article XX(a) of GATT 1994.[229] The Appellate Body appears to have relied on non-WTO treaties for evidentiary (as opposed to interpretative) purposes in its report in the *Shrimp Turtle Case*.[230]

The International Law Commission, in its commentary to the draft Article that became Article 31(3)(c) of the *Vienna Treaty Convention*, appeared to recognise that the rule contained in the article allowed for the interpretation of a treaty in the light of subsequent evolution of rules of general international law.[231] The rule contained in Article 31(3)(c) therefore has particular significance for the interpretation of the WTO Agreement in that it potentially allows for the consideration of rules of general international law regardless of whether such rules arose prior to or subsequent to the conclusion of the WTO Agreement.

The WTO Appellate Body appears to have adopted this approach in its decision in the *Shrimp Turtle Case* when it gave an "evolutionary interpretation" to

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this view, see, for example, the ILC Study Group Report on Fragmentation, note 115 above, 226-228. Compare Campbell McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 International and Comparative Law Quarterly 279, 315 (2005).

227 Pauwelyn, note 93 above, 575.

228 Ibid, 575-6.

229 See Marceau, note 93 above, 133-134.

230 The *Shrimp Turtle Case*, note 196 above, paras 169 to 172. See also *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, note 226 above, paras 7.92-7.96.

231 Yearbook of the International Law Commission 1966, Volume II, 222, para 16. See also Pauwelyn, note 93 above, 575-576; McLachlan, note 226 above, 291-293; and the ILC Study Group Report on Fragmentation, note 115 above, 213-218.

Article XX(g)[232] of GATT 1994 and when it made the following observation at paragraph 148 of its report:

> "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'[233] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[234]

The rules of treaty interpretation referred to in paragraph 31(3)(c) therefore provide a means by which rules of general international law that impose obligations to respect human rights might have relevance in the interpretation of the WTO Agreement. In addition, as noted in Chapter 4, the peremptory character of obligations to respect human rights adds another important interpretative dimension. Nowhere is it more likely that human rights standards will be relevant to the interpretation of a provision of the WTO Agreement than it is in relation to the interpretation of Article XX of GATT 1994 and equivalent provisions.

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232 The *Shrimp Turtle Case*, note 196 above, paras 130 to 131. This feature of the Appellate Body's report is discussed further below, see text accompanying note 290 below.

233 B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

> "… A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty …" (emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407-410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142. [Footnote in original.]

234 Vienna Convention, Article 31(3)(c). [Footnote in original.]

(c) Contrasting Approaches to Article XX and Environmental Measures

As noted already, the unadopted panel reports in the *Tuna Dolphin* litigation addressed the interpretation of the general exceptions in Article XX. These unadopted reports together with the WTO *panel* report in *Shrimp Turtle Case* reached conclusions that essentially removed any prospect of defending trade measures for human rights purposes under Article XX. The three panel reports addressed environmental measures but the reasoning employed to exclude justification of such measures under Article XX would have applied equally to measures focussing on human rights concerns. Each of these panel reports included reliance on *general* arguments for excluding the types of measures that would be relied upon in attempts to ensure respect for international human rights obligations through trade measures. These general arguments will now be briefly considered in order to contrast the approach of these panels with the approach taken by the Appellate Body in the *Shrimp Turtle Case*.

(i) *First Tuna Dolphin Case*

The panel report in the *First Tuna Dolphin Case*[235] considered, *inter alia*, whether a United States import embargo on tuna caught in the Eastern Tropical Pacific using *purse seine* nets could be justified under Article XX. The United States embargo applied to tuna caught by vessels registered in States that did not have programs in place for reducing the incidental killing of dolphins (which apparently swim with tuna in the Eastern Tropical Pacific) that were comparable to the United States program. The United States argued, *inter alia*, that Article XX(b) of GATT 1947 allowed measures that were aimed at the conservation of animals outside of the State taking the measures. The panel found (on a complaint by Mexico) that the United States embargo was in breach of Article XI of GATT 1947 and could not be defended under Article XX. The panel relied in part on a general argument against Article XX(b)'s applicability:

> "The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States [ie that the United States could justify under Article XX(b) measures directed at the conservation of dolphins *outside* of United States waters] were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."[236]

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235 The *First Tuna Dolphin Case*, note 12 above.

236 Ibid, para 5.27. The panel also relied on the general argument that as an exception to positive GATT obligations Article XX had to be given a narrow construction – para 5.22.

A similar general argument was offered in relation to Article XX(g).[237]

The panel also considered that the drafting history of Article XX(b), and the requirement of the provision that any measure be "necessary", ruled out United States reliance on Article XX.[238] The broad scope of the ruling, however, resulted from the finding that Article XX, paragraphs (b) and (g), could not accommodate measures targeting conduct occurring outside of the State taking the measures.[239] It is apparent that the Panel was generally concerned that allowing the United States measures to be justified under Article XX would undermine the multilateral trading system. This concern was used to justify the interpolation of an additional limitation on the scope of Article XX.

(ii) *Second Tuna Dolphin Case*

The panel in the *Second Tuna Dolphin Case*[240] adopted a slightly different tack but reached the same result. The case concerned essentially the same facts as the *First Tuna Dolphin Case* but focussed instead on the secondary boycott imposed under United States laws on tuna imports from States that allowed tuna embargoed by the United States into their territory. The panel shared the first panel's concern about the use of Article XX to justify trade measures directed at the conduct of foreign nationals acting outside of the State imposing the measures. However, rather than relying on the general basis for limiting Article XX put forward in the *First Tuna Dolphin Case*, the panel attempted to read down Article XX by reference to the word "necessary" in Article XX(b)[241] and the terms "relating to" and "in conjunction with" in Article XX(g).[242] The necessity requirement of Article XX(b) was

237 Ibid, para 5.32.

238 Ibid, paras 5.26 – 5.28.

239 Panels in this area have used terms such as "extra-territorial" and "extra-jurisdictional" to describe such measures. References to these terms can be misleading as they imply the relevance of rules of international law governing exercises of extraterritorial jurisdiction. Trade measures justifiable under Article XX are never, however, extraterritorial in this sense. Stopping goods from entering a State for any reason has no extraterritorial quality and does not violate the rules governing permissible exercises of jurisdiction under international law. See, for example, the United States submissions to the panel in the *Shrimp Turtle Case*, note 198 above, paras 3.162 and 3.167. This issue was discussed in Chapter 5 and is discussed further below. For the above reason the term advocated by Steve Charnovitz – "outwardly directed" – has been employed in this Chapter – see Steve Charnovitz, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law, 689, 695 (1998).

240 The *Second Tuna Dolphin Case*, note 12 above.

241 Ibid, para 5.31. Article XX(b) of GATT 1994, note 2 above, protects measures "*necessary* to protect human, animal or plant life or health". [Emphasis added.]

242 Ibid, paras 5.23 – 5.27. Article XX(g) of GATT 1994, ibid, protects measures "*relating to* the conservation of exhaustible natural resources if such measures are made effective *in conjunction with* restrictions on domestic production or consumption". [Emphasis added.]

used by the panel to address general concerns as to outwardly directed measures and measures imposed by certain GATT parties that were designed to force other GATT parties to change their policies:

> "… If Article XX (b) were interpreted to permit contracting parties to deviate from the basic obligations of the General Agreement by taking trade measures to implement policies within their own jurisdiction, including policies to protect living things, the objectives of the General Agreement would be maintained. If however Article XX(b) were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which required such changes to be effective, the objectives of the General Agreement would be seriously impaired.
>
> … The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b) …"[243]

The differences between the panel reports in the two *Tuna Dolphin* cases on these issues are not fundamental.[244] Whereas a restriction was read into the general terms of paragraphs (b) and (g) in the *First Tuna Dolphin Case*, a limitation was read into the words "necessary" (Article XX(b)) and "related to" (Article XX(g)) in the *Second*. As already noted, the reports in the two *Tuna Dolphin* cases were not adopted.

(iii) *Panel* Report in *Shrimp Turtle Case*

The WTO panel in the *Shrimp Turtle Case*[245] appeared to share a similar general concern about outwardly directed trade measures. The panel expressed concern over the potential for conflicting policies of parties to the WTO Agreement undermining the WTO trading system.[246] These general concerns, however, were linked not to the particular paragraphs, (a) to (j), of Article XX (as in the two *Tuna Dolphin* cases), but instead were linked to the opening clause or *chapeau* of Article XX:

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243 Ibid, paras 5.38 – 5.39.

244 The panel in the *Second Tuna Dolphin Case* accepted the general proposition that as an exception, Article XX must be construed restrictively – ibid, para 5.26. The panel did offer extremely limited concessions in favour of outwardly directed measures – see paras 5.20 and 5.33. Any potential expansion in the coverage of Article XX flowing from these concessions was undermined by the interpretation of the words "necessary" in paragraph (b) and "related to" in paragraph (g) of Article XX.

245 The report of the panel in the *Shrimp Turtle Case*, note 198 above.

246 Ibid, paras 7.44 to 7.45.

> "In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. If that happened, it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements. … Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system."[247]

(iv) *Appellate Body* Report in *Shrimp Turtle Case*

The Appellate Body in its report in the *Shrimp Turtle Case* effectively abandoned this search for some general argument to exclude the protection of Article XX for trade restrictions imposed for non-trade policy purposes that targeted policies or practices in other States. The Appellate Body made the following observation that captures this fundamental shift:

> "It appears to us … that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[248]

One of the most significant features of the Appellate Body's approach to Article XX in its report in the *Shrimp Turtle Case* was its apparent willingness to accept that trade measures could be justified under Article XX(g) (and perhaps also (b)) even if they were directed at actions occurring outside the State imposing the mea-

247 Ibid, para 7.45. [Footnote not reproduced.]

248 The *Shrimp Turtle Case*, note 196 above, para 121. [Italics in original.]

sures.[249] In other words, the Appellate Body effectively rejected the view found in different forms in the three earlier panel reports that such measures are necessarily outside the protection offered by Article XX(b) and (g). This feature of the Appellate Body's decision is discussed further below.

(d) Contrasts between Environmental and Human Rights Policies

The panels in the *Tuna Dolphin* cases and the *Shrimp Turtle Case* heard submissions from a number of States that argued that the United States dolphin and turtle conservation measures were not defensible under Article XX of GATT 1994.[250] One concern expressed[251] by some States[252] was that the United States measures constituted unilateral coercive action. This general concern appeared to comprise at least three components:

– a concern about the United States unilaterally setting conservation standards for dolphins[253] and turtles;[254]
– a concern about the United States eschewing cooperative action[255] and instead unilaterally requiring other parties to the GATT/WTO Agreement (and their nationals) to respect those standards; and

249 Ibid, para 133.

250 For example, in the *First Tuna Dolphin Case*, note 12 above, the complainant (Mexico) appears to have been supported by Australia (paras 4.1 – 4.6), Canada (paras 4.7 – 4.9), the European Economic Community (paras 4.10 – 4.14), Indonesia (para 4.15), Japan (paras 4.16 – 4.19), Korea (para 4.20), Norway (para 4.21), Philippines (para 4.22), Senegal (para 4.23), Thailand (para 4.24) and Venezuela (paras 4.26 – 4.30).

251 See, for example, Venezuela's submission in the *First Tuna Dolphin Case*, ibid, para 4.27; the European Economic Community's and Dutch submission in the *Second Tuna Dolphin Case*, note 12 above, para 3.40; and the submissions made by Malaysia, Pakistan and Thailand referred to in the panel report in the *Shrimp Turtle Case*, note 198 above, paras 3.99-3.105.

252 Note that the European Economic Community was also a complainant in the *Second Tuna Dolphin Case*, ibid.

253 Not all species of dolphin protected by the relevant United States legislation were recognised as endangered species under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES"), done at Washington on 3 March 1973, entered into force on 1 July 1975, 993 UNTS 243 (1976), reprinted in 12 ILM 1085 (1973). See the *First Tuna Dolphin Case*, note 12 above, para 4.5.

254 The use of turtle excluder devices was not a universally accepted standard at the time that the United States first imposed obligations to employ such devices – see, the Malaysian submissions referred to in the panel report in the *Shrimp Turtle Case*, note 198 above, para 3.99.

255 For example, Thailand asserted that the United States had failed to cooperate or negotiate in the *Shrimp Turtle Case*, see the panel's report, ibid, para 3.104 – 3.105.

– a concern about the use of coercive measures by the United States to force the target States to change internal policies and secure compliance with the unilaterally determined standards.[256]

These concerns have been addressed in various ways by developments in the rules of international law dealing with the environment. International obligations to respect human rights standards and related institutional arrangements, however, address concerns that differ in significant respects. This is of importance to the current analysis because differences between the nature of environmental regulation and obligations to respect human rights standards may impact on the relevance of panel and Appellate Body reports (that deal with environmental regulation) when addressing Article XX and human rights related measures. More specifically, difficulties arise when seeking to rely on the approach taken by the Appellate Body in the *Shrimp Turtle Case* (which dealt with environmental concerns) in order address human rights concerns.

Addressing the first specific concern identified above – the concern about unilaterally set standards – the three panel reports appear designed to guarantee freedom for States to determine their own environmental policies operating within their own territory and thus limit the extent to which one party to the GATT/WTO Agreement can dictate the environmental policies of another party.

The question of unilaterally set standards raises different issues when addressing human rights concerns. The United Nations commitment to *universal* human rights standards is a potential obstacle to efforts to unilaterally set human rights standards. Beginning with the adoption of the Universal Declaration of Human Rights in 1948, standard setting in the context of human rights has reached a level of development not yet seen in the context of international environmental regulation.[257] Whilst States might seek to unilaterally set human rights standards, such

256 Arguments of based on "sovereign equality" and "non-intervention" were raised by India, Pakistan and Thailand in the *Shrimp Turtle Case* – see the panel report, ibid, para 3.157. Contrast the three "important questions of principle" identified by Halina Ward, Common But Differentiated Debates: Environment, Labour and the World Trade Organization, 45 International and Comparative Law Quarterly 592, 603 (1996). For more detailed reflections on differences between environmental and human rights regulation, see Daniel Bodansky, "The Role of Reporting in International Environmental Treaties: Lessons for Human Rights Supervision" in Philip Alston and James Crawford (eds), The Future of UN Human Rights Treaty Monitoring, Cambridge University Press, Cambridge, 2000, 361, 363-365; and Steve Charnovitz, The World Trade Organization and Social Issues, 28(5) Journal of World Trade 17, 21-23 (1994).

257 There appears to be a qualitative difference in the approach to environmental and human rights standards. Contrast the "horse-trading" that occurs in setting environmental standards. According to Daniel Bodansky "[i]n human rights agreements, the end point of the negotiations is a common core of human rights to be respected. In contrast, international environmental negotiations often involve a process of outright-horse-

attempts can be countered by reference to international instruments establishing universal standards. The emphasis in panel reports on negotiation would therefore appear to be of little or no relevance when addressing human rights standard setting.[258]

The second concern identified above in relation to Article XX related to unilateral attempts to enforce standards as opposed to seeking cooperative responses. Unilateral attempts to enforce environmental standards that address global environmental concerns can be questioned on pragmatic grounds. Unilateral efforts by the United States to secure protection of highly migratory species such as sea turtles appear to lack feasibility. Cooperative solutions to such global problems appear essential.

Whilst enforcement of international human rights standards is generally enhanced by cooperative efforts, global cooperation is not normally necessary. Even systematic and gross violations of human rights obligations can sometimes be halted by pressure or action on the part of one or a small number of States brought to bear on the perpetrators of the violations.[259] Action to secure greater respect for international human rights obligations in such cases is more akin, for example, to conservation action in respect of a species found only in the territory of one State. Whilst global environmental problems overlap with human rights concerns,[260] the protection of civil and political rights and economic, social and cultural human rights appears to raise quite different issues to those raised by efforts to address global environmental problems.[261]

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trading that, on the one hand, results in different requirements for different countries, but by virtue of that fact, allows more stringent and specific requirements to be adopted than would otherwise be possible" – ibid, 364-5. [Footnote not reproduced.]

258 Negotiation does, however, appear to be relevant to questions of implementation or enforcement of human rights standards. But again, significant differences arise that are addressed in the consideration of the second area of concern.

259 Examples of military action by one or a number of States bringing to an end widespread and systematic violations of human rights include the Tanzanian invasion of Uganda and the Vietnamese invasion of Cambodia in the 1970s; and the NATO military action against the Federal Republic of Yugoslavia in the 1990s. The legality of such actions has been questioned on account of the apparent violation of the UN Charter's prohibition on the use of force in Article 2(4) – see generally Lori F Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit (eds), International Law Cases and Materials, 4th edition, West Group, St Paul, 2001, 990-1005. The examples do, however, illustrate the potential utility of unilateral action in defence of human rights.

260 Note the discussion in Chapter 2 of human rights and environmental protection.

261 Another area in which environmental protection appears to raise different enforcement related issues is the area of *proof*. Questions of proof arise in relation to both environmental and human rights enforcement efforts although in the case of systematic or widespread violations of human rights the scale of violations renders proof less contentious. It seems less likely that there will be significant evidentiary problems

The third concern identified above in relation to Article XX related to unilateral attempts to enforce standards using coercive action. States have raised concerns as to the extraterritorial or extra-jurisdictional application of standards. Concerns have also been expressed about interference in the internal affairs of the target State. The concern about coercive action is closely linked to the standards the coercing State seeks to enforce (*ie* the first concern noted above). A target State might reasonably complain about environmental standards idiosyncratically set by one State being coercively imposed on the target State. As suggested in Chapter 5, the complaint lacks substance, however, when one considers obligations under general international law to respect human rights.

As noted in Chapter 4, one feature of environmental regulation that appears to distinguish global environmental instruments from global human rights instruments is the presence in a number of environmental treaties of specific provisions governing trade. The *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[262] and the *Montreal Protocol on Substances that Deplete the Ozone Layer*,[263] for example, include provisions addressing trade in endangered species[264] and chlorofluorocarbons,[265] respectively.

It is submitted that the fact that human rights treaties rarely require or even refer to trade measures in response to human rights violations does not justify an interpretation of Article XX that would exclude its application to human rights related trade measures. Such an interpretation would potentially give rise to conflict between the WTO Agreement and those few human rights treaties that require

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in relation to the existence and the intensity of harm resulting from human rights violations (one exception might be disappearances). Evidentiary problems in relation to protection of the environment often relate to the probability of harm occurring and its likely intensity. The question of probability of harm arises due to the tendency in environmental policy to adopt a prophylactic paradigm (this may contribute to the more "political" nature of environmental regulation when compared to more "legalistic" human rights regulation – see Bodansky, note 256 above, 364-365). The precautionary approach or principle has been developed to respond to such problems of proof. See Principles 15 of the Rio Declaration on Environment and Development, note 221 above. Scientific uncertainty as to the existence of environmental risks and the intensity of possible harm are addressed by the principle. There does not appear to be the same need for reliance on a precautionary approach in the context of human rights.

262 CITES, note 253 above.

263 The *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal on 16 September 1987, entered into force on 1 January 1989, 1522 UNTS 3 (1989), reprinted in 26 ILM 1550 (1987), agreement amending the protocol reprinted in 30 ILM 537 (1991).

264 See, for example, Article III of the CITES, note 253 above.

265 See, for example, Article 4 of the *Montreal Protocol*, note 263 above.

trade measures.[266] To interpret Article XX in this way would also potentially conflict with the obligations enshrined in Articles 16 and 41 of the *Articles on States Responsibility* adopted by the International Law Commission in 2001, and with obligations to exercise due diligence to prevent the violation of particular peremptory norms, which were discussed in Chapter 4. The presence of trade provisions in

266 See the *Slavery Convention* of 1926, done at Geneva on 25 September 1926, entered into force on 9 March 1927, 60 LNTS 253, as amended by protocol of 7 December 1953, 212 UNTS 17 – which includes a provision (Article 2) governing the suppression of trade in slaves – note also Article 99 of the 1982 *Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 3; and the *International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches*, done at Berne on 26 September 1906, accessible at <http://www.austlii.edu.au/au/other/dfat/treaties/1919/9.html>, visited 12 May 2007 – which can be conceived of as an early form of human rights treaty that suppressed (in Article 1) trade in such matches. Note also the discussion in Chapter 4 of Article 41 of the *Articles on State Responsibility*, note 110 above.

The International Labour Organization is founded upon implicit recognition of the link between respect for labour related human rights and international trade. The third preambular paragraph to the Organization's constitution recognises the importance of harmonisation in securing the protection of labour rights – see Part XIII, *Treaty of Peace between the Allied and Associated Powers and Germany*, done at Versailles on 28 June 1919. Trade measures do not, however, appear to be *required* by International Labour Organization conventions. See, for example, "Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar" adopted by International Labour Conference at its 88th session, Geneva, June 2000, which approved a recommendation that "governments … review … the relations that they may have with the member State concerned [ie Burma] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour …" – paragraph 1(b)(i). Joost Pauwelyn discusses this resolution in Pauwelyn, "Human Rights in WTO Dispute Settlement" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 14 above, 205, 218-219. Halina Ward makes the following observation:

> "The incorporation of environmental and labour concerns in international economic instruments is not new. The treaty of Rome evolved to take on an integrated environmental and social dimension. Both the social and environmental dimensions of international trade were also addressed in the North American Free Trade Agreement, particularly through side agreements on labour and environmental co-operation. Environmental and labour provisions have been incorporated within multilateral commodity agreements"- Ward, note 256 above, 596-597. [Footnotes not reproduced.]

Of these treaties, only the labour side agreement to the *North American Free Trade Agreement* appears to allow (but not require) trade measures in response to violations of labour related human rights – see Article 41 of the *North American Agreement on Labor Cooperation*, done on 14 September 1993, entered into force on 1 January 1994, reprinted in 32 ILM 1499 (1993).

environmental treaties will have potential legal significance (especially for States that are parties to both the WTO Agreement and an environmental treaty[267]) but it does not justify reading down Article XX so as to exclude its potential application to human rights related trade measures.

(i) The Scope of Article XX

With these reflections in mind, attention will now be turned to the specific terms of Article XX of GATT 1994 and the Appellate Body report in the *Shrimp Turtle Case*. The *chapeau* of Article XX and the relevant paragraphs of the article provide that:

> "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
>
> (e) relating to the products of prison labour;
>
> ….
>
> (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;…"

267 It could, for example, involve a modification of rights under the WTO Agreement *inter se* in accordance with the rules contained in Article 41 of the *Vienna Treaty Convention*, note 17 above.

Article XIV of *General Agreement on Trade in Services*[268] and Article 27 of *Agreement on Trade-Related Aspects of Intellectual Property Rights*[269] are drafted in similar terms.[270] Differences between these provisions and Article XX of GATT 1994 will be assessed when corresponding provisions of Article XX are considered below.

(e) Article XX(a) of GATT 1994

Article XX(a) deals with measures "necessary to protect public morals." Whether Article XX(a) proves to be of importance as a means by which to defend human rights related trade measures appears to depend initially on whether three requirements can be established:

– That Article XX(a) applies to human rights related trade measures;
– That Article XX(a) is available to countenance outwardly directed measures; and
– That the necessity requirement of Article XX(a) can be satisfied.

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268 Paragraph (a) of Article XIV ("General Exceptions") of the *General Agreement on Trade in Services*, note 16 above, provides that:

> "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> (a)necessary to protect public morals or to maintain public order;…

A footnote to paragraph (a) provides that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." The Appellate Body considered this provision in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, note 203 above, paras 296-299.

269 See, in particular, paragraphs 2 and 3 of Article 27 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, note 169 above.

270 See also Article XXIII(2) of the "plurilateral" *Agreement on Government Procurement*, note 201 above. Not all parties to the WTO Agreement are required to be parties to the *Agreement on Government Procurement*. The potential need for the United States to rely on exceptions in Article XXIII(2) in relation to human rights related measures instituted by the government of Massachusetts in 1996 was avoided when the particular legislation in question was declared unconstitutional by the United States Supreme Court in 2000 – see *Crosby v National Foreign Trade Council*, 530 US 363 (2000). The European Union and Japan initiated WTO panel proceedings in 1998 in respect of the consistency of the Massachusetts legislation with the *Agreement on Government Procurement*. These proceedings were discontinued following the United States Supreme Court's decision – see United States – Measure Affecting Government Procurement: Lapse of Authority for Establishment of the Panel: Note by Secretariat, WT/DS88/6, WT/DS95/6, 14 February 2000.

In order to successfully rely on Article XX(a) a party to the WTO Agreement will also need to satisfy the requirements of the *chapeau* to Article XX. Each of these requirements will now be addressed.

(i) Article XX(a) – "Public Morals" and Human Rights

Initial scepticism about efforts to justify human rights related trade measures by reference to a "public morals" exception is not unreasonable. "Public morals" as a concept recognised in legal instruments has an ambiguous relationship with international obligations to protect human rights. In a number of international human rights instruments concerns about "public morals" can be invoked as a justification for limitations on the exercise of human rights.[271] Though certain types of human rights violations, such as exploitative practices and racial vilification, can also be approached as threats to "public morals"[272] there appears to be limited overlap within human rights instruments between the concept of "public morals" and human rights.

The questions raised by the term "public morals" in Article XX(a) are not, however, necessarily the same as those raised by the same words in human rights treaties. The trade context of the WTO Agreement may justify a different interpretation. The ordinary meaning of the term "public morals" is certainly broad enough to encompass international human rights standards.[273]

An analysis of the drafting history of Article XX(a) also suggests that it is open to argue that "public morals" in Article XX(a) encompasses human rights concerns. Based on the scholarship of Steve Charnovitz[274] it can be argued that

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271 For example, Articles 12(3), 18(3), 19(3), 21 and 22(2) of the *International Covenant on Civil and Political Rights*, note 216 above, refer to limitations on the exercise of human rights that are necessary to protect "public … morals". The Universal Declaration of Human Rights, note 216 above, refers limitations on the exercise of human rights to meet the "just requirements of morality" in Article 29(2). The European *Convention on Human Rights* refers to limitations on the exercise of human rights for, *inter alia*, "the protection of health or morals" – see Articles 6(1), 8(2), 9(2), 10(2), and 11(2) – the European *Convention on Human Rights and Fundamental Freedoms*, done at Rome on 4 November 1950, entered into force 3 September 1953, 213 UNTS 222, as amended by Protocol No 11, done at Strasbourg on 11 May 1994 and which entered into force on 1 November 1998, ETS No 155.

272 Anti vilification laws, for example, are sometimes justified on grounds of public morality – see the views of the Human Rights Committee in *Faurisson v France*, UN Doc CCPR/C/58/D/550/1993, 8 November 1996.

273 The Shorter Oxford English Dictionary refers to various meanings of "moral" including "of or pertaining to the distinction between right and wrong, or good and evil, in relation to actions, volitions, or character"; and "of rights, obligations, etc: Founded on the moral law" – Shorter Oxford English Dictionary on Historical Principles, 3rd ed, Clarendon Press, Oxford, 1975, Volume II, 1354.

274 Charnovitz, note 239 above. On the interpretation of Article XX(a), see also Christoph T Feddersen, Focussing on Substantive Law in International Economic Relations: The

those who drafted Article XX(a) intended the provision to cover what were at the time referred to as "humanitarian" concerns but would now be referred to as human rights concerns.[275]

This interpretation of Article XX(a) faces a number of difficulties. One is that the *travaux* of GATT 1947 does not appear to include any explicit acknowledgement that humanitarian concerns were encompassed by the reference to "public morals".[276] Charnovitz infers the existence of such an intention from, *inter alia*, an

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Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 7 Minnesota Journal of Global Trade 75 (1998).

275 It appears relevant to note that Article 227 of the Treaty of Versailles, note 266 above, provided, *inter alia*, that "[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for *a supreme offence against international morality* and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan." [Emphasis added.] Note also Judge Schücking's dissent in the *Oscar Chinn Case*, Permanent Court of International Justice, Series A/B, No 63 (1934), 65, 149-150, where, having earlier referred to the creation of a "*jus cogens*" that rendered acts done in contravention "automatically void", went on to observe that:

> "[t]he Court would never … apply a convention the terms of which were contrary to public morality."

276 Charnovitz notes that the only explicit reference in the *travaux* of GATT 1947 as to what may have been encompassed by what became Article XX(a) was a reference by the Norwegian representative at the negotiations in 1947 to the applicability of the exception to Norway's "temperance" based restrictions on the importation, production and sale of alcoholic beverages – Charnovitz, ibid, 704. Charnovitz makes the following observation as to the significance of this feature of the negotiating history: "[t]he lack of debate on article XX(a) is nevertheless illuminating. The simplest explanation for why article XX(a) was not discussed is that the negotiators knew what it meant." In the accompanying footnote he continues – "[a] more precise way of putting this would be that negotiators knew that it was an amorphous term covering a wide range of activities that provoked moral concerns by particular governments" – ibid, 705 and footnote 94.

Reference was made in Chapter 5 to the imposition by India of trade sanctions against South Africa in 1946, see note 29 in Chapter 5. During negotiations regarding a number of provisions of the Charter for the International Trade Organization, India raised "reservations" regarding the entitlement to take such measures – see, for example, Preparatory Committee of the International Conference on Trade and Employment, Government of India, Department of Commerce, Comments on U.S. Proposals for Expansion of World Trade and Employment, UN Doc E/PC/T/W.14, 21 October 1946, 40. India appears to have maintained its "reservation" (see, for example, E/PC/T/A/PV/36, 12 August 1947, 13) up to the final stages of the negotiations of the Havana Charter. The Appellate Body in *Mexico – Tax Measures on Soft Drinks and other Beverages*, note 124 above, para 78, emphasised the non-inclusion of India's reservations in the final Havana Charter. It is submitted, however, that it is difficult to

acknowledgement in the minutes of a meeting in November 1946 in London of the preparatory committee established by ECOSOC to assist in the drafting of the ITO Charter. These minutes record that:

> "[i]t was generally recognized that there must be general exceptions [in the ITO Charter] such as those usually included in commercial treaties, to protect public health, morals, etc."[277]

Charnovitz then refers to the common inclusion of "public morality" clauses in trade treaties at the time.[278] He argues that such clauses were generally understood to include and often expressly referred to humanitarian concerns.

Charnovitz identifies another difficulty faced by the argument that humanitarian concerns were understood to be encompassed by the term "public morals". A significant proportion of the trade treaties that had been negotiated prior to the drafting of the original GATT specifically recognised an exception covering "prohibitions or restrictions imposed on moral or humanitarian grounds."[279] It appears

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assess the significance of this non-inclusion without knowing the exact circumstances surrounding the apparent withdrawal of India's reservation.

277 Preparatory Committee of the International Conference on Trade and Employment, Committee II, Report of the Technical Sub-Committee, United Nations Document E/PC/T/C.II/54/Rev.1, 35-36, 28 November 1946; and Charnovitz, ibid, 704. Clair Wilcox, a United States trade negotiator in the 1940s, once described the ITO Charter exceptions as "almost boilerplate" – International Trade Organization, Hearings Before the Committee on Finance, Part 1, United States Senate, 80th Congress, 1st Session, 412, cited in Steve Charnovitz, Exploring the Environmental Exceptions in GATT Article XX, 25(5) Journal of World Trade, 37, 44 (1991). Charnovitz also refers to the views of the Economic Committee of the League of Nations that was charged with the preparation of a draft treaty on the abolition of import and export restrictions. The draft treaty prepared in 1927 included an exception for moral and humanitarian measures. The Committee expressed the view that the exceptions contained in the draft treaty "… have been admitted through long-established international practice, as regarded in a large number of commercial treaties, to be indispensable and compatible with the principle of freedom of trade" – reproduced in League of Nations, International Conference for the Abolition of Import and export Prohibitions and Restrictions, Geneva, October 17th to November 8th, 1927, Proceedings of the Conference, League of Nations Doc No C. 21. M. 12. 1928. II., 228. See Charnovitz, note 239 above, 706.

278 Charnovitz, note 239 above, 709-710. Charnovitz lists forty-one pre-1947 trade treaties that included exceptions covering both moral and humanitarian concerns. Two treaties are listed that explicitly referred to moral but not humanitarian concerns. Up to 1946 thirty-four States appear to have been parties to one or more trade treaties with exceptions covering both moral and humanitarian concerns. To place this figure in context it should be remembered that the membership of the United Nations in 1945 comprised 51 States.

279 Ibid, 709.

that the initial[280] and all subsequent drafts of what became Article XX(a) only referred to "public morals". It is unclear what effect, if any, the verbal separation of "humanitarian grounds" from "morals"[281] was intended to have on the scope of Article XX(a).[282]

A partial response to this difficulty in the interpretation of Article XX(a) is to point out that when Article XX was drafted certain treaties already included provisions requiring trade measures for non trade purposes.[283] Thus the 1926 *Slavery Convention* called upon all parties to suppress trade in slaves.[284] It is a reasonable inference that those drafting Article XX intended the article to accommodate such provisions.[285] A prohibition of trade in slaves fits most comfortably within the terms of Article XX(a).

In addition to these "original intent" arguments in favour of an interpretation of Article XX(a) that would encompass human rights related trade measures, support for such an interpretation may also be derived from the approach of the Appellate Body in the *Shrimp Turtle Case*.

Appellate Body in the *Shrimp Turtle Case* considered, *inter alia*, whether United States turtle conservation measures could be justified under Article XX(g), which applies to "measures … relating to the conservation of exhaustible natural resources …". One question that the Appellate Body was therefore required to consider was whether "exhaustible natural resources" could include endangered sea turtles. Evidence was lead by the complainants before the panel in order to establish that those who drafted Article XX(g) intended the provision to cover only

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280 See Article 32 of the 1946 United States "Suggested Charter for an International Trade Organization of the United Nations" – Preparatory Committee of the International Conference on Trade and Employment, Report of the First Session, London 1946, Annexure II; and Article 43 of the draft Charter adopted by the Preparatory Committee at its second session in 1947, Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Geneva 1947, 37.

281 It might be argued that the move from "moral or humanitarian" (as in the League of Nations Economic Committee's 1927 draft) to "public morals" does not reflect a change in scope, with the word "public" encompassing humanitarian reasons.

282 Charnovitz, note 239 above, 716-717, makes the following observation:

> "The difference in phrasing between the "public morals" exception in GATT article XX(a) and the pre-World War II trade practice of providing an exception for 'moral or humanitarian grounds' can be viewed in two ways. On the one hand, one might argue that 'public morals' subsumes both 'moral' and 'humanitarian' grounds. On the other hand, one might argue that 'humanitarian' grounds were intentionally left out of 'public morals.' … The evidence from the archives sheds no light on why the U.S. government, in drafting article XX(a), used the more succinct phraseology."

283 Ibid, 717.

284 Article 2 of the *Slavery Convention*, note 266 above.

285 Recall the "principle of harmonization" referred to by the ILC Study Group Report on Fragmentation, note 115 above, and discussed in Chapter 4.

non-living and non-renewable natural resources.[286] In concluding that the term in Article XX(g) did encompass measures to protect sea turtles,[287] the Appellate Body endorsed[288] the approach to treaty interpretation of the International Court of Justice in the *Namibia Advisory Opinion*.[289] The Appellate Body argued, based on the WTO Agreement's Preamble, that the generic term "natural resources" in Article XX(g) was not "static" in its content or reference, but was rather "by definition, evolutionary." In the accompanying footnote, the Appellate Body quoted from the Court's Advisory Opinion in the following manner:

> "The International Court of Justice stated [in the *Namibia Advisory Opinion*] that where concepts embodied in a treaty are 'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law… . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'"[290]

The particular treaty terms being considered by the International Court of Justice in the *Namibia Advisory Opinion* were contained in Article 22 of the *League of Nations Covenant*. Article 22 recognised, *inter alia*, that "the well being and development" of the "peoples" of League mandate territories formed "a sacred trust of civilization". The Court interpreted Article 22 of the *League Covenant* in light of the subsequent development of the human right to "self determination".[291]

As already noted,[292] the WTO Agreement's preambular references to the "raising of standards of living" and "ensuring full employment" reflect a commitment to respect human dignity and are consistent with the inclusion human rights based measures within Article XX. The commitment to "sustainable development" also

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286 See, for example, the submissions of India, Pakistan and Thailand summarised at paras 3.238-3.239 of the panel report in the *Shrimp Turtle Case*, note 198 above. See para 3.243 for a reference to evidence to the contrary.

287 In reaching this conclusion the Appellate Body appeared to reject the characterisation of the drafting history of Article XX(g) offered by India, Pakistan and Thailand – see Appellate Body report, note 196 above, paragraph 131, footnote 114. As pointed out by Gabrielle Marceau, there are at least two other reasons why it was not necessary for the Appellate Body to adopt an evolutionary approach. It could have referred to the understanding of the words at the conclusion of the WTO Agreement. It could also have simply followed earlier panel decisions to the same effect – see Marceau, note 93 above, 100.

288 The *Shrimp Turtle Case*, note 196 above, paragraph 130.

289 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, 16.

290 The *Shrimp Turtle Case*, note 196 above, para 130, footnote 109

291 The *Namibia Advisory Opinion*, note 289 above, para 53.

292 See the text accompanying note 215 above.

appears to have a human rights dimension. It is submitted that given the contingent terms of Article XX(g),[293] a stronger case can be made for an "evolutionary" interpretation of Article XX(a) or (b), taking into account the profound post-1945 developments in international law relating to the protection of human rights.[294] Such an "evolutionary" interpretation of Article XX, paragraphs (a) and (b), appears to be consistent with the object and purpose of the WTO Agreement.[295]

The general exception provision in the *General Agreement on Trade in Services*, Article XIV, expands upon the terms of Article XX(a) by including a reference to "public order".[296] The drafting history of the article suggests that there were concerns amongst developed States of abuse of the GATT public morals exception.[297] Notwithstanding the presence of a footnote that appears to restrict potential justifications of "public order" based measures under the article, the inclusion of the term "public order" in Article XIV is not inconsistent with an interpretation of "public morals" that extends to human rights concerns. A similar point can be made in relation to the reference to "*ordre public*" (alongside "morality") in Article 27.2 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

(ii) Article XX(a) and Outwardly Directed Measures

As already noted,[298] the panels in the *Tuna Dolphin* litigation and the *Shrimp Turtle Case* rejected arguments that Article XX, paragraphs (b) and (g), could be relied upon to defend measures directed at conditions outside of the State taking the measures. The approaches taken by these three panels have been contrasted with the approach of the Appellate Body in the *Shrimp Turtle Case*.[299]

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293 The article requires that a measure "be made effective in conjunction with restrictions on domestic production or consumption". Compare the difference noted earlier between "horse-traded" environmental standards and the "common core of human rights" – see note 257 above and the text accompanying.

294 According to Sir Ian Sinclair "[t]here is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as 'public policy' or 'the protection of morals'" – Sinclair, The Vienna Convention on the Law of Treaties, 2nd edition, Manchester, 1984, 139 – referred to in Marceau, note 14 above, 785. See also Marceau's discussion, ibid, 789-791 and 808-9.

295 The relevance of the "object and purpose" of the WTO Agreement to the interpretation of Article XX(a) is discussed further below.

296 See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, note 203 above, paras 296-299.

297 Jimmie V Reyna, "Services" in Stewart, note 49 above, Volume II, Commentary, 2335, 2385.

298 See text accompanying notes 235 to 247 above.

299 See the text accompanying note 248 above.

None of these decisions, however, involved any detailed consideration of Article XX(a). A number of points can be made as to the applicability of Article XX(a) to outwardly directed measures. An initial point is that the ordinary meaning of the terms of Article XX(a) sheds no light on whether it can apply to outwardly directed measures.[300] Article XX(a) can therefore be contrasted with Article XX(e)[301] which necessarily allows for outward measures. That Article XX(e) can apply to outwardly directed measures does not, however, mean that other paragraphs of Article XX must be given an outward interpretation.

In his review of the drafting history of Article XX(a), Steve Charnovitz assembles the relevant State practice leading up to the drafting of Article XX(a) that supports an outward interpretation of the provision.[302] Using the same approach to interpretation described above,[303] Charnovitz concludes that based on the available evidence it remains "an open question" whether Article XX(a) was intended to have an outward operation.[304]

The approach of the Appellate Body in the *Shrimp Turtle Case* as to whether Article XX(g) applied to justify United States measures that were applied to protect turtles (which the Appellate Body appeared to acknowledge included turtles that had never and would never enter United States waters) offers guidance as to the possible approach that might be taken to Article XX(a). In order to assess the potential significance of the Appellate Body's approach in the *Shrimp Turtle Case* it is necessary to recount the main facts in the case. A familiarity with the facts of the case will also assist in the analysis of the Appellate Body's approach to the *chapeau* of Article XX.[305]

(iii) Facts of *Shrimp Turtle Case*

All species of marine turtles are recognised by the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES")[306] to be species threatened with extinction. Research conducted within the United States supported the conclusion that the incidental capture and drowning of sea turtles by shrimp (or prawn) trawlers was a significant cause of mortality of sea turtles. By 1990, essentially all shrimp trawler vessels registered in the United States were required to use nets fitted with turtle excluder devices in all areas where there was

300 Charnovitz discusses this point, note 239 above, 700.

301 Article XX(e) of GATT 1994, note 2 above, refers to measures "relating to the products of prison labour".

302 Charnovitz, note 239 above, 703-18.

303 See text accompanying notes 274 to 277 above.

304 Charnovitz, note 239 above, 717.

305 The following summary is essentially drawn from the report of the panel in the *Shrimp Turtle Case*, note 198 above.

306 CITES, note 253 above.

a likelihood of turtle and shrimp interaction. These devices were designed to allow turtles to escape from nets and thus to reduce turtle mortality in shrimp trawling.

United States legislation enacted in 1989 required the United States executive arm of government to initiate negotiations and to enter bilateral and multilateral treaties to regulate, *inter alia*, commercial fishing operations likely to have a negative impact on sea turtles. A regional treaty was in fact negotiated in 1996 relating to the Caribbean and Western Atlantic.

The United States legislation also provided that shrimp harvested using techniques that may adversely affect certain sea turtles protected under United States law could not be imported into the United States unless the President annually certified that:

– the harvesting State had a regulatory program governing the incidental taking of sea turtles that was comparable to that of the United States and that the average rate of incidental taking by the vessels of the harvesting State was comparable to the average taking by United States vessels; or
– the fishing environment of the harvesting State did not pose a threat of incidental taking of sea turtles.[307]

Up until 1996, the United States regime was not applied to shrimp originating beyond the Caribbean and Western Atlantic. In 1996, it was extended to all waters worldwide. Administrative guidelines issued pursuant to the United States legislation demanded, for the purposes of certification, foreign regulations requiring the use of turtle excluder devices in shrimp nets used by vessels operating in waters in which there was a likelihood of intercepting sea turtles. The turtle excluder devices had to be comparable in terms of effectiveness to those used in the United States.

After the extension of the United States legislation beyond the Caribbean and the Western Atlantic, the United States began preliminary discussions with nations outside this region on turtle conservation measures. For those States within the Caribbean/Western Atlantic region, certification was given and a three year phase in period was negotiated for measures designed to protect turtles. No equivalent phase in period was provided for States outside this region.

In October 1996, the United States Court of International Trade ruled that the shrimp embargo under the relevant United States legislation applied to "all shrimp and shrimp products harvested in the wild by citizens or vessels of nations which have not been certified".[308] Thus even shrimp harvested using turtle excluder

307 Panel report in the *Shrimp Turtle Case*, note 198 above, para 7.3.

308 This decision of the Court of International Trade was overturned on appeal in 1998 – see the Appellate Body report, note 196 above, para 5. The United States "… Department of State reinstated the policy of permitting importation of shrimp harvested with TEDS in countries not certified under … [the United States legislation]" on 28 August 1998 – see para 2.17 of *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, report of panel, note 198 above.

devices was subject to the embargo if it was caught by nationals of, or by vessels registered in, a State that had not been certified.

Complaints as to the consistency of the United States measures with GATT 1994 were made by India, Malaysia, Pakistan and Thailand. They complained, *inter alia*, that the United States embargo violated Articles XI and XIII of GATT 1994. They also denied that the United States measures could be justified under Article XX.

The complainant States pointed out that the imposition of the embargo had not followed attempts by the United States to negotiate with them in order to reach bilateral or multilateral agreements dealing with the conservation of sea turtles. The complainant States also noted that States in the Caribbean/Western Atlantic region were accorded more favourable treatment through having been allowed a phase in period of three years.

The complainants contended that populations of sea turtles found in waters under their jurisdiction followed regional migration patterns and never entered waters subject to United States jurisdiction. The complainants also raised complaints as to the process by which States could have their certification revoked by United States authorities. As the United States measures imposed an embargo on shrimp imports based on whether or not the complainants promulgated particular regulations to protect sea turtles within their own waters, the United States measures were clearly outward.

A number of arguments were raised by the complainants against interpretations of Article XX(b) and XX(g) that countenanced the use of outwardly directed measures. Reference was made to the *travaux* of Article XX of GATT 1947 and subsequent developments in international environmental instruments.

Submissions were also made that the United States measures were impermissibly extra-territorial under rules of international law governing jurisdiction. These rules were linked to Article XX *via* the rule of treaty interpretation that provides that treaties should be interpreted in light of existing rules of international law.[309] Similar arguments were also raised that the United States measures constituted unlawful interference in the internal affairs of the complainants.

(iv) Jurisdiction, Extra-Territoriality and Outwardly Directed Measures

As noted earlier, references to jurisdiction and extra-territoriality have served to complicate the interpretation of Article XX.[310] This point has particular relevance when considering outwardly directed measures and will now be considered in more detail.

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309 Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, note 17 above, provides that "[t] here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties."

310 See note 239 above.

Notwithstanding arguments to the contrary,[311] it is submitted that the United States measures considered in the *Shrimp Turtle Case* did not involve an unlawful extraterritorial exercise of jurisdiction.[312] The United States measures did not involve an exercise of legislative or enforcement jurisdiction outside of the United States. The United States measures did not impose civil or criminal penalties on foreign nationals or vessels operating outside United States territorial jurisdiction. What the United States measures did involve was a restriction on imports into the United States. Such a measure, regardless of the motivation, does not involve an impermissible exercise of jurisdiction under international law.[313] The WTO Agreement imposes limitations on the use of such measures, but this restriction on the imposition of embargoes comes *via* the WTO Agreement and not the general rules governing jurisdiction under international law.[314]

The European Communities before the panel in the *Shrimp Turtle Case* asserted that "in general international law, states could normally not apply their legislation so as to coerce other states into taking certain actions, including modifying their own domestic standards."[315] The discussion of jurisdiction in the 9th edition of Oppenheim was cited in support of this principle.[316] The cited section of Oppenheim does not appear to support the submissions that Article XX, paragraphs (b) and (g), should be construed restrictively when dealing with outwardly directed measures. Indeed, in the discussion of intervention under international law, the following observation is made in Oppenheim at pages 432-434:

> "… a state may, without thereby committing an act of intervention (although it might be in breach of some other international obligation, for example under treaties such as the General Agreement on Tariffs and Trade which promote freedom of trade),[317]… discontinue exports to … [another State] or a program of aid, or organise a boycott of its products. Such measures are often in response to actions or policies which the state taking the measure disapproves or regards as unlawful, and may be presented

311 See, for example, Brigitte Stern, Can the United States set Rules for the World? A French View, 31(4) Journal of World Trade 5, 9.

312 See, for example, the United States submissions to the panel in *Shrimp Turtle Case*, note 198 above, paras 3.162 and 3.167 and the discussion of this issue in Chapter 5.

313 Although it may violate other rules of international law, for example, where a trade measures is implemented with genocidal intent.

314 See the quotation set out below from Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th ed, Longman, London 1992, Volume I, 432-434.

315 The *Shrimp Turtle Case*, note 198 above, para 4.30. The European Communities accepted before the panel in the *Shrimp Turtle Case* that Article XX could apply to outwardly directed measures but that the application of the Article to such circumstances should be "exceptional".

316 Jennings and Watts, note 314 above, 456-498.

317 "But note that Article XXI of the GATT permits unilateral trade restraints if a state believes its national security is threatened." [Footnote in original.]

> by it as a form of 'sanctions'. Although such measures may, at least indirectly and in part, be intended not only as a mark of displeasure, but also to persuade the other State to pursue, or discontinue, a particular course of conduct, such pressure falls short of being dictatorial and does not amount to intervention."[318]

The fundamental distinction between the international rules governing jurisdiction and the WTO rules governing the imposition of trade restrictions for non-trade policy purposes, is perhaps best illustrated by the following passage from the Appellate Body's report in the *Shrimp Turtle Case*:

> "The sea turtle species here at stake, i.e., covered by … [the United States legislation], are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the … [United States] nor any of the … [complainants] claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."[319]

The nexus to which the Appellate Body referred and which was taken to satisfy the requirements of Article XX(g) appears to be unrelated to issues of jurisdiction under international law. There appears to be no comparable principle of jurisdiction under international law that would allow a State to regulate the taking of wild animals in the waters of another State on the grounds that the species is endangered and that specimens of the same species are found within the jurisdiction of the regulating State.

(v) Article XX(a) and Outwardly Directed Measures – A Nexus Requirement?

The Appellate Body did not make clear the basis upon which it read this nexus requirement into Article XX(g). It may have been derived from the Appellate Body's assessment of the object and purpose of the WTO Agreement, which is

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318 Jennings and Watts, note 314 above. [Some footnotes not reproduced.] According to Professor Brownlie "[t]he customary law and general principles of law related to jurisdiction are emanations of the concept of domestic jurisdiction and its concomitant, the principle of non-intervention in the internal affairs of other states" – Brownlie, Principles of Public International Law, sixth edition, Oxford University Press, Oxford, 2003, 309.

319 The *Shrimp Turtle Case*, note 196 above, para 133. [Footnote not reproduced and emphasis in original.]

relevant for the purposes of treaty interpretation.[320] Perhaps the Appellate Body accepted the United States submission, summarised in paragraph 17 of its report, that the object and purpose of the WTO Agreement included a variety of different objects and purposes.[321] The need to balance commitments to liberalise trade, with the recognition of the right to restrict trade in furtherance of specific non-trade policies may thus have required the interpolation of a nexus requirement. It is unfortunate that the Appellate Body did not offer further explanation of the basis for this nexus requirement.

If the nexus requirement (whatever its basis) is also read into Article XX(a) it is bound to have important consequences for the application of Article XX(a) to outward human rights measures. A State proposing to restrict trade with another State due to human rights violations in the other State can legitimately claim a nexus between itself and the violations. The existence of obligations owed *erga omnes* ("to all States") would appear to provide such a nexus.[322] On this basis Article XX(a) would be potentially applicable where the target State is responsible for violations customary obligations to respect human rights.[323]

Further, even invoking principles of jurisdiction under international law, the State taking the measure would have jurisdiction in respect of violations of human rights protected under international law where those violations constituted crimes under international law or where the violations give rise to universal jurisdiction

320 Article 31(1) of the *Vienna Convention on the Law of Treaties*, note 17 above, provides "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*." [Emphasis added.]

321 On whether a treaty's "object and purpose" is a unitary concept or if it can encompass multiple objects and purposes – see Jan Klabbers, Some Problems Regarding the Object and Purpose of Treaties, 8 Finnish Yearbook of International Law 138, 152-153 and 156 (1997).

322 A similar argument can be deployed to rebut the suggestion that Article XX(g) is necessarily more outward than Article XX(a). Once the conservation of natural resources referred to in Article XX(g) is acknowledged as extending to endangered species, it could be argued that because extinction of a species means global extinction, there is something inherently outward in the notion of conservation. This argument does not, however, serve to distinguish Article XX(a). The notion of conservation may be inherently global, but the notion of human rights is also inherently outward. Human rights protected under general international law are universal. All people are entitled to their respect and enjoyment and all States are entitled to act to secure their protection.

323 Note the discussion in Chapter 4 as to the scope of *erga omnes* obligations.

such as exists in respect of slavery,[324] genocide,[325] crimes against humanity,[326] war crimes[327] and torture.[328] A nexus based on the existence of universal jurisdiction would also potentially encompass *corporate* as opposed to *State* violations of human rights.[329]

(vi) Article XX(a) and Outwardly Directed Measures – Unlawful Intervention in Internal Affairs?

The claim that outwardly directed measures involve unlawful intervention in another State's internal affairs raises questions of sovereignty and domestic jurisdiction. But as noted in Chapter 5 questions of sovereignty are also raised when one considers whether a State can control imports into and exports from its territory.

Traditional principles of sovereignty have in the past been invoked to justify absolute freedom to disrupt trade with other States. In 1939, Sir John Fisher Williams wrote that:

> "… [i]t is open to any State without violating a legal rule, except in so far as it may be bound by commercial treaty, to take any measures which it may think fit in the sphere of international commerce. It may stretch out its hand into the economic life of its neighbour by destroying without compensation such part of its neighbour's trade as consisted in export to its own domestic market. The inhabitants of a particular district in one country may have for many years made their living by the supply of some article to another country; that other country may then suddenly and without warning put on a prohibitive duty against the import of the particular article so supplied, and a peaceable group of producers in the first country is ruined without redress, by action over which its own government, in spite of its 'sovereignty', had in fact no sort of control. Such cases have in fact occurred."[330]

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324 American Law Institute, Restatement of the Law Third – The Foreign Relations Law of the United States, American Law Institute Publishers, St Paul, 1987, Volume 1, §404, 254; see also the references set out in Chapter 4, note 255.

325 See the references collected in Chapter 4, note 250.

326 See the references collected in Chapter 4, note 251.

327 See the references collected in Chapter 4, note 254.

328 See the references collected in Chapter 4, note 256.

329 See the discussion in Chapter 2 of individual and corporate responsibility for crimes under international law.

330 J Fischer Williams, Aspects of Modern International Law, Oxford University Press, London, 1939, 108-109, quoted in Antonio Cassese, International Law in a Divided World, Clarendon Press, Oxford, 1986, 25.

Even if it is conceded that such an absolute freedom no longer exists,[331] it is apparent from the quotation from the 9th edition of Oppenheim set out earlier[332] that such action does not amount to unlawful intervention under international law. As noted in Chapter 5, it is also apparent from the practice of developing and developed States that the freedom not to trade with a State due to human rights concerns survived the negotiation of both the United Nations Charter and GATT 1947. Perhaps the best illustration of this has been the reliance on Article XXXV of GATT 1947 by parties to the GATT for human rights related reasons in order to ensure freedom to restrict trade with a target State. Egypt, India, Morocco, Pakistan and Tunisia relied on Article XXXV in respect of trade with South Africa, which secured their freedom to impose trade restrictions to place pressure upon South Africa to dismantle its former policy of apartheid.[333]

Indeed, as also noted in Chapter 5, the statements made within international institutions, such as the General Assembly, in relation to unilateral measures generally decry the adoption of unilateral measures "not in accordance with international law". Measures designed to place pressure on a State to ensure compliance

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331 See the discussion in Chapter 5. Compare the limitations on the right to resort to countermeasures – see the International Law Commission's commentary to the *Articles on State Responsibility*, note 110 above, 335-336. See also Antonio Cassese, International Law, 2nd ed, Oxford University Press, Oxford, 2005, 12. A State would, for example, be in breach of international law if it restricted exports of essential foodstuffs to another State that were necessary for the survival of that State's population.

332 See text accompanying note 318 above. The International Court of Justice, in its merits decision in the *Nicaragua Case*, note 179 above, 125-126, observed that:

> "244. … Nicaragua has also asserted that the United States is responsible for an 'indirect' form of intervention in its internal affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981, and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.
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> 245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua; any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seised the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. *At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.*" [Emphasis added.]"

333 GATT, Analytical Index, note 21 above, Volume 2, 1036.

with its international obligations to respect and protect human rights can quite plainly be in accordance with international law.

(vii) Article XX(a) and Outwardly Directed Measures – Conclusion

The ordinary meaning of the terms of Article XX(a) does not resolve the question of whether the Article XX(a) is available to defend outwardly directed trade measures. The negotiating history is equivocal. The general rules of international law, be they jurisdictional, or based on concepts such as domestic jurisdiction and non-intervention, do not preclude an outward interpretation of Article XX(a). The nexus requirement identified by the Appellate Body can probably be satisfied by outwardly directed human rights measures that relate to *erga omnes* obligations owed by States, or which are imposed in respect of violations of human rights giving rise to universal jurisdiction. The "evolutionary" interpretation given to the terms of Article XX(g) might equally be countenanced in relation to whether Article XX(a) applies to outwardly directed measures. On one point, however, there is no room for equivocation. An outward interpretation is required if Article XX(a) is to be interpreted in a manner that allows compliance with the international obligations enshrined in Articles 41 and 16 of the *Articles of State Responsibility* and the due diligence obligations to prevent violation of particular peremptory norms (discussed in Chapter 4).

(viii) Article XX(a) – Necessity Requirement

Turning to the requirement in Article XX(a) that the measure must be "necessary" to protect public morals for the paragraph to apply. Unfortunately, there appear to have been no GATT or WTO decisions that have dealt with the meaning of the word "necessary" in Article XX(a).[334] There have, however, been a number of decisions that have considered the meaning of "necessary" as it appears in other paragraphs of Article XX.[335] The approach in those cases sheds light on the approach that most likely will be taken to the necessity requirement in Article XX(a). It is to those cases that attention will now be turned.

The interpretation applied to the term "necessary" by the panel in the *Second Tuna Dolphin Case* has already been briefly referred to.[336] The panel commenced

334 The "necessity" requirement in the equivalent exception in GATS was considered by the Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, note 203 above, paras 300-327. The Appellate Body countenanced, in relation to Article XIV(a) of GATS, essentially the same approach as that discussed in this section.

335 Article XX, paragraphs (a), (b) and (d) require a measure to be "necessary" to achieve the non-trade policy purpose in order to be justified. Paragraphs (c), (e) and (g) require simply that the measure "relate to" the non-trade policy purpose. Paragraphs (f), (h), (i) and (j) each have different requirements.

336 See the text accompanying notes 240 to 244 above.

its consideration of the meaning of the word "necessary" in Article XX(b)[337] by endorsing the approach in two earlier panel reports that had dealt with the meaning of the word.[338] The panel then proceeded to ignore these earlier reports and applied instead the interpretation noted above, namely that an outwardly directed measure could not be "necessary", as such an approach would seriously impair the objectives of GATT.

The GATT panel's report in the *United States Tariff Act Case*, addressed the exception contained in Article XX(d)[339] and made the following observation on the scope of the word "necessary":

> "… a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[340]

This interpretation of "necessary" was specifically applied to Article XX(b) by the panel in the *Thai Cigarettes Case*.[341]

The WTO Appellate Body has addressed the scope of the word "necessary" on a number of occasions.[342] In the *Korean Beef Case* the Appellate Body consid-

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337 Article XX(b) of GATT 1994, note 2 above, deals with measures "necessary to protect human, animal or plant life or health".

338 *United States – Section 337 of the Tariff Act of 1930* (the "*United States Tariff Act Case*"), adopted 7 November 1989, BISD, 36th Supplement, 345; and *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes* (the "*Thai Cigarettes Case*"), note 198 above.

339 Article XX(d) of GATT 1994, note 2 above, applies to measures "…necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of …[GATT], including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices …".

340 The *United States Tariff Act Case*, note 338 above, para 5.26.

341 The *Thai Cigarettes Case*, note 198 above, para 74. It has been argued that differences in the terms of paragraphs (d) and (b) of Article XX justify different interpretations of the word "necessary" in the two paragraphs – see Steve Charnovitz, Exploring the Environmental Exceptions in GATT Article XX, note 277 above, 50. As noted below the WTO Appellate Body in the *Asbestos Case*, note 15 above, endorsed the panel's approach in *Thai Cigarettes Case*.

342 See, for example, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, adopted by the Dispute Settlement Body on 10 January 2001 ("the *Korean Beef Case*"); the *Asbestos Case*, note 15 above; and *United States – Measures Affecting the Cross-Border Supply*

ered the meaning of the word in the context of Article XX(d). It endorsed the above quoted approach of the panel in the *United States Tariff Act Case*. It made two further observations with potential relevance to the interpretation of the necessity requirement in Article XX(a).

The Appellate Body in the *Korean Beef Case* emphasised the significance of the "relative importance" of the non-trade policy objective[343] to an assessment of whether a measure designed to achieve that objective was "necessary". According to the Appellate Body:

> "… a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument."[344]

This passage was endorsed by the Appellate Body in the context of Article XX(b) in the *Asbestos Case*.[345] It was also cited with approval by the Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* when interpreting the "public morals" exception found in Article XIV(a) of the *General Agreement on Trade in Services*.[346]

If the approach taken in the *Korean Beef Case* were applied to Article XX(a) it would potentially enhance the prospects of justifying an outwardly directed human rights related trade measure under Article XX(a). It should not be difficult to establish that human rights concerns are "vital … common interests" of all States.

The second related feature of the Appellate Body's report in the *Korean Beef Case* that appears to have significance for Article XX(a) is the reference to the "weighing and balancing" process that the Appellate Body advocated in order to determine whether a measure was "necessary". The Appellate Body identified various factors of relevance. They included the "common interests or values" protected by the measure, the extent to which the measure contributes to the policy end pursued, and the extent to which the measure "produces restrictive effects on

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of Gambling and Betting Services, note 203 above. For a discussion of the approach of the Appellate Body in these two cases – see Howse and Tuerk, note 9 above, 323-327.

343 The Appellate Body appears to have been considering the relative importance of the policy to the State instituting the measure. Importance to all States, might, however, also be considered.

344 The *Korean Beef Case*, note 342 above, para 162.

345 The *Asbestos Case*, note 15 above, para 172.

346 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, note 203 above, paras 305-311 and 323.

international commerce".[347] Thus a human rights measure that is not well adapted to improving the human rights situation to which it is directed and which had a restrictive effect on international commerce may have difficulties being justified as "necessary" under Article XX(a).

The Appellate Body in the *Asbestos Case* found that a French ban on products containing asbestos could be justified under Article XX(b). The Appellate Body appeared to endorse the general approach to word "necessary" in the *United States Tariff Act Case* and applied the "weighing and balancing process" identified in the *Korean Beef Case*.[348]

The approach of GATT/WTO panels and the Appellate Body to the necessity requirements in Article XX has been criticised from a human rights perspective. According to Professor Frank Garcia:

> "… the necessity test as currently formulated and employed is biased in favor of trade values. The test evaluates measures by reference to their trade effects, and not their human rights effectiveness; the test cannot consider whether measures with a greater trade impact might be justifiable because of their greater effectiveness in realizing the human rights purpose. This turns the human rights priority on its head, privileging trade values over all other competing values."[349]

Such concerns, however, do not appear to be as significant when considering outwardly directed human rights related trade measures. The restrictiveness of the interpretation by WTO bodies of the term "necessary" in Article XX appears to depend upon whether inwardly directed or outwardly directed measures are considered. Professor Robert Hudec noted in 1996 that:

> "'[n]ecessity' can be rather hard to prove in a domestic regulatory setting, where the government has total regulatory control over all participants within its territory. With that much government control over the situation, there are usually many other trade neutral means of accomplishing domestic regulatory goals. It is the exceptional case in which a GATT-illegal trade measure is really needed.
>
> The 'necessity' test of Article XX would not impose the same kind of restraint when applied to externally-directed regulatory measures. Unlike the domestic setting where

347 The *Korean Beef Case*, note 342 above, para 163.

348 The *Asbestos Case*, note 15 above, paras 171-175.

349 Frank Garcia, Symposium: Global Trade Issues in the New Millennium: Building a Just Trade Order for a New Millennium, 33 George Washington International Law Review 1015, 1059 (2001). The author's major concern appears to be theoretical – namely the inappropriateness of subjecting *deontological* human rights standards to a *consequentialist* trade analysis – 1058-1059. The author also raises the trade bias likely to result from the membership of panels and the Appellate Body being dominated by trade lawyers. For additional criticism of the necessity requirement, see Cleveland, note 188 above, 240-241 and 255-256.

> trade-neutral alternatives abound, the only policy instruments that governments can use to influence externally-directed behavior are two: diplomatic negotiation and coercion. Once negotiation has been tried and failed, trade restrictions will be necessary every time."[350]

The necessity requirement in Article XX(a) does not, therefore, appear to be a significant obstacle to the justification of outwardly directed human rights related measures under Article XX, provided negotiations with the target State have been attempted and have been unsuccessful. Professor Hudec's point (which was made in the context of a consideration of environmental measures) may not, however, apply in the same way to all forms of human rights related trade measures. It is conceivable that notwithstanding a breakdown of negotiations, the imposition of coercive trade measures might nonetheless fail to satisfy the necessity requirement in Article XX(a).

In relation to violations of civil and political rights, the necessity requirement does not appear to create significant difficulties for coercive trade measures designed to improve respect for human rights in the exporting State. Once negotiations to halt human rights violations have been exhausted, there may be no GATT-consistent or less inconsistent option reasonably available to the State proposing to take such trade measures.

Some human rights related trade measures may nonetheless fail to meet the necessity requirement. Coercive trade measures that did not differentiate between goods on the basis of whether the goods were tainted by human rights violations (untainted goods would include, for example, goods produced by independent non-State owned enterprises not implicated in the human rights violations of a regime the target of the trade measures) may fail to satisfy the balancing test identified in the *Korean Beef Case*.

An undifferentiating trade measure would often give rise to questions as to the extent that it achieves the non-trade policy end pursued, and this factor may be outweighed by the measure's restrictive effects on international commerce.[351] The

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350 Robert E Hudec, "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices" in Bhagwati and Hudec, note 178 above, Volume 2, 95, 128. Compare Frieder Roessler, "Diverging Domestic Policies and Multilateral Trade Integration" in Bhagwati and Hudec, ibid, Volume 2, 21, 35. Note also the rejection by the Appellate Body of the strict efficacy approach adopted by the panel in *Mexico – Tax Measures on Soft Drinks and other Beverages*, note 124 above, para 72-77. Compare Cann, note 165 above, 449-450. See also *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, note 203 above, paras 309-311 and 317.

351 Recall the empirical work on the effectiveness of sanctions undertaken by Hufbauer *et al*, note 194 above. One of the conclusions reached by Hufbauer *et al* was that "success [in achieving the aims of sanctions] is more often achieved when the target country conducts a significant proportion of its trade with the [State imposing the sanctions]" – ibid, Volume 1, 99-100. On the effectiveness of preferential trade measures liked to

negative consequences of a coercive trade measure on the economic and social rights of the population of the target State could also be considered under the balancing approach in the *Korean Beef Case*.[352] Similar arguments might be raised in relation to trade measures directed at respect for economic human rights such as the right to freedom of association and collective bargaining.

Trade measures designed to address violations of other economic and social human rights, such as rights to food, health and shelter, could also be confronted by the necessity requirement in Article XX(a), given that aid from the State imposing the measures would presumably alleviate such human rights violations. Thus, in the absence of a concerted campaign by a State to starve or impoverish sections of its own population, it is difficult to see how a linkage measure could be justified as "necessary" under Article XX(a) where the measure related to such economic and social rights and where the State proposing to take the measure was not at least offering the target State some form of financial assistance. On a more realistic level, it is perhaps worth noting that coercive trade measures to secure respect for such economic and social rights do not appear to be on the agenda for any State currently using or considering the use of trade measures for human rights purposes.

(ix) Article XX(a), Outwardly Directed Measures and Necessity – Deference to National Policy Choices

The "weighing or balancing" process advocated by the Appellate Body in the *Korean Beef Case* also raises the question of what degree of deference is shown towards the means chosen to secure non-trade policy goals selected by the governments of WTO member States. In submissions to the panel in the *Second Tuna Dolphin Case* on behalf of the European Economic Community and the Netherlands, concerns were expressed about the deference that should be shown when applying the necessity requirement in Article XX. The panel summarised this submission on the question of deference in its report at paragraph 3.73:

> "The EEC and the Netherlands stated … that panels had tempered the notion of 'necessary' by applying the criterion of reasonableness, in the sense of 'reasonably available' to the government taking the measure. The reasonableness inherent in the interpretation of 'necessary' was not a test of what was reasonable for a government to do, but of what a *reasonable government* would or could do. In this way, the panel did not substitute its judgement for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in dif-

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human rights conditions see Emilie M Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 International Organization 593 (2005).

352 Compare Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8, 12 December 1997.

> ferent forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second-guessing of such actions."[353]

It is difficult to reconcile this submission with the approach of the Appellate Body in the *Korean Beef Case*.

The WTO panels in the *Reformulated Gasoline Case*[354] and the *Asbestos Case*[355] refused to review the particular policy objectives that were behind measures sought to be justified under Article XX. In both cases the panels ruled that the choice of non-trade policy objectives was not to be assessed under the necessity requirement.[356] In a footnote to its finding on this point,[357] the panel in the *Asbestos Case* contrasted the approach under Article XX with the constraints on national policy objectives contained in Article 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*SPS Agreement*").[358] Article 3.2 of the *SPS Agreement* creates a presumption in favour of the legality of sanitary and phytosanitary ("SPS") measures that "conform to international standards". Article 3.3 places a heavier onus on a State seeking to justify SPS measures that result in higher levels of SPS protection than those achieved by application of international standards.

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353 The *Second Tuna Dolphin Case*, note 12 above. [Emphasis in original.]

354 The *Reformulated Gasoline Case*, note 198 above, para 6.22. This aspect of the panel's finding was not appealed – see the Appellate Body's report, note 198 above, 9.

355 The *Asbestos Case*, note 198 above, para 8.210. Canada did not appear to challenge this finding before the Appellate Body.

356 At para 6.22 of its report in the *Reformulated Gasoline Case*, note 198 above, the panel stated:

> "[i]t was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement."

The panel in the *Asbestos Case*, ibid, was considering French measures imposed to achieve French health policy objectives. The French measures imposed higher health standards in relation to asbestos than those set out in international instruments. The panel accepted that exposure to asbestos posed a high level health risk and observed (at para 8.210) that:

> "[c]onsidering the high level of risk identified, France's objective – *which the Panel cannot question* – justifies the adoption of exposure ceilings lower than those for which the international conventions provide. We therefore find that controlled use based on international standards would not seem to make it possible to achieve the level of protection sought by France." [Emphasis added and footnote not reproduced.]

357 The panel report in the *Asbestos Case*, note 198 above, para 8.210, footnote 176.

358 The *SPS Agreement*, note 10 above.

One issue that arises when considering *outwardly* directed human rights related trade measures is the appropriate degree of deference to be shown to the objectives chosen by the State imposing the measures. Sovereignty based justifications for deference[359] in relation to inwardly directed measures do not appear to apply with the same force to outwardly directed measures. The deference shown in relation to the choice of non-trade policy objectives in the panel reports in the *Reformulated Gasoline* and *Asbestos* cases, however, precludes scrutiny of such choices under the necessity requirement. The *nature of measures* chosen to implement these policy objectives (as opposed to the actual objectives) can be subjected to scrutiny under the necessity requirement, following the approach in the *Korean Beef Case*.[360]

Consideration has already been given to whether the scope of Article XX(a) can be read down by reference to principles of jurisdiction, reserve domain or non-intervention.[361] It was concluded that these principles did not justify a restrictive interpretation of Article XX(a). The nexus requirement identified by the Appellate Body in the *Shrimp Turtle Case* could,[362] however, operate to allow increased WTO scrutiny of non-trade policy objectives falling within Article XX. The nexus requirement, for example, may preclude reliance on Article XX(a) to justify outwardly directed measures designed to secure compliance with human rights standards higher than those recognised under general international law. A State seeking to justify such measures would have difficulty establishing a nexus between itself and violations in other States of the human rights standards it has idiosyncratically selected.

The nexus requirement therefore has the potential to offer a form of two-tiered review of outwardly directed measures under Article XX that is similar to that provided under the *SPS Agreement* in relation to SPS measures. Greater deference would effectively be shown towards outwardly directed measures that seek to protect internationally recognised human rights standards because, as noted above, the State imposing such measures would be able to satisfy the nexus requirement. Measures seeking to protect idiosyncratically set standards would not, on this approach, receive protection under Article XX.[363]

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359 The approaches of the panels in the *Reformulated Gasoline* and *Asbestos* cases, referred to in note 356 above, appear to be based on concern to not interfere with the "sovereignty" of States to choose their own non-trade policy objectives.

360 See the text accompanying note 343 above.

361 See the text accompanying notes 310 to 333 above.

362 See the text accompanying note 319 above.

363 This conclusion carries with it various implications. To the extent that the human rights standards currently recognised under general international law reflects gender biases, then those biases would, for example, be replicated in the operation of Article XX as interpreted above. For a review of feminist critiques of international law, see Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law – A Feminist Analysis, Manchester University Press, Manchester, 2000.

(x) Article XX(a) – The *Chapeau* and Human Rights Related Trade Measures

Even if Article XX(a) is potentially applicable to outwardly directed human rights related trade measures, there will be no protection under Article XX unless the measure is applied in a manner that meets the requirements of the *chapeau* to the article. The *chapeau* was initially included within what became Article XX of GATT 1947 as a response to concerns as to the potential for abuse of the article.[364]

As already noted,[365] the panel in the *Shrimp Turtle Case* commenced its analysis of Article XX by considering the *chapeau* and used the terms of the *chapeau* to justify a general exclusion of outwardly directed measures from the protection of Article XX. The Appellate Body in its report in the *Shrimp Turtle Case* rejected the panel's interpretation of Article XX. Rather than commencing with a consideration of the *chapeau* and then considering the paragraphs, (a) to (j) of the article, as the panel did, the Appellate Body contended that the correct approach was to assess the measure under the paragraphs of Article XX before considering the *chapeau*. After determining whether a measure was provisionally justified under one of the paragraphs, (a) to (j), the Appellate Body then considered the *chapeau* as a "second tier" in its analysis.[366]

In applying this approach the Appellate Body suggested that the standards set by the *chapeau* could indeed vary depending on which paragraph of Article XX was being relied upon:

> "The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter … has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure 'in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail' or 'a *disguised restriction* on international trade.'(emphasis added [by the Appellate Body]) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as 'arbitrary discrimination' or 'unjustifiable discrimination', or as a 'disguised restriction on international trade' in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of 'arbitrary discrimination', for example, under the chapeau may be different for a measure that

364 GATT, Analytical Index, note 21 above, Volume 1, 563-564.

365 See text accompanying note 245 above.

366 The *Shrimp Turtle Case*, note 196 above, para 150.

> purports to be necessary to protect public morals than for one relating to the products of prison labour."[367]

One consequence of this approach is that care must be taken in applying panel or Appellate Body decisions on the scope of the *chapeau* outside the context of the particular paragraphs of Article XX being considered in such decisions. In particular, care must be taken when relying on the Appellate Body report in the *Shrimp Turtle Case* to derive guidance as to the operation of the *chapeau* in relation to Article XX(a), given that the Appellate Body was considering the *chapeau* in the context of Article XX(g).

Before turning to the specific words of the *chapeau*, one further general comment will be made. At the beginning of this consideration of Article XX, it was noted that Article XX attempts to strike a balance or achieve "equilibrium" between trade and non-trade policy concerns. Reflections on the nature of the balance achieved by Article XX have been offered in the context of the *chapeau*. The manner in which this balance has been struck is important in assessing the potential application of Article XX(a) to human rights related trade measures. The Appellate Body in *Shrimp Turtle Case* made the following observations on this balancing in its report:

> "… the chapeau of Article XX … embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. …."[368]

> "… [T]he language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say,

367 Ibid, para 120. [Italics in original.] See also para 159.

368 Ibid, para 156. [Emphasis in original.]

> the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau…"[369]

> "The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (eg, Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[370]

(xi) The Specific Requirements of the *Chapeau*

It is now convenient to recall the specific language of the *chapeau*:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … ."

It has been observed[371] that the *chapeau* "[in effect]…contains a modified form of both the most favoured nation obligation[372] and the national treatment obligation."[373] The Appellate Body in the *Reformulated Gasoline Case*[374] indicated that the modified most favoured nation and national treatment features of the *chapeau* were closely linked. In that case, the Appellate Body effectively accepted the assumption of the parties to the dispute that "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" would include

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369 Ibid, para 157. [Emphasis in original and footnote not reproduced.]

370 Ibid, para 159. These comments can be contrasted with the observations made in Chapter 4 regarding limitation clauses in human rights treaties.

371 Jackson, World Trade and the Law of GATT, note 26 above, 743.

372 Ibid, "[t]he MFN clause prohibits discrimination among countries, whereas this clause prohibits 'arbitrary [or] unjustifiable discrimination between countries where the same conditions prevail'". [Footnote in original]

373 Ibid, "[t]he national treatment obligation, Article III of the GATT, prohibits discrimination against imported goods. All import restrictions favour domestic goods to some extent, but Article XX requires that those restrictions falling within the exceptions of that Article avoid being a "disguised restriction on international trade". [Footnote in original.]

374 The *Reformulated Gasoline Case*, note 198 above.

discrimination between exporting WTO members *and* the importing member concerned.[375]

The Appellate Body in the *Reformulated Gasoline Case* also emphasised the *chapeau's* focus upon the *manner of application* of a specific measure rather than revisiting the non-trade policies covered by the paragraphs to Article XX.[376] "The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied."[377]

The scrutiny under the *chapeau* is not limited to the *formal* provisions dealing with how the measure is to be applied. The *actual* manner of application of the measure, whether or not it is expressly provided for, is also relevant. There is recognition of this in the following passage from Appellate Body report in the *Shrimp Turtle Case*:

> "We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX [and thus caught by the *chapeau*] not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements."[378]

Notwithstanding the differences between Article XX(a) and Article XX(g), [Article XX(g) provided the context for the Appellate Body's consideration of the contours of the *chapeau* in the *Shrimp Turtle Case*] the Appellate Body's approach in the case sheds light on the potential application of the *chapeau* to outwardly directed measures designed to secure respect for human rights under international law.

The Appellate Body in the *Shrimp Turtle Case* considered separately questions of unjustifiable *and* arbitrary discrimination arising from the United States measures. The Appellate Body found that the United States measures were both unjustifiably discriminatory and that they involved arbitrary discrimination.

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375 Ibid, 23-24.

376 Note also the Appellate Body's approach to the word "measures" in the *chapeau*. According to Gabrielle Marceau "[t]he Appellate Body…established that it is not merely the compatibility of that aspect of the measure that violates one of the substantive GATT requirements which must be examined under Article XX, but rather the compatibility of the entire measure. This is significant, as, generally, it is more difficult to prove that the 'discriminatory' aspect or the 'less favourable treatment' provided by the measures, rather than the broader measures itself, can be justified… [under the paragraphs of Article XX] – Marceau, note 93 above, 96-97. [Footnotes not reproduced.]

377 The *Reformulated Gasoline Case*, note 198 above, 22.

378 The *Shrimp Turtle Case*, note 196 above, para 160.

(xii) Unjustifiable Discrimination

The Appellate Body began its consideration of unjustifiable discrimination arising from the United States measures with the following observation:

> "Perhaps the most conspicuous flaw in the … [the United States] measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. ... [The United States measure], in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers."[379]

Notwithstanding the first sentence in the above quotation, which appears to focus solely on the *coercive* effect of the United States measure, the second sentence indicates that it is the undifferentiating or inflexible nature of the coercive measures that was of primary significance to the Appellate Body. This interpretation of the passage is confirmed in paragraph 164 of the Appellate Body report, where the Appellate Body observed that:

> "… it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members."[380]

These passages indicate that in the Appellate Body's view, at least so far as Article XX(g) was concerned, coercive measures similar to the United States measures in question could have been justified if they had differentiated between WTO members when different conditions prevailed. This interpretation of the Appellate Body's report has been subsequently affirmed by the 2001 panel report, which examined whether modifications to the United States measures following the Appellate Body's 1998 report brought the United States measures into conformity with the WTO Agreement.[381] This subsequent panel found that the modified United States measures were now more flexible (though an embargo remained and the measures were still, in that sense, coercive) and that therefore the United States had "established a *prima facie* case that the implementing measure complies

379 Ibid, para 161. [Emphasis in original.]

380 Ibid. [Emphasis in original.]

381 Panel report *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198 above.

with the findings of the Appellate Body concerning insufficient flexibility … ."[382] Malaysia's appeal against this finding was rejected.[383]

Putting these observations into a human rights context, a measure designed to deal with human rights such as the right to be free from torture or racial discrimination would not require a consideration of different conditions in WTO member States. These rights have been recognised as applicable to all States regardless of their conditions. Similarly, freedom of association, the right to collectively bargain and the right to be free from forced labour fall into the same category.[384] Measures designed to protect the human rights of children in relation to child labour may have to take different conditions in States into account in order to avoid being declared unjustifiably discriminatory under the *chapeau* to Article XX.[385]

Returning to the Appellate Body's report in the *Shrimp Turtle Case*, another feature of the United States measures identified by the Appellate Body as unjustifiably discriminatory was the embargo on shrimp caught *using* turtle excluder devices, where the shrimp were caught in the waters of States that had not been certified by the United States. According to the Appellate Body:

> "This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated."[386]

This passage implies that in order for a trade measure to be justifiable under the *chapeau*, it needs to be targeted more carefully at achieving the policy goal directly as opposed to indirectly aiming to harm unrelated trade of the target State in order to increase pressure for a policy shift. Translating this into a human rights context, it may be permissible to target products produced in breach of fundamental labour standards or products produced by State owned enterprises where the government of the State engages in systematic or widespread violations of internationally recognised human rights, but it would be impermissible to target goods produced

382 Ibid, para 5.104.

383 Appellate Body report *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 150.

384 Although note, for example, the presence of limitation clauses in treaties setting out the right to freedom of association.

385 The Appellate Body report in the *Shrimp Turtle Case*, note 196 above, observed (at para 175) that the failure to consistently offer technical assistance contributed to its finding of unjustifiable discrimination. Technical assistance in a labour related human rights context is an important feature of the work of the International Labour Organization. Thus, the provision or failure to provide technical assistance will be potentially relevant to the applicability of Article XX. It would also be relevant as an issue when the necessity requirement under Article XX(b) is being considered.

386 The *Shrimp Turtle Case*, note 196 above, para 165.

consistently with labour related human rights standards in order to pressure the target State to improve its labour standards generally.

The Appellate Body also considered that the justification of the United States measures was affected by the efforts the United States had made to *negotiate* solutions to the problems caused by the incidental capture of sea turtles by shrimp trawlers. According to the Appellate Body:

> "Another aspect of the application of … [the United States measures] that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the … [complainants], as well as other Members exporting shrimp to the United States, in serious across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members."[387]

The Appellate Body contrasted successful United States efforts in negotiating a regional treaty dealing with the conservation of sea turtles with the United States' failure to pursue negotiations prior to the imposition of its embargo on the complainants.[388]

A number of observations can be made about this aspect of the Appellate Body's approach so far as it may relate to outwardly directed human rights related trade measures. The first is that any requirement to negotiate prior to the imposition of the human rights inspired trade measure would have to take account of the elaborate international system regulating the protection of human rights. An obligation to negotiate would therefore presumably involve discussion between the target State and the State proposing to impose trade measures as to how violations of international human rights obligations might be avoided. If the negotiations prove to be unsuccessful, then the State proposing to take measures would presumably have to raise the matter in international *fora*, such as the United Nations Human Rights Council, the General Assembly and the Security Council, in an effort to secure a collective response. If no collective response can be agreed upon, the Appellate Body's approach would not appear to stand in the way of unilateral trade action against the target State.

The obligations to negotiate imposed on the State considering the use of trade measures would presumably be affected by the type of human rights violation in issue. Violations of rights such as the freedom from torture, racial discrimination or freedom of association would presumably not translate into as onerous an obligation to negotiate with the target State. The target State's *bona fides* could more readily be impugned if such human rights violations have been systematic or widespread. Violations of a right to education, food or housing, however, would require greater cooperation between the State proposing the measures and the

387 Ibid, para 166.

388 Ibid.

target State. It is difficult to see how a State could reasonably impose measures upon a target State which genuinely sought to improve its educational system, for example, but which was struggling due to the level of its external debt and the frugality of potential donors that would no doubt include the State proposing to take the measures.[389]

There has been recognition in WTO panel and Appellate Body reports of the entitlement to take unilateral action once negotiations fail. Such recognition is implicit in the following statement of the Appellate Body in the *Shrimp Turtle Case*:

> "… the record … does not show that … the United States … attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban."[390]

Implicit in this statement is that had the record shown such prior *attempted* recourse, the import ban might have been imposed. This interpretation of the Appellate Body's report is confirmed by the 2001 panel report issued following a request by Malaysia under Article 21.5 of the DSU.[391] Malaysia challenged whether United States adjustments to its measures following the Appellate Body's 1998 report had brought the United States measures into conformity with the WTO Agreement. The panel rejected the argument that Article XX required that negotiations be successfully concluded before Article XX could be invoked. The panel considered the Appellate Body's 1998 report and concluded:

> "… that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection or conservation of sea turtles in order to comply with Article XX."[392]

Malaysia appealed against the panel's ruling on this point and the Appellate Body in its second report in 2001 emphatically rejected the Malaysian position:

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389 The Appellate Body report in the *Shrimp Turtle Case*, ibid, addressed a similar issue by reference to the doctrine of abuse of rights – see paragraph 158. See also the panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, paras 5.59 to 5.60 and 5.67 to 5.73, 5.76 to 5.77 and 5.86.

390 The *Shrimp Turtle Case*, note 196 above, para 171. [Footnote not reproduced.]

391 The panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198.

392 Ibid, para 5.67. Compare the unadopted panel report in the *Second Tuna Dolphin Case*. At para 7.61 of their report, the panel stated that "our findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted."

> "Requiring that a multilateral agreement be *concluded* by the United States in order to avoid 'arbitrary or unjustifiable discrimination' in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfil its WTO obligations. Such a requirement would not be reasonable."[393]

The Appellate Body noted in its 2001 report that the WTO had itself recognised the need for cooperative efforts to address global environmental problems.[394] It quoted Principle 12 of the Rio Declaration on Environment and Development which states that "[e]nvironmental measures addressing transboundary or global environmental problems should as far as possible, be based on international consensus." The Appellate Body then made the following observation:

> "Clearly and 'as far as possible', a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding 'arbitrary or unjustifiable discrimination' under the chapeau of Article XX. We see, in this case, no such requirement."[395]

As already discussed,[396] the obligation to negotiate prior to imposing human rights related trade measures may be more readily satisfied than an equivalent obligation in an environmental context. Environmental protection standards may still be in the process of development and may be of a contingent nature, and there may be a lack of consensus as to how best to secure respect for those standards. More onerous obligations to negotiate prior to allowing reliance on Article XX may therefore be justified. Once bilateral and multilateral efforts to secure respect for international human rights standards have failed, unilateral action to ensure respect for universally accepted international human rights standards may be *justifiable* discrimination consistent with the *chapeau* of Article XX.

The most-favoured-nation feature of the *chapeau* was also effectively emphasised by the Appellate Body in its 1998 report in the *Shrimp Turtle Case*. The United States had negotiated a regional turtle conservation treaty with some States

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393 The Appellate Body report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 123. [Emphasis in original.]

394 The Appellate Body referred to its 1998 report in which it referred to the Decision on Trade and Environment – ibid, para 168.

395 Ibid, para 124. [Emphasis in original.] The 2001 panel report also recognised that the obligation to negotiate may be ongoing – see panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 5.67.

396 See the text accompanying note 258 above.

but not others.[397] The failure of the United States to seriously negotiate with all States exporting shrimp to the United States before imposing trade measures on some of these States was found to be unjustifiably discriminatory.[398]

In a human rights context, this would appear to require consistency in the imposition of human rights related trade measures. If a WTO member imposed trade restrictions on another WTO member on the grounds that labour related human rights standards were being suppressed, such a measure could be found to be unjustifiably discriminatory if similar measures were not applied in the same way to other WTO members that also suppressed labour related human rights standards.[399] Given that lack of consistency in the application of human rights related trade measures is one criticism of, for example, United States trade measures (see the discussion of United States trade measures in Chapter 5), this feature of the Appellate Body's report is potentially of great significance when assessing human rights related trade measures.

Finally, on the question of unjustifiable discrimination caught by the *chapeau* to Article XX, the Appellate Body in its 1998 report in the *Shrimp Turtle Case* indicated that measures that were unilateral in the mode of application (as opposed to involving unilaterally set standards imposed by the measure) were at risk of falling foul of the *chapeau*.

> "The system and processes of certification [necessary in order to avoid the United States trade measures] are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of … [the United States measures] heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability."[400]

It is apparent that this concern over unilateral application has significance for trade measures designed to ensure respect for human rights. If, for example, a State seeks to impose trade measures to secure protection of labour related human rights standards, then reliance on scrutiny by ILO expert bodies would avoid similar concerns over unilateral application.

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397 The *Shrimp Turtle Case*, note 196 above, paras 169 to 172.

398 Ibid, para 172.

399 Thus if States friendly to the State imposing the measures are, for example, given more time to correct their human rights record before the imposition of trade measures, then the imposition of trade measures against hostile States with a similar human rights record would potentially amount to unjustifiable discrimination.

400 The *Shrimp Turtle Case*, note 196 above, para 172.

(xiii) Arbitrary Discrimination

The Appellate Body in its 1998 report in the *Shrimp Turtle Case* also concluded that the United States measures were applied in a manner that constituted "arbitrary discrimination between countries where the same conditions prevail[ed]" and were thus caught by the *chapeau*. The Appellate Body found that the following features of the United States measures constituted arbitrary discrimination within the meaning of the *chapeau*:

– the imposition of a "single, rigid and unbending requirement that countries applying for certification under the … [United States rules] adopt a comprehensive regulatory programme that … [was] essentially the same as the United States' program, without enquiring into the appropriateness of that program for the conditions prevailing in the exporting countries"; and
– that "… there … [was] little or no flexibility in how officials … [made] the determination for certification pursuant to … [the United States] provisions".[401]

Perhaps most significant, so far as trade measures directed at human rights concerns, was the Appellate Body's view that *due process* was required in order for a measure not to be found to involve "arbitrary discrimination" under the *chapeau*. The Appellate Body found that the United States' certification process lacked transparency and predictability. The Appellate Body also expressed concerns about the *ex parte* nature of the inquiry and certification procedures followed by United States officials under the United States measures. The certification process provided:

> "… no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification … [was] made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, … [was] rendered on application for … certification… . Countries whose applications … [were] denied also … [did] not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application … [was] provided."[402]

The Appellate Body relied on Article X of GATT 1994 to effectively require "rigorous compliance with the fundamental requirements of due process" in order for the United States measures not to fall foul of the *chapeau's* proscription of arbitrary discrimination.[403]

401 Ibid, para 177.

402 Ibid, para 180.

403 Ibid, para 182.

As discussed in Chapter 4, international human rights standards include rules requiring due process of law.[404] It is therefore reasonable to conclude that similar due process guarantees would need to be in place before a measure that sought to link trade and human rights could satisfy this requirement of the *chapeau* to Article XX. Due process concerns arising in relation to existing United States human rights related trade measures have already been discussed in Chapter 5.

(xiv) Disguised Restrictions on International Trade

The *chapeau* to Article XX also precludes reliance on the general exceptions of Article XX where the measure in question is "applied in a manner which would constitute … a disguised restriction on international trade". In light of its findings of both unjustifiable and arbitrary discrimination, the Appellate Body in its 1998 report in the *Shrimp Turtle Case* did not go on to consider this third aspect of the *chapeau*. The disguised restriction requirement of the *chapeau* has, however, been considered by GATT and WTO panels, and in other Appellate Body reports.

The Appellate Body in its report in the *Reformulated Gasoline Case* considered the scope of Article XX(g) and the *chapeau*. The Appellate Body specifically linked the "disguised restriction on international trade" element of the *chapeau* to the "arbitrary" and "unjustifiable discrimination" components of the *chapeau*:

> "It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'. We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[405]

The Appellate Body found that the United States' environmental measures in that case involved both "unjustifiable discrimination" and a "disguised restriction on international trade." Two omissions on the part of the United States were identified as critical:

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404 See, for example, Article 14 of the *International Covenant on Civil and Political Rights*, note 216 above. Recall also conceptions of the international rule of law discussed in Chapter 4.

405 The *Reformulated Gasoline Case*, note 198 above, 24-25.

- the failure of the United States to pursue alternative, less trade-restrictive options including cooperative solutions;[406] and
- the apparent failure of the United States to "count the costs for foreign … [producers] that would result from the imposition of … [the United States measure]" in contrast with United States concern over the costs to United States producers.[407]

In its consideration of the requirements of the *chapeau*, the Appellate Body in the *Reformulated Gasoline Case* relied upon the panel's discussion of the necessity requirement in Article XX(b).[408] The Appellate Body's apparent interpolation of a "least trade restrictive" requirement into the *chapeau* would involve a significant additional limitation on Article XX(g) measures[409] but would appear to largely reproduce the necessity requirement of Article XX(a). This therefore does not appear to significantly affect the requirements discussed above for human rights related trade measures to be protected under Article XX(a).

The *chapeau* requirement that the measure in question not be a disguised restriction on international trade was also considered by the panel established in 2001 to determine whether the modifications to the United States measures following the Appellate Body's 1998 report in the *Shrimp Turtle Case* had brought the United States measures into line with obligations under the WTO Agreement. The panel considered that it was not sufficient to point to the fact that the measure in question was narrowly tailored to achieve one of the policy areas identified in the paragraphs of Article XX in order to avoid a finding of disguised discrimination under the *chapeau*.[410] The panel noted that the *chapeau* condition would catch a measure that was "only a disguise to conceal the pursuit of trade restrictive endeavours."[411]

The panel continued:

> "As mentioned by the Appellate Body in Japan – Taxes on Alcoholic Beverages, the protective application of a measure can most often be discerned from its design, archi-

406 Ibid, 26-28.

407 Ibid, 28.

408 The Appellate Body report, ibid, 26 – 27, quotes the panel report discussion of the necessity requirement under Article XX(b), paras 6.26 and 6.28.

409 Article XX(g) of GATT 1994, note 2 above, does not include a necessity requirement. In order to be justified under Article XX(g) a measure must "relate to" the conservation objectives of the paragraph.

410 The panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 5.140.

411 Ibid, para 5.142, quoting from the panel report in the *Asbestos Case*, note 198 above, para 8.236. The panel in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, ibid, notes that this finding was neither reversed nor modified by the Appellate Body in the *Asbestos Case*.

> tecture and revealing structure. We therefore proceed to determine whether, beyond the protection which automatically results from the imposition of … [the United States] ban, the design, architecture and revealing structure of … [the United States measures], as actually applied by the US authorities, demonstrate that the implementing measure constitutes a disguised restriction on international trade."[412]

The panel concluded that the revised United States turtle protection measures did "not constitute a disguised restriction on international trade within the meaning of the *chapeau* of Article XX of the GATT 1994."[413]

The panel reached this conclusion notwithstanding that (as noted by the panel) United States environmental groups had initiated the court action that resulted in the expansion of the scope of application of the United States measures in 1996 and that some protectionist sentiment had been expressed in respect of the United States measures in the United States Congress. The Panel considered that the ways in which the United States had actually applied the measures demonstrated that they had "not [been] applied so as to constitute a disguised restriction on international trade".[414]

Though Malaysia challenged the panel's decision, its appeal did not relate to the panel's decision on whether the United States measures constituted disguised restrictions on international trade.[415] The disguised restriction requirement of the *chapeau* does not, therefore, appear to significantly restrict the use of Article XX(a) to justify human rights related trade measures.

(f) Article XX(b) GATT 1994

In addition to Article XX(a), it is conceivable that outwardly directed human rights related trade measures might be justified under Article XX(b), which refers to measures "necessary to protect human, animal or plant life or health." Much of the above discussion of the applicability of Article XX(a) similarly applies to the issue of whether Article XX(b) is capable of justifying human rights related trade measures. In order to avoid repetition, those aspects that are specific to Article XX(b) will be the focus of the following analysis.

Two questions appear critical to the potential application of Article XX(b) to human rights related trade measures:

1. Can human rights related measures fall within the terms of Article XX(b) as measures "to protect human … life or health"?
2. Is Article XX(b) capable of justifying outwardly directed measures?

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412 The panel report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 5.142. [Footnote not reproduced].

413 Ibid, para 5.144.

414 Ibid, para 5.143.

415 See the Appellate Body report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, note 198, para 82.

(i) Human Rights Related Trade Measures – Measures to Protect Human Life or Health?

Reference must be made to the general rules of treaty interpretation to determine the scope of the words contained in Article XX(b). Unfortunately limited assistance can be derived from GATT/WTO jurisprudence as there are no specific GATT or WTO decisions that deal directly with whether Article XX(b) might encompass human rights related trade measures.

The ordinary meaning[416] of the words "measures … to protect human … life or health" appears broad enough to encompass certain human rights related measures, for example, measures designed to protect the right to life. The drafting history of Article XX(b) suggests that the provision was initially intended to justify sanitary and quarantine restrictions.[417] This construction is supported by the terms of Article XXII of GATT 1947 prior to its amendment in 1957. In its original formulation, Article XXII provided that:

> "[e]ach contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, *sanitary laws and regulations for the protection of human, animal or plant life or health*, and generally all matters affecting the operation of this Agreement."[418]

The *SPS Agreement* confirms this close association between Article XX(b) and sanitary measures. The final preambular paragraph of the *SPS Agreement* refers to the desire of WTO members to "… elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)".[419]

Whilst it is therefore clear that Article XX(b) applies to sanitary measures it remains unclear whether the provision is restricted in its application to such measures. The United States has asserted, for example, that Article XX(b) may apply to measures prohibiting the importation of weapons.[420]

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416 See Article 31(1) of the *Vienna Convention on the Law of Treaties*, note 17 above.

417 See, for example, GATT, Analytical Index, note 21 above, Volume 1, 565-566. See, however, Charnovitz, note 277 above, 44-45.

418 Reproduced in GATT, Analytical Index, ibid, Volume 2, 621. [Emphasis added.] The 1957 amendment of Article XXII is discussed in GATT, Analytical Index, ibid, Volume 2, 621-622.

419 See also Annex A, Clause 1(a) of the *SPS Agreement*, note 10 above.

420 See, for example, the panel report in the *Second Tuna Dolphin Case*, note 12 above, para 3.27.

In addition, as noted already in the discussion of Article XX(a),[421] the Appellate Body's "evolutionary" approach to the interpretation of Article XX(g) could apply with similar justification to other paragraphs of Article XX. It is therefore possible that Article XX(b) could be relied upon to justify human rights related trade measures.

(ii) Article XX(b) and Outwardly Directed Measures

The terms of Article XX(b) do not expressly address whether outwardly directed measures can be justified under Article XX(b). The drafting history of Article XX(b) does not resolve this ambiguity.

Inward "sanitary" measures were clearly intended to be covered by Article XX(b).[422] Whilst there appears to have been no reference in the *travaux* to the outward application of Article XX(b), neither does there appear to have been any express indication that outwardly directed measures were to be excluded. Similar arguments to those considered in the context of the potential outward application of Article XX(a) appear relevant to the interpretation of Article XX(b).[423] For example, the 1906 *International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorous in the Manufacture of Matches*,[424] required parties, *inter alia*, to impose outwardly directed trade measures designed to protect the health of foreign workers. The most appropriate provision under which to justify such measures would have been Article XX(b) of GATT 1947.

The nexus identified by the Appellate Body in its 1998 report in the *Shrimp Turtle Case* in order to justify outwardly directed measures under Article XX(g),[425] also has potential application under Article XX(b). As discussed in the context of

421 See the text accompanying note 286 above.

422 As is apparent from the terms of Article XXII of GATT 1947 prior to its amendment in 1957.

423 On this point, see, for example, the United States submissions to the panel in the *Second Tuna Dolphin Case* summarised in the panel report, note 12 above, para 3.29; paras 3.43-3.45 for a summary of the submissions made the European Economic Community and the Netherlands against the United States position; para 5.33 in the panel's report for its conclusion on this point – *ie* the *travaux* of GATT 1947 "… did not clearly support any particular contention of the parties with respect to the location of the living thing to be protected under Article XX(b)." See also Charnovitz, note 277 above, 44-46 and 52-53. The author notes that the balance of academic opinion on the question favours restricting Article XX(b) to inwardly directed measures – ibid, 52, footnote 79.

424 Article 1 of the *International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorous in the Manufacture of Matches*, note 266 above. According to Steve Charnovitz "… the main reason for this treaty was to prevent matchworkers from contracting the dreaded 'phossy jaw'" – Charnovitz, The Influence of International Labour Standards on the World Trading Regime – A Historical Overview, 126 International Labour Review 565, 571 (1987).

425 See the text accompanying note 319 above.

Article XX(a),[426] a similar nexus may exist in order to justify outwardly directed human rights related measures based on *erga omnes* obligations, or based on rights that are protected by international criminal standards giving rise to universal jurisdiction.

Although the position does not appear to be as clear as it is in relation to Article XX(a),[427] an outward interpretation of Article XX(b) is certainly open.

(iii) Article XX(b) – Other Requirements

The other features of Article XX(b) relevant to its potential application to outwardly directed human rights related trade measures (*ie*, the necessity requirement and the *chapeau*) appear to be identical to those considered in relation to Article XX(a). Both Article XX(a) and XX(b) therefore appear to have significant potential to justify human rights related trade measures.

(g) Article XX(d) of GATT 1994

Article XX(d) is a general exception unlike any other exception contained in Article XX. Its focus is expressly procedural. It operates to protect measures:

> "… necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; …"

One proposed amendment to the ITO Charter provision equivalent to Article XX(d) which was considered during the Havana conference was an extension of the scope of the provision to cover measures directed against social dumping.[428] The amendment was apparently not accepted because it was considered unneces-

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426 See the text accompanying note 322 above.

427 The major difference in relation to the two provisions appears to be the evidence linking Article XX(b) to inwardly directed sanitary measures. Note that in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, WT/DS246/AB/R, 7 April 2004, adopted by the Dispute Settlement Body on 20 April 2004, the European Communities did not seek to argue that their trade preference provisions for developing States combating drug production or trafficking were justified as outwardly directed measures to protect the human life in developing States. Instead they argued, unsuccessfully, that the measures were justified under Article XX(b) as measures to protect human life or health within the European Union – see panel report, ibid, para 7.180.

428 Havana Reports, note 139 above, 84, para 19; and GATT, Analytical Index, note 21 above, Volume 1, 580.

sary as social dumping was to be covered by the safeguards provision and Article 7 of the ITO Charter.[429]

Article XX(d) requires a State to show that the laws or regulations that the measure seeks to ensure compliance with are themselves consistent with GATT 1994. As laws or regulations imposing human rights related trade measures are unlikely to be GATT-consistent (*ie* potentially violating Articles I, III and XI), the Article XX(d) exception does not appear to be relevant to efforts to justify such measures.

It is, however, possible that Article XX(d) may operate in conjunction with Articles XX(a) and XX(b). Thus laws and regulations dealing with the protection of human rights in other States that are justifiable under Articles XX(a) or XX(b) may be supported by measures justifiable under Article XX(d). Whilst the United States appears to have made similar submissions before the panel in the *Second Tuna Dolphin Case*,[430] it is difficult to reconcile this interpretation of Article XX(d) with the specific language of the article.

Mexico sought to rely on Article XX(d) in order to justify its taxation measures challenged in *Mexico – Tax Measures on Soft Drinks and Other Beverages*. Mexico argued that its measures had been taken to secure compliance by the United States with its obligations under the *North American Free Trade Agreement*. The Appellate Body rejected Mexico's contention that "laws or regulations" referred to in Article XX(d) extended beyond municipal standards to include international instruments.[431]

In order to rely on Article XX(d), a State must also satisfy the necessity requirement which appears to be essentially the same as that discussed in the context of Article XX(a).

(h) Article XX(e) of GATT 1994

Article XX(e) provides that parties to the WTO Agreement may take "… measures … relating to the products of prison labour." As noted already, Article XX(e) necessarily justifies outwardly directed measures. Whilst it is true that the concern of many, if not all, of the delegates involved in the negotiation of what became Article

429 Havana Reports, ibid. See the text accompanying note 7 in Chapter 3, for the terms of Article 7 on "fair labour standards".

430 The *Second Tuna Dolphin Case*, note 12 above, paras 3.78 to 3.82.

431 *Mexico – Tax Measures on Soft Drinks and other Beverages*, note 124 above, paras 66-80. The Appellate Body based its conclusions on a textual analysis of Article XX(d) and on more general concerns, considered in Chapter 4, regarding the relevance of non-WTO rules in WTO dispute resolution.

XX(e) was economic[432] rather than humanitarian,[433] it cannot reasonably be argued that a party to the WTO Agreement that bans imports of goods produced by prison labour solely in order to protect the human rights of foreign prison labourers is thereby unable to rely on Article XX(e).

The relevance of Article XX(e) to human rights related trade measures is limited by its reference to "prison labour". It is difficult to see how this term could be interpreted to justify a significant expansion in the scope of the paragraph. The rules of treaty interpretation set out in the *Vienna Treaty Convention*, for example, do not readily support an interpretation of this term to cover forced or compulsory labour.[434] Measures addressing forced or compulsory labour would, however, potentially fall within the terms of Articles XX(a) and XX(b).

(i) Article XX(h) of GATT 1994

Article XX(h) justifies measures:

> "… undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved; …"

A number of international commodity agreements include provisions recognising the importance of fair labour standards.[435] Such provisions do not, however, appear to impose specific obligations or to create legal entitlements.[436] It is, therefore, dif-

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432 The perceived unfairness of having to endure competition from imports produced by prison labour appears to have been the main motivation behind the provision – see, for example, the *Second Tuna Dolphin Case*, ibid, para 3.35.

433 Given that many States at the time appear to have relied on prison labour, it appears impossible to interpret the provision as solely humanitarian in orientation, *ie* concerned the well-being of prisoners in foreign countries.

434 Note, however, the following observation from the Leutwiler Report (commissioned by the Director-General of GATT in 1983):

> "… [T]here is no disagreement that countries do not have to accept the products of slave or prison labour. A specific GATT rule allows countries to prohibit imports of such products" – Trade Policies for a Better Future, GATT, Geneva, 1985, 29.

There is no further indication in the report as to which "GATT rule" reference was being made. Presumably it was Article XX(e).

435 For a discussion of such clauses, see Ulrich Kullmann, 'Fair Labour Standards' in International Commodity Agreements, 14 Journal of World Trade Law 527 (1980); Philip Alston, Commodity Agreements – As Though People Don't Matter, 15 Journal of World Trade Law 455 (1981); and the reply by Dr Kullmann, 15 Journal of World Trade Law 460 (1981).

436 According to Jean-Marie Servais labour standards clauses in international commodity agreements "… seem to be more declarations of intent than a genuine legal

ficult to see how such provisions could be relied upon in conjunction with Article XX(h) to justify human rights related trade measures.

(j) WTO Remedies Available Against Measures Justified under Article XX

In the discussion of Article XXI (the security exception) of GATT 1994 it was noted that notwithstanding that trade measures might be justified under Article XXI, parties to the WTO Agreement that are injured by such measures are entitled to invoke Article XXIII and may ultimately receive authorisation to retaliate against the State taking the measures.[437] Article XXIII also has potential application in response to measures justified under Article XX.

Article XX specifically provides that "nothing" in the GATT "shall be construed to prevent the adoption or enforcement of measures" justified under the specific paragraphs of the article. It is difficult to reconcile these words in Article XX with the possibility that a State validly invoking Article XX may be the target of retaliation authorised under Article XXIII.[438] Allowing retaliation is perhaps understandable when addressing measures taken under Article XXI because invocations of Article XXI may not be reviewable and Article XXI lacks the discipline found in the *chapeau* to Article XX. The application of Article XXIII to invocations of Article XX appears, however, to be anomalous.

Despite this apparent anomaly, the *travaux* to Article XX supports the conclusion that the invocation of the Article was intended to be subject to non-violation complaints under Article XXIII:1(b). In 1946, during the same sub-committee meeting at which the *chapeau* to what became Article XX was first proposed as a protection against abuse of the general exceptions:

> "[i]t was recognized … that practical protection against misuse of … [what became Article XX] depended on utilization of the GATT clauses on nullification and impairment."[439]

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commitment" – Servais, The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress? 128 International Labour Review 423, 426 (1989).

437 See the text accompanying note 189 above.

438 Compare the views of PJ Kuyper:

> "It is totally improper that in the case … of a general exception such as Article XXI, where by definition there *can* be no reasonable expectation of the continuation of any tariff concession, some compensation because of non-violation would be required" – Kuyper, note 115 above, 249. [Emphasis in original.]

439 Jackson, World Trade and the Law of GATT, note 26 above, 741-742. See the observations of the United States representative recorded in the minutes of the 9th meeting on 13 November 1946 of Committee II – Technical Sub-Committee, Preparatory Committee of the International Conference on Trade and Employment, UN Doc E/PC/T/C.II/50, 6.

This interpretation of Articles XX and XXIII was accepted by the WTO Appellate Body in the *Asbestos Case*. Not only were the European Communities required to defend, under Article XX(b), the French measures directed against products containing asbestos, but they were also required to defend against Canada's complaint under Article XXIII:1(b) of non-violation nullification or impairment of Canada's benefits under the WTO Agreement.

In the discussion above of the potential for reliance on Article XXI to defend human rights related trade measures it was concluded that Article XXIII was a significant limitation on the potential utility of Article XXI to defend such measures. The same may not be true, however, of measures justifiable under Article XX.

The actual terms of Article XXI provide no justification for human rights related trade measures where the measures in question are not directed at violations of human rights in a target State that have been recognised as creating a threat to international peace and security, or at least as constituting a threat to the security of the State imposing the measures. A non-justiciable reliance on Article XXI in the absence of a threat to international peace and security or specific threat to the State imposing the measures appears to increase the pressure for allowing a successful complaint under Article XXIII:1(b) in response to such measures.

Reliance on Article XX in order to defend human rights related measures does not appear to raise the same issues. As argued above, provided the measures in question are directed against violations of internationally recognised human rights standards and meet the necessity and *chapeau* requirements of Articles XX(a) and XX(b), justification of such measures under Article XX appears to be consistent with the actual terms *and* purpose of Article XX. That invocations of Article XX are justiciable appears to be of particular practical significance.

Further, the WTO panel's approach in the *Asbestos Case* to Canada's nullification or impairment complaint against the French health measures that were justified under Article XX(b), suggests that a human rights related measure may readily escape retaliation under Article XXIII. As already noted,[440] nullification and impairment complaints under Article XXIII:1(b) normally depend upon showing that a measure has upset the competitive relationship leading to an impairment of benefits that "could not reasonably have been anticipated" by the complainant at the time of the negotiation of the tariff concessions that have been impaired by the measure. Just as the panel in the *Asbestos Case* found that Canada could have reasonably anticipated that French health regulations might impair tariff concessions *vis-à-vis* products containing asbestos,[441] so it appears that a State targeted by human rights related trade measures could reasonably anticipate the impairment of tariff concessions in favour of products implicated in violations of international human rights standards. The same, however, cannot be said of measures directed at products not implicated in human rights violations.

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440 See the text accompanying note 95 above.

441 The panel report in the *Asbestos Case*, note 198 above, para 8.300. This finding was not appealed – see the Appellate Body report, note 15 above, para 184.

Thus, provided a human rights related trade measure justified under Article XX is directed at goods produced in violation of internationally recognised human rights standards, or is directed at goods produced by or on behalf of an entity implicated in such violations, Article XXIII:1(b) may not allow the target State to retaliate against the measure. The capacity to avoid the "cost" of retaliation under Article XXIII has potential significance for assessments by States as to whether to impose outwardly directed human rights related trade measures that are justifiable under Article XX.

(k) Article XX of GATT 1994 and Human Rights – Conclusion

Of all the provisions of GATT 1994, it is Article XX that is most likely to provide a justification for trade measures which are directed outwardly at human rights violations in other States. Article XX justification is conceivably available to a WTO member that seeks to impose a trade embargo on, for example, products produced in breach of labour related human rights standards. Similarly, a WTO member could potentially rely on Articles XX(a) and XX(b) to justify restrictions on imports produced by State owned enterprises when the exporting State is implicated in the violation of human rights under international law.

Measures justified under Article XX are not tied to requirements of "material" or "serious" injury suffered by producers in the State imposing the measures. Retaliation by target States under Article XXIII:1(b) may be precluded. The requirements of paragraphs (a) and (b) of Article XX, and the *chapeau* to the Article, offer significant safeguards against abuse of the general exceptions. Notwithstanding the apparent reluctance of States to establish outwardly directed human rights measures, the potential for Article XX of GATT 1994 (and equivalent provisions of other WTO agreements) to offer justification for their establishment cannot be ignored.

8. Waivers and Labelling Initiatives – Linking Human Rights and Trade

(a) Waivers

As noted in Chapters 3 and 5 formal waivers have been issued under Article IX of the WTO Agreement in relation to measures that link trade and human rights. Trade measures designed to restrict the flow of "conflict diamonds" were the subject of a waiver issued by the General Council of the WTO on 15 December 2006.[442] The

442 Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 December 2006, WT/L/676, 19 December 2006. The background to the original 2003 waiver is described by Krista Nadakavukaren Schefer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 14 above, 391.

General Council explicitly recognised the link between trade in conflict diamonds and human rights violations:

> "… [T]he trade in conflict diamonds remains a matter of serious international concern and has been directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons; … [The General Council recognised] the extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts … ".[443]

The waiver explicitly addresses import and export restrictions between States participating in the "Kimberley Process and Certification Scheme for Rough Diamonds" on the one hand *and* States not participating in that scheme on the other.[444] The waiver is, however, silent regarding the restrictions called for under the Kimberley Process scheme in relation to trade in uncertified rough diamonds *between* States participating in the scheme.[445]

A number of the parties to the WTO Agreement that supported the Kimberley Process scheme maintained that there was no legal requirement to seek a waiver as the trade measures contemplated under the scheme would not be inconsistent with obligations under the WTO Agreement.[446] The General Council effectively acknowledged the position taken by these parties when it noted in the preamble to the waiver that:

> "… this Decision does not prejudge the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions, and that the Existing Waiver was granted and is hereby extended for reasons of legal certainty."[447]

The consistency of Kimberley Process trade measures with obligations under the WTO Agreement has been supported by those assessing the original 2003 waiver.[448]

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443 Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 December 2006, ibid, 1.

444 Ibid, 2.

445 For possible reasons for this silence see Joost Pauwelyn, WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds", 24 Michigan Journal of International Law 1177, 1193-1196 (2003).

446 Ibid, 1183.

447 Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 December 2006, ibid, 1.

448 Schefer, note 442 above, 420-440; and Pauwelyn, note 445 above, 1183-1189.

In particular, it has been argued that Articles XX and XXI of GATT 1994 would apply in respect of the measures and this conclusion is supported by the analysis of those provisions earlier in this chapter. Doubts have nonetheless been raised regarding the consistency of the measures.[449] It has been noted that the measures do not relate to production or processing methods used in the extraction of conflict diamonds.[450] Instead the focus of the trade measures is to deny any opportunity for rebel groups responsible for human rights violations to profit from the sale of "rough" diamonds that they have gained access to during the course of particular armed conflicts and to thus reduce the intensity of such conflicts and the associated human rights violations. This indirect relationship between trade in conflict diamonds and respect for human rights has led to concerns regarding the applicability of, for example, Article XX of GATT 1994.[451]

The waiver itself only refers to obligations under GATT 1994 and concerns have also been raised regarding the consistency of the measures under other agreements set out in the annexes to the WTO Agreement.[452] There may, for example, be difficulties in defending the measures under the *Agreement on Technical Barriers to Trade*.[453] In this regard it appears relevant to note that the Security Council has, by resolution, "strongly support[ed]" the Kimberley Process Scheme[454] and that there has been participation in the scheme by "all of the major diamond producing countries and the most important diamond trading centres".[455] The absence of any reference in the waiver to obligations under other parts of the WTO Agreement and the express acknowledgement by the General Council that the waiver was being issued for "reasons of legal certainty" suggest that the General Council did not consider these difficulties to be significant.[456]

(b) Labelling Initiatives

One relatively modest means by which trade and human rights can be linked consistently with WTO rules relates to labelling requirements. In the unadopted panel report in the *First Tuna Dolphin Case*, the panel found that United States legisla-

449 See, for example, Kevin R Gray, "Conflict Diamonds and the WTO: Not the Best Opportunity to be missed for the Trade-Human Rights Interface" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 14 above, 451, 454-458.

450 Pauwelyn, note 445 above, 1187; and Gray, ibid, 453-454.

451 Gray, ibid, 454-457.

452 Schefer, note 442 above, 445-447.

453 Ibid, 445-446.

454 Security Council resolution 1459 (2003) adopted on 28 January 2003. See Schefer, ibid, 400-416 for additional references to Security Council and General Assembly endorsement of measures to address the trade in conflict diamonds.

455 Scheffer, ibid, 416. On the relevance of this to the operation of the *Agreement on Technical Barriers to Trade*, see Pauwelyn, note 445 above, 1188-1189.

456 Pauwelyn, ibid, 1180-1182.

tion regulating the use of "dolphin safe" labels that differentiated between tuna products based on whether the tuna had been caught using fishing techniques that posed an incidental risk to dolphins, did not breach Article I or any other provision of GATT 1947.[457]

The WTO *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*") addresses labelling requirements and establishes notification obligations on members imposing labelling standards and encourages members to agree on international standards governing labelling requirements. The *TBT Agreement* would not, however, have required the panel in the *First Tuna Dolphin Case* to reach a different conclusion on the consistency with international trade rules of the labelling regime considered in that case.

Labelling standards, such as those voluntarily applied to rugs that attest to the non-use of the child labour[458] and other "core labour standards",[459] could be applied consistently with the WTO Agreement.[460] The effectiveness of labelling regimes in securing respect for human rights, however, appears dependent on consumer sentiments. If demand for products is unaffected by information of human rights violations, then labelling is unlikely to have any impact in limiting human rights violations.[461] Not surprisingly, therefore, the controversy over linkage between trade and human rights has not abated despite the potential consistency of human rights labelling regimes with the WTO Agreement.

9. Conclusion

This chapter has demonstrated that outwardly directed human rights related trade measures may be justified under various provisions of the WTO Agreement. The consistency of such measures depends on the human rights standards selected,

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457 The *First Tuna Dolphin Case*, note 12 above, para 5.41.

458 See, for example, the discussion of the "Rugmark" campaign in Lance Compa and Tashia Hinchliffe-Darricarrere, Enforcing International Labor Rights through Corporate Codes of Conduct, 33 Columbia Journal of Transnational Law 663, 673-4 (1995).

459 A Belgian law to promote socially responsible production through a labelling scheme entered into force in 2002 – see Breining-Kaufmann, "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations", note 14 above, 109.

460 ibid, 109-111.

461 See, for example, Christopher McCrudden and Anne Davies, "A Perspective on Trade and Labour Rights" in Francesco Francioni (ed), Environment, Human Rights and International Trade, Hart Publishing, Oxford, 2001, 179, 190. A collective action problem has also been identified in relation to labelling schemes – "[u]nless … [a consumer] can be sure that most other consumers will do likewise, the individual consumer may well not consider it rational to avoid buying the product in question" – Robert Howse and Michael J Trebilcock, The Fair Trade – Free Trade Debate: Trade, Labor and the Environment, 16 International Review of Law and Economics, 61, 71-72 (1996).

the mode of operation of the trade measures and the terms of the relevant provisions of the WTO Agreement. The distinctly commercial focus of the subsidies and safeguards rules creates difficulties for efforts to rely upon these rules in relation to human rights measures. The distinctly non-trade focus of Article XX of GATT 1994 (and equivalent provisions) appears reasonably well adapted to addressing human rights related trade measures.

The consideration of international human rights standards in Chapter 2 included consideration of the human right to development. There are numerous provisions of the WTO Agreement that address the interests of developing States. This chapter has not addressed these provisions. Such provisions will be addressed in Chapter 7.

Chapter 7

International Trade Regulation, Human Rights and Development

1. Introduction

Issues related to economic and social development have already been addressed from a number of perspectives. In Chapter 2, reference was made to the human right to development. In 1986 the United Nations General Assembly[1] adopted, by a significant majority,[2] a declaration proclaiming such a right. Controversy and uncertainty nonetheless persist as to the content of the human right to development, in particular as to the nature of any concrete obligations flowing from the right.[3] In the discussion of the interrelation of human rights in Chapter 4, it was noted that it has been suggested on behalf of certain East Asian governments that securing economic development took precedence over the enjoyment of civil and political rights.[4] By contrast, the 1986 United Nations declaration on the right to development expressly provides that "States should take steps to eliminate obsta-

1 General Assembly resolution 41/128, adopted on 4 December 1986.

2 One hundred and forty-six States voted for the resolution. One State voted against the resolution (the United States) and eight States abstained (Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom). The United States has voted for a resolution referring to the right – see resolution 1994/21 of the United Nations Commission on Human Rights (50th Session of the Commission) which includes a reference to the 1986 declaration and the right to development. In explaining its vote the United States representative observed that "[the United States] Government had, a year previously, decided for the first time to accept references to the right to development and to seek a serious dialogue with other Governments on its content and meaning" – cited in Allan Rosas, "The Right to Development" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), Economic, Social and Cultural Rights – A Textbook, 2nd revised edition, Martinus Nijhoff, Dordrecht, 2001, 119, 125.

3 Article 22 of the *African Charter on Human and Peoples' Rights*, adopted at Nairobi on 27 June 1981, entered into force 21 October 1986, reprinted in 21 ILM 58 (1982), appears to be the only treaty provision that refers to the right.

4 Contrast Article 9(2) of the Declaration on the Right to Development, note 1 above, which provides that:

cles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights."

In Chapter 3, there was brief reference made to the provisions of the original *General Agreement on Tariffs and Trade* ("GATT 1947")[5] which explicitly recognised difficulties faced by developing States[6] and afforded GATT contracting parties some flexibility in order to give preferential treatment to developing States.[7] The modest achievements of United Nations Conference on Trade and Development ("UNCTAD") were also acknowledged in Chapter 3, as were changes in the trading regime in favour of developing States instituted under the *Marrakesh Agreement Establishing the World Trade Organization* ("the WTO Agreement").[8]

In Chapter 5, there was an examination of how the scope for preferential treatment for developing States under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994)[9] and other agreements annexed to the WTO Agreement has been used by both the United States and the European Union to link the giving of trade preferences to respect for human rights in beneficiary developing States. In Chapter 6 there was an extended discussion of the *Shrimp Turtle Case*[10] which was initiated by four developing States seeking to protect their shrimp exports to the United States.

"[n]othing in the present Declaration shall be construed … as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights."

5 Entered into force on 1 January 1948 through the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, done at Geneva, 30 October 1947, 55 UNTS 308 (1950).

6 On the identification of "developing" States – see John H Jackson, William J Davey and Alan O Sykes Jr, Legal Problems of International Economic Relations, 4th Edition, West Group, St Paul, 2002, 1169-1170 and 1191 ("Jackson *et al*"); and Isabella D Bunn, The Right to Development: Implications for International Economic Law, 15 American University International Law Review 1425, 1449 (2000).

7 For an account of the post-war history of trade relations between developing and developed States, see Robert E Hudec, Developing Countries in the GATT Legal System, Gower, Aldershot, 1987.

8 Done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, reprinted in World Trade Organization, The Legal Texts – Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, Cambridge, 1999; also reprinted in 33 ILM 1144 (1994).

9 GATT 1994 is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid.

10 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (the "*Shrimp Turtle Case*"), WT/DS58/AB/R, 12 October 1998, adopted by the Dispute Settlement Body on 6 November 1998.

The purpose of this chapter is to examine the legality of human rights related trade measures imposed upon or used by developing States. The chapter will examine in more detail how GATT 1947 and the WTO Agreement have attempted to accommodate the concerns of developing States. It will consider the experience of developing States within the multilateral trading system, particularly in the context of developing State attitudes to linkage between trade and human rights. It will assess the legality of trade related human rights measures directed at developing States. It will also assess the legality of human rights related measures taken *by* developing States that address patent and other forms of intellectual property protection.

The Doha Round[11] of multilateral trade negotiations that were initiated in 2001 are focussing on a number of concerns raised on behalf of developing States.[12] The extent to which the negotiations succeed in addressing these concerns remains to be seen. Human rights related trade measures are not, however, formally on the Doha agenda. The chapter will therefore conclude with certain observations on the significance of developing State concerns about human rights related trade measures.

2. Developing States, GATT 1947 and the WTO Agreement

GATT 1947 contained a number of provisions that sought to accommodate the concerns of developing States. Articles XVIII and Part IV of GATT 1947 sought to provide additional flexibility under the treaty so that development concerns could be accommodated. As noted in Chapter 3, with only one significant exception these provisions appear to have been largely hortatory.[13]

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11 The WTO Director-General in 2001 referred to the programme of negotiations as the "Doha Development Agenda" – Jackson *et al*, note 6 above, 1222.

12 Ibid. Most of the paragraphs of the Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001, deal in one way or another with the concerns expressed on behalf of developing States.

13 The only exception appears to be Article XVIII:B which allows quantitative restrictions to deal with balance of payment difficulties. A number of GATT panel reports suggest justiciable obligations under Article XXXVIII – see, for example, *European Communities – Refunds on Exports of Sugar – Complaint by Brazil*, adopted 10 November 1980, GATT BISD, 27th Supplement, 69, 97-98, para (h). In this case the panel found that the European Communities had failed to collaborate with other contracting parties as set out in the "guidelines given in Article XXXVIII". The panel report does not, however, indicate what, if any, consequences flowed from this finding. See generally GATT, Analytical Index: Guide to GATT Law and Practice, 6th Edition, Geneva, 1995, Volume 1, 496 and Volume 2, 1042-1045; and Jackson *et al*, ibid, 1169-1171. In *Norway – Restrictions on Imports of Certain Textile Products*, adopted on 18 June 1980, BISD, 27th Supplement, 119-126, the GATT panel made the following observation (at para 15):

> "While noting that provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those

In addition to these provisions that expressly addressed some of the concerns of developing States, other general provisions of GATT 1947 were relied on by developing States to seek to accelerate their economic development. Developing States with balance of payment difficulties relied on the general balance of payment exception in Article XII prior to and even after inclusion of Article XVIII: B in 1955.[14]

Developing States were also generally free to impose tariffs to protect infant industries as there were few product lines that they had bound in tariff negotiations under Article II.[15] It has also been suggested that developed States were reluctant to confront developing States over technical GATT violations, not least because GATT balance of payment exceptions could generally have been invoked to justify such violations.[16]

One significant express concession offered to developing States was the general dispensation from GATT most favoured nation ("MFN") discipline, provided initially for a fixed period and later extended indefinitely, which allowed developing States to be given preferential treatment in trade.[17] Reference has been made to the United States and European Union generalised system of preferences schemes in Chapter 5.

Notwithstanding provisions in GATT 1947 designed to address concerns of developing States, economic development achieved under GATT 1947 was not generally in accordance with the expectations of developing States. Various theories have been offered for the lower than expected growth rates of many developing State economies. For example, it has been suggested that the import substitution policies countenanced by provisions such as Article XVIII of GATT 1947 have not served developing States well. Rather than encouraging economic development, these policies may have simply encouraged the establishment of uncompetitive industries that required protection from imports in order to survive.[18] Improvements in the economic position of certain developing States (principally in Asia)

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countries with the spirit and objectives of Part IV of the GATT, this cannot be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT."

14 GATT, Analytical Index, ibid, Volume 1, 378.

15 Jackson *et al*, note 6 above, 1168-1169.

16 John H Jackson, World Trade and the Law of GATT, Bobbs Merrill, Indianapolis, 1969, 670-671.

17 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, decision of 28 November 1979, BISD, 26th Supplement, 203 (the "*Enabling Clause*"). This decision continues in force under the WTO Agreement pursuant to Article 1(b)(iv) of GATT 1994, note 9 above.

18 Jackson *et al*, note 6 above, 1181, citing a report supported by the Ford Foundation on developing States and the global trading system.

have been attributed to strong export orientation, albeit coupled with strategic protectionism.[19]

In addition, developing States under GATT 1947 found their access to markets for products for which they enjoyed considerable comparative advantage, such as agriculture and textiles, limited by protectionist policies such as those reflected in the Multi-fibre Arrangement.[20] Variable tariff rates which imposed higher tariffs on processed as opposed to unprocessed exports from developing States were also pernicious from the perspective of developing States.[21] Developing States were pressured into signing voluntary export restraints[22] which operated, to all intents and purposes, as quotas. The capacity to avoid having to give tariff concessions on joining GATT 1947 if the developing State's membership was sponsored by its former colonial master, was of little significance compared to the lack of, or limitations on, access to developed State markets for the products of export interest to developing States.

These obstacles only compounded the difficulties that many developing States faced due to continuing deterioration in the terms of trade for developing State exports.[23] Commodity agreements negotiated under the auspices of UNCTAD could provide some temporary respite but they could not arrest the general downward trend in commodity prices.[24] Global economic recession in the 1980s reduced demand for exports from developing States and increased developed State protectionism. High debt levels and interest rates combined to ensure that, with the exception of certain East Asian States, economic growth in many developing States remained disappointing.[25]

The WTO Agreement contained provisions that offered some improvements for developing States. The Multi-fibre Arrangement was replaced by the *Agreement on Textiles and Clothing*[26] and liberalisation commitments were made in relation to textiles. The movement was in the same direction for agriculture, although not at the same pace.[27] Specific acknowledgement was given to the needs of "least-developed countries". Developing States were forced to make tariff commitments, but, as suggested above, the limited tariff discipline required of developing States

19 Ibid, 1181-2.

20 Michael J Trebilcock and Robert Howse, The Regulation of International Trade, 3rd Edition, Routledge, London, 2005, 482-483.

21 Ibid, 481.

22 Ibid, 482.

23 Ibid, 484.

24 John H Jackson, William J Davey and Alan O Sykes Jnr, Legal Problems of International Economic Relations, 3rd Edition, West Publishing, St Paul, 1995, 1177.

25 Trebilcock and Howse, note 20 above, 488-490.

26 John H Jackson, The World Trading System, 2nd edition, MIT Press, Cambridge Massachusetts, 1997, 207.

27 Jackson *et al*, note 6 above, 1185.

under GATT 1947 was relatively insignificant when compared to the limitations on access to developed State markets for goods of export interest to developing States.[28]

The WTO Agreement built on the provisions designed to assist developing States in Article XVIII and Part IV of GATT 1947. The agreements contained in the annexes to the WTO Agreement include numerous provisions setting out special arrangements for developing States.[29]

In a study[30] issued in revised form in 2001, the WTO Secretariat identified six forms of "special and differential treatment" for developing State members of the WTO provided for in the WTO Agreement:

(i) "Provisions aimed at increasing trade opportunities of developing country members."[31] These provisions include paragraph 2(a) of the *Enabling*

28 The apparent double standard of developed States – low tariffs on industrial products of export interest for developed States, high tariffs for agricultural products and textiles of export interest to developing States – also appears evident in new areas covered by the Uruguay Round. Under the *General Agreement on Trade in Services*, an annexure to (see Annex 1B) and an integral part of the WTO Agreement, note 8 above, developed States secured establishment rights under the agreement, allowing their nationals to move to the territory of other members in order to provide services. These establishment rights are not accorded to developing State enterprises, such as building companies, that have comparative advantage due to low labour costs but whose employees are unable to avoid immigration restrictions imposed by developed States.

29 One estimate of WTO provisions dealing with special and differential treatment identifies "… 145 provisions spread across the different Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; The Agreement on Trade-Related Aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various Ministerial Decisions. Of the 145 provisions, 107 were adopted at the conclusion of the Uruguay Round, and 22 apply to least-developed country Members only" – Note by Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/77, 25 October 2000, 3, para 2. The study referred to in note 30 below is a revision of this study. The revised study, however, omits the above-quoted paragraph.

30 Note by Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions ("WTO Secretariat Report"), WT/COMTD/W/77/Rev.1, 21 September 2001.

31 Ibid, 5.

Clause[32] and the generalised system of preferences ("GSP") that it authorised;[33]

(ii) "Provisions under which WTO members should safeguard the interests of developing country members."[34] Included under this category is Article 9.1 of the *Agreement on Safeguards* that seeks to limit the use of safeguard measures against the exports of developing State members;

(iii) "Flexibility of commitments, of action, and use of policy instruments."[35] Such provisions are designed to give greater freedom to developing State members to pursue conduct which would otherwise contravene the provisions of the WTO Agreement. Article XVIII of GATT 1994 illustrates this type of provision;

(iv) "Transitional time periods."[36] The WTO agreements include a number of provisions that establish time periods for liberalisation. Developing States have been allowed longer periods in which to liberalise trade restrictions;[37]

(v) "Technical Assistance."[38] Technical assistance has long been identified as a means by which to assist developing States in their economic development.

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32 The *Enabling Clause*, note 17 above. Paragraphs 1 and 2(a) of the *Enabling Clause* [and footnote 3 to paragraph 2(a)] provide:

> "1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. …
>
> 2. The provisions of paragraph 1 apply to the following:
>
> (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.[3]
>
> [3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries' (BISD 18S/24)."

33 For a general assessment of the GSP see Bernard Hoekman and Çağlar Özden, "Introduction" in Hoekman and Özden (eds), Trade Preferences and Differential Treatment of Developing Countries, Edward Elgar Publishing, Cheltenham, 2006, xi.

34 WTO Secretariat Report, note 30 above, 6.

35 Ibid, 7.

36 Ibid, 8.

37 Such provisions include: Article 15.2 of the *Agreement on Agriculture*, an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 8 above; Article 10, paras 2 and 3, of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (see Annex 1A of the WTO Agreement); Article 12.8 of the *Agreement on Technical Barriers to Trade* (see Annex 1A of the WTO Agreement); and Article 65, paras 2 and 4, of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (see Annex 1C of the WTO Agreement). "Least-developed country Members" are sometimes allowed longer periods.

38 WTO Secretariat Report, note 30 above, 8.

Six WTO agreements include such provisions.[39] Article 27.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* is an example of such a provision; and

(vi) "Provisions relating to least-developed country Members."[40] Differentiation between developing States was provided for in Article XVIII:4 of GATT 1947 which came into force in 1955. The WTO Agreement provides for special assistance to "least-developed country Members" in various WTO agreements and decisions.[41]

As noted above, the WTO Agreement addressed a number of the concerns of developing States. Trade in textiles, clothing and agricultural products was to be liberalised. Further restrictions were placed on non-tariff barriers, and disciplines in relation to antidumping and countervailing duty actions were enhanced. Developing States, however, still raise significant concerns.

In relation to the six forms of assistance to developing States, it appears that the first three have occasioned the most controversy. In relation to the question of limiting developed State action to avoid harming the interests of developing States, concerns have been raised about the absence of legal obligations in this regard.[42]

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39 Ibid, 8-9.

40 Ibid, 9.

41 Ibid, 9-10.

42 See, for example, Article 15 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, note 8 above, which provides that:

> "[i]t is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

Despite the presence of this provision developing States appear to have complained of "… the proliferation of anti-dumping measures directed against products from developing countries (particularly textiles and clothing) and the harassing effects of such measures" – see Secretariat Report, note 29 above, 47. Article 15 was found to have been violated by the European Communities in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, 30 October 2000, paras 6.219 to 6.238. The European Communities did not raise this aspect of the panel's finding on appeal – WT/DS141/AB/R, 1 March 2001, adopted by the Dispute Settlement Body on 12 March 2001. It is unclear, however, from the panel report whether any effective remedy was available to India. Subsequent panel consideration pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), annexed to (see Annex 2) and an integral part of the WTO Agreement, ibid, did not provide significant guidance as to the nature of the obligation under Article 15 – WT/DS141/RW, 29 November 2002, paras 6.247-6.261.

Lack of clear legal obligations poses significant problems in enforcement.[43]

The manner in which developed States have administered their GSP programs has been the source of controversy. The WTO Secretariat Report referred to above catalogues developing State concerns. These concerns include that:

1. Developed States have not included amongst products entitled to GSP benefits, products of export interest to developing States such as agricultural products, textiles and clothing;[44]
2. Developed States sometimes exclude products that would otherwise be subject to GSP benefits.[45] The United States, for example, employs what it describes as a "competitive need" exclusion which allows the United States to deny GSP status to a developing State in respect of a particular product if the developing State becomes a significant supplier of that product in market percentage terms or in terms of value.[46]

This mechanism is similar to the issue of "graduation." Developed States sometimes deny GSP benefits to industry sectors or to all exports of WTO members on the grounds that the particular industry or member has "graduated" from the ranks of developing industries or States. Support for denial of GSP benefits to States

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43 According to the WTO Secretariat report "… developing countries have raised doubts as to the effective access of developing countries to the dispute settlement process and the lack of clarity regarding the manner in which the special and differential treatment provisions are implemented" – note 30 above, 112.

44 Ibid, 26. Commenting on the meaning of the word "generalized" in footnote 3 of the *Enabling Clause* the panel in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, 1 December 2003, made the following observation:

> "Based on the context and the preparatory work of the Enabling Clause, the term 'generalized' in footnote 3 has two meanings: (i) providing GSP to all developing countries; and (ii) ensuring sufficiently broad coverage of products in GSP" – para 7.175.

However, as Lorand Bartels has noted, the European Communities contested the second meaning on appeal and the Appellate Body "did not dwell on these issues to any great degree" – see Bartels, "The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programmes" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 463, 479. The Appellate Body observed that "…the term 'generalized' requires that the GSP schemes of preference-granting countries remain generally applicable" – WT/DS246/AB/R, 7 April 2004, adopted by the Dispute Settlement Body on 20 April 2004, para 156. For opposing interpretations of this ambiguous observation see Steve Charnovitz, Lorand Bartels, Robert Howse, Jane Bradley, Joost Pauwelyn and Donald Regan, Internet Roundtable – The Appellate Body's GSP decision, 3 World Trade Review 239, 260-261 (2004).

45 WTO Secretariat report, ibid.

46 Jackson *et al*, note 6 above, 1192.

that have developed their economies can be found in paragraph 7 of the *Enabling Clause*.[47]

Developing States have raised concerns that such an approach contravenes the principle of non-discrimination between developing States[48] and non-reciprocity[49] enshrined in the *Enabling Clause*. Despite these concerns, graduation does not appear to have been subjected to any sustained legal challenge.

The notion of graduation of a *particular* industry appears to be most controversial. If special and differential treatment is designed to allow developing States to advance their economic development *generally*, it appears unreasonable to effectively restrict that general development by denying GSP benefits in relation to particular competitive industries that could generate resources for further economic development in other sectors. By contrast, treating States as having graduated based on their general level of economic development appears to be not only consistent with the *Enabling Clause*, but indeed may be essential if the disciplines of the WTO Agreement are not to be undermined.

3. Developing States and Human Rights Conditionality under the GSP

Similar concerns about discrimination have been raised in relation to linkages between GSP benefits and non-trade policy concerns such as labour related human rights. These concerns have been combined with the sovereignty concerns discussed in Chapters 5 and 6. Frustration with the GSP and the imposition of non-trade conditionalities is well expressed by Professor T N Srinavasan who has confessed that:

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47 Para 7 of the *Enabling Clause*, note 17 above, provides that:

> "[t]he concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement."

48 The footnote to para 2(a) of the *Enabling Clause*, ibid, refers to the 1971 GATT authority to establish "generalized, non-reciprocal and *non discriminatory* preferences beneficial to the developing countries" [Emphasis added.] See also the GATT, Analytical Index, note 13 above, Volume 1, 58-59; contrast the complaint discussed in the 1980 report of the GATT Committee on Trade and Development, adopted 26 November 1980, BISD, 27th Supplement, 48, paras 9 to 10.

49 See para 5 of the *Enabling Clause*, ibid; and also Article XXXVI:8 of GATT 1994, note 9 above.

> "I view GSP as no more than crumbs from a rich man's table. The developing countries would be far better off under a liberal trading system than under one in which they get special and differential treatment in return for their acquiescing in the illiberal trade policies of the rich."[50]

As with cases of "graduation" there appears to have been no formal legal challenge to the attachment by the United States and European Union of *human rights* conditions to the conferral of GSP benefits. There has, however, been a successful challenge to a related feature of the European Union regulation referred to in Chapter 5.[51] In a report dated 1 December 2003, a WTO panel, formed at the request of India, found that differential tariff preferences to assist designated developing States "combat drug production and trafficking" did not fall within the terms of the *Enabling Clause* due to their differential character which was treated as discriminatory.[52] Based on a consideration of efforts within UNCTAD in the 1960s to phase out discriminatory trade preferences in favour of a generalised system of preferences, the panel gave a strict interpretation to the term "non-discriminatory" as it appears in the *Enabling Clause*.[53]

The Appellate Body, in its report dated 7 April 2004,[54] upheld the panel's conclusion that the European regulation was not justified under paragraph 2(a) of the enabling clause. The Appellate Body, however, rejected the strict interpretation

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50 Quoted in Virginia A Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Jagdish Bhagwati and Robert E Hudec (eds), Fair Trade and Harmonization – Prerequisites for Free Trade? MIT Press, Cambridge Massachusetts, 1996, Volume 2, Legal Analysis, 177, 229, footnote 87.

51 See *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above.

52 As noted above the term "non-discriminatory" appears in the footnote to para 2(a) of the *Enabling Clause*, note 17 above. The text of the footnote appears in note 32 above.

53 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above, paras 7.126- 7.177. For an account of the history of the *Enabling Clause*, see Hudec, note 7 above, 56-102. For various arguments regarding the interpretation of the *Enabling Clause*, see Robert Howse, Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences, 18 American University International Law Review 1333 (2003); Bartels, note 44 above; Gregory Shaffer and Yvonne Apea, "GSP Programmes and Their Historical-Political-Institutional Context" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 44 above, 488; Jane Bradley, "The Enabling Clause and the Applied Rules of Interpretation" in Cottier, Pauwelyn and Bürgi Bonanomi, ibid, 504; Charnovitz *et al*, note 44 above.

54 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above.

given by the panel to the relevant provision[55] of the *Enabling Clause* that referred to "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries". The Appellate Body accepted that differentiation between developing State beneficiaries was permissible under the *Enabling Clause* under certain conditions. Thus developed States were entitled to differentiate between developing States in order to respond to the different "development, financial and trade needs" of developing States.[56] Such differentiation must, according to the Appellate Body, be based on an "objective standard". Relying again on the language of paragraph 3(c) of the *Enabling Clause*, the Appellate Body also required that differentiation must be "positive" for developing State beneficiaries:

> "… the expectation [arising from the terms of paragraph 3(c) of the *Enabling Clause*] that developed countries will 'respond positively' to the 'needs of developing countries' suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2 [of the *Enabling Clause*], and, on the other hand, the likelihood of alleviating the relevant 'development, financial [or] trade need'. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the 'positive' manner suggested, in 'respon[se]' to a widely-recognized 'development, financial [or] trade need', can such action satisfy the requirements of paragraph 3(c)."[57]

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55 Para 2(a) of the *Enabling Clause*, note 17 above.

56 The Appellate Body drew on the terms of paragraph 3(c) of the *Enabling Clause* in reaching this conclusion – see *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above, paras 157-174. The phrase "development, financial and trade needs of developing countries" in para 3(c) of the *Enabling Clause* appears to have been first employed in GATT 1947 in Article XXXVII:4 which was included in the General Agreement in February 1965 with the introduction of Part IV – see GATT, Analytical Index, note 13 above, Volume 2, 1040. The phrase also appears in the Interpretative Note *Ad* Article XXXVI (to paragraph 8) from Annex I of GATT 47.

57 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ibid, para 175. The Appellate Body appears to justify its inclusion of the words "widely-recognized" in para 163 when referring to the need for an "objective standard". According to the Appellate Body:

> "Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard."

The Appellate Body also noted, in para 167, that "… pursuant to paragraph 3(a) of the *Enabling Clause*, any 'differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties' …".

The Appellate Body nonetheless concluded that the drug production and trafficking provisions of the European regulation were inconsistent with the *Enabling Clause*. The Appellate Body based this conclusion in part on the failure of the European Communities to demonstrate that preferences were provided to all developing State beneficiaries that were "similarly affected by the drug problem".[58] The Appellate Body also raised concerns regarding the absence of any procedure for developing States to apply for trade preferences to respond to threats posed by the drug trade and the absence of criteria or standards set out in the regulation justifying differentiation between developing State beneficiaries.[59]

The European Union subsequently modified the provisions of the successor regulation to that challenged by India. As discussed in Chapter 5, Council Regulation (EC) No 980/2005[60] continues the practice of allowing additional preferences but limits these incentive measures to "vulnerable" States provided they adhere to and effectively implement various human rights, environmental and drug suppression treaties.[61] Various features of this regulation reflect Appellate Body criticisms of the earlier regulation.[62] The positive nature of the special incentive arrangements appears to bring them within the scope of the Enabling Clause as interpreted by the Appellate Body. By contrast, the temporary withdrawal provisions of the Regulation[63] will be more difficult to justify under the Enabling Clause.[64] An alternative basis for justification for such measures, however, appears available.

The European Communities also sought to justify the drug measures before the panel by reference to Article XX(b) of the GATT 1994. The panel rejected the

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58 Ibid, para 180.

59 Ibid, paras 177-189.

60 Official Journal of the European Union, L 169/1, 30 June 2005.

61 See, in particular Articles 8-11 and Annex III of Regulation No 980/2005, ibid. According to the European Communities:

> "Vulnerable developing countries which by their own volition assume special burdens and responsibilities due to the ratification and effective implementation of core international conventions on human and labour rights, environmental protection and good governance should benefit from additional tariff preferences. These preferences are designed to promote further economic growth and thereby to respond positively to the internationally recognised need for sustainable development" – "The EU's Generalized System of Preferences: Responses to Questions Submitted by Brazil, China, India and Pakistan", WT/COMTD/57/Add.5, 27 June 2006, 8.

62 For example, the reference to "vulnerable" States appears designed to address the Appellate Body's concern that the differentiating measures be "positive" for a similarly situated group of developing States – see Article 9(3) of Regulation No 980/2005, ibid. Mechanisms for application by developing States requesting additional benefits under the regulation have also been included – see Article 10 of the regulation.

63 Articles 16-20 of Regulation No 980/2005, ibid.

64 See the discussion and references in note 130 in Chapter 5.

application of Article XX(b)[65] and the European Communities did not appeal this aspect of the panel's decision. An Article XX defence may nonetheless be available to defend such measures. There is the recognition in both the *Enabling Clause*[66] and its 1971 precursor[67] that GATT "rights" (other than MFN entitlements) are not to be affected by the GSP. GATT "rights" include the entitlement to institute measures justified under Article XX. Developed States can therefore justify human rights related GSP conditions to the extent that outwardly directed human rights related trade measures can be justified under Article XX.[68]

4. GSP and the Human Right to Development

The existence of GSP arrangements has not yet led to general acceptance by developed States of an international legal *obligation* to provide development assistance of the kind advocated by developing States in the 1980s in the context of the human right to development.[69] The practice of developed States giving preferences and the terms of the WTO Agreement do not appear to be sufficient to sustain the contention that developing States have a legally enforceable entitlement to such preferences. Whether a developed State grants preferences under the GSP is still treated as more akin to charity than to some form of legislated redistribution obligation. Associate Professor Frieder Roessler's comment that "it is undeniable that there is no obligation to grant GSP benefits at all"[70] is overstated but essentially accurate.[71]

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65 Panel report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above, paras 7.195-7.236.

66 The footnote to para 4 of the *Enabling Clause*, note 17 above, provides that "[n]othing in these provisions shall affect the rights of contracting parties under the General Agreement."

67 Waivers – Generalized System of Preferences, decision of 25 June 1971, BISD, 18th Supplement, 24. Paragraph (a) provides that the decision is "without prejudice" to any … Article of the General Agreement" other than Article I.

68 Although the panel rejected the European Communities' submissions regarding Article XX on the merits in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, note 44 above, paras 7.195-7.236. *Cf* Pauwelyn in Charnovitz *et al*, note 44 above, 258-260.

69 Although note the ambiguous language of the Appellate Body in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ibid, para 156, discussed in note 44 above.

70 Frieder Roessler, "Diverging Domestic Policies and Multilateral Trade Integration" in Bhagwati and Hudec, note 50 above, Volume 2, 21, 39.

71 Contrast the position taken by Isabella Bunn, note 6 above. Bunn cites views of Oscar Schachter expressed in 1976 in support of an obligation to provide assistance, but then concludes that "… while one principle of the right to development is differential treatment of developing nations, this stops short of any entitlement to such assistance or aid" – Bunn, 1450-1451. The 1971 decision of the GATT contracting parties, note 67 above, includes the following recital: "[n]oting the statement of developed contracting

Paradoxically, the human right to development was invoked by the European Union to justify human rights related trade measures in the preamble to Council Regulation No 980/2005.[72] Notwithstanding that the phrase "development, financial and trade needs" in the *Enabling Clause* predates the 1986 declaration on the right to development, it will be extremely difficult to argue that the concept of "development", given its evolutionary character, has been unaffected by subsequent practice. As noted in Chapter 6, the *Rio Declaration on Environment and Development* refers, in Principle 3, to "the right to development". Whether or not it was intended in 1992 to link the concept of "sustainable development" to the human right to development,[73] in 2002 the *Johannesburg Declaration on Sustainable Development* made the link explicit when it referred to the 1998 "Declaration on Fundamental Principles and Rights at Work of the International Labour Organization".[74] And as indicated in the introduction to this chapter, the 1986 declaration on the right to development explicitly identified "failure to observe civil and political rights" as "obstacles to development". These links appear to have been recognised by the European Union in Regulation No 980/2005. Thus the right to development appears in this context to provide *support for*, rather than *opposition to*, the use of certain human rights related trade measures.[75]

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parties that the grant of tariff preferences does not constitute a binding commitment and that they are of a temporary nature."

72 See para 7 of the preamble to Regulation No 980/2005, note 60 above.

73 The connection was made by at least one State in 1992. The United States submitted the following written Statement in relation to Principle 3 of the Rio Declaration at the 1992 conference:

> "The United States does not, by joining consensus on the Rio Declaration, change its long-standing opposition to the so-called 'right to development'. Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of the human rights set out in the Universal Declaration of Human Rights. The United States understands and accepts the thrust of principle 3 to be that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present and future generations are taken into account. The United States cannot agree to, and would disassociate itself from, any interpretation of principle 3 that accepts a 'right to development', or otherwise goes beyond that understanding" – Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3 – 14 June 1992, Volume 2, Proceedings of the Conference, UN Doc A/CONF.151/26/Rev.l (Vol II).

74 Johannesburg Declaration on Sustainable Development, UN Doc A/CONF.199/L.6/Rev.2 and A/CONF.199/L.6/Rev.2/Corr.1, 4 September 2002, para 28.

75 Professor Brownlie suggested in 1989 that developing States "may be making rods for their own backs" with the 1986 General Assembly declaration – see Brownlie, The Human Right to Development, Commonwealth Secretariat, London, 1989, 20, para 46.

5. Developing States, the WTO and Human Rights Related Trade Measures

The first session of the WTO Ministerial Conference following the negotiation of the WTO Agreement provided an opportunity for developing States to voice their political opposition to linkage of trade and labour related human rights within the WTO system.[76] A measure of the opposition to such linkage in relation to labour standards is provided by an incident early at the 1996 Singapore Ministerial.[77] The Director-General of the International Labour Organization was invited to address the Singapore gathering. This invitation was "withdrawn due to objections from developing countries who wanted no discussion of labour issues at the meeting."[78] Fear of protectionism appears to have been uppermost for a number of developing State members. Despite this opposition, the United States and other developed States were successful in having the ministerial declaration refer to the question of labour standards. The United States threatened to refuse to support the declaration if labour standards were not referred to.[79] The assembled trade ministers dealt with "core labour standards" in paragraph IV of the declaration:

> "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."[80]

The Doha Ministerial Declaration reaffirms this approach.[81]

The principal concern expressed by developing States over linkage proposals appears to have been the fear that linkage was simply a form of protectionism seeking to hide itself behind human rights concerns. United States linkage mechanisms appear to provide some support for this concern. Chapter 5 catalogued deficiencies

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76 See generally Virginia A Leary, The WTO and the Social Clause: Post-Singapore, 8 European Journal of International Law 118 (1997).

77 The incident is described by Leary, ibid, 119.

78 Ibid.

79 Ibid, 120.

80 World Trade Organization, Singapore Ministerial Declaration, WT/MIN(96)/DEC/W, 13 December 1996. Note similar language in International Labour Organization Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session Geneva, June 1998. The Declaration is reprinted in 137 International Labour Review 253 (1998).

81 The Doha Ministerial Declaration, note 12 above, para 8.

identified in relation to United States linkage mechanisms. Amongst these deficiencies was the fact that the United States applied labour standards under its linkage legislation which it had not itself accepted internationally. The United States mechanisms also include the following labour standard:

> "Acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health …"[82]

Representatives of developing States and economists working in developed States have joined to condemn unilateral attempts to impose such standards.[83] They have pointed out that what are considered to be acceptable conditions of work depends significantly on the level of economic development. Fears of protectionism naturally arise. What the United States may be doing when it conditions GSP and other benefits on whether a developing State meets such standards is attempting to undermine the developing State's legitimate comparative advantage. To continue the earlier quotation from Professor Srinavasan:

> "By attaching undue significance to GSP and other measures of special and differential treatment, the developing countries have opened themselves to being pressured on imposing unsustainably high labour standards."[84]

A response from advocates of linkage has been that proposals should not seek to apply standards which are dependent on levels of development.[85] International obligations to protect freedom of association and collective bargaining, and the prohibition of forced labour and discrimination in employment are not dependent on the level of development of a State. All developing States are legally obliged to enforce such standards. The International Labour Organization declaration of 1998 considered in Chapter 2 can be seen in this light.[86]

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82 See, for example, section 507(4) of the *Trade Act 1974*, Title 19 United States Code §2467(4).

83 Economists who raise concerns about such attempts include Drusilla K Brown, Alan V Deardorff and Robert M Stern, "International Labor Standards and Trade: A Theoretical Analysis" in Bhagwati and Hudec, note 50 above, Volume 1, 227.

84 Quoted in Leary, note 50 above, 229, footnote 87.

85 See, for example, Brian A Langille, Eight Ways to think about Labour Standards, 31(4) Journal of World Trade 27, 32 (1997).

86 The problem may, however, remain, albeit in a mitigated form, in relation to child labour. The use of child labour has been linked to the level of poverty within developing States – see, for example, Jagdish Bhagwati, Afterword: The Question of Linkage, 96 American Journal of International Law, 126, 132 (2002). In the context of child labour, the International Labour Organization's own standards reflect this fact by allowing variation in the norms depending on levels of development. Such variation, however, with its attendant increase in complexity, makes application more complex

Developing State dismay over unilateral linkage in relation to human rights has an analogue in the environmental context. Mexico (in the *First Tuna Dolphin Case*) and India, Malaysia, Pakistan and Thailand (in the *Shrimp Turtle Case*) were the complainants that challenged the GATT and WTO legality of United States environmental regulations which imposed trade restrictions in respect of the treatment of wildlife outside of the United States.

Developing States may suffer negative consequences from such measures even where they are not the targets of such trade measures. The GATT panel report in the *First Tuna Dolphin Case* recognised this at paragraph 4.23 when it recorded the Senegalese submissions made before the panel (which was considering a United States embargo of tuna caught by Mexican vessels):

> "Senegal … noted the importance of tuna in its national economy. Noting that the United States embargo had caused Mexico to invade Senegal's traditional markets (provoking a fall in prices and in Senegal's export revenues), Senegal wished for a speedy resolution to the dispute which might enable its exports to return to normal levels."[87]

The involvement of the European Communities in the *Second Tuna Dolphin Case* and the large number of developed State submissions in support of the challenges to the United States regulations in the *Shrimp Turtle Case* illustrate that this issue is not exclusively a developing State concern.

Developing State concerns over the apparent tolerance under Article XX of GATT 1994 of measures that imposed trade restrictions unilaterally on imports due to differences in environmental policies in other States was expressed immediately after the delivery of the Appellate Body's report in the *Shrimp Turtle Case*.[88] I have argued in Chapter 6 that this report (and subsequent reports) has left open the use of Article XX as a justification for human rights related trade measures. But as suggested in Chapter 6, the *chapeau* to Article XX and other features of Article XX do provide protection for developing States (and other WTO members) from protectionist measures.

Less obviously, the Appellate Body report in the *Shrimp Turtle Case* may offer some additional specific protection to developing States. As noted in Chapter 6, one aspect of the complaint against the United States regulations was the difference in phase-in periods allowed by the United States for States to introduce turtle protection measures to meet United States regulatory requirements. Fourteen States in the Caribbean/Western Atlantic region were allowed three years in which

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and presumably increases the scope for protectionist capture, at least in the context of unilateral measures.

87 *United States – Restrictions on Imports of Tuna*, not adopted, BISD, 39th Supplement, 155, reprinted in 30 ILM 1597 (1991).

88 Nancy L Perkins, Introductory Note to the Report of the Appellate Body in the *Shrimp Turtle Case*, 38 ILM 118, 120 (1999).

to phase-in various measures. All other States were allowed four months.[89] The Appellate Body appears to have been prepared to consider the circumstances of individual States and their capacity to comply with United States requirements within four months as relevant to whether there had been unjustifiable discrimination under the *chapeau*.[90] Particular difficulties faced by developing States could, on this basis, be considered and would be relevant to any attempted justification of trade measures under Article XX.[91]

As suggested in Chapter 6,[92] it is also possible that the economic conditions in a target State will be relevant in assessing the consistency under the *chapeau* of Article XX of outwardly directed human rights related measures. As noted in Chapter 6, measures directed at child labour that do not take account of conditions within the target State may be unable to be justified under the *chapeau*.

6. Trade Related Intellectual Property Rights, Agriculture and Human Rights

Developing States appear to have an interest in relying on trade measures[93] in order to protect a number of human rights including:

– The human right to health;
– The human rights of indigenous peoples including the right to the protection of traditional knowledge; and
– The human right to food.

(a) Developing States and the Human Right to Health

In the lead-up to and during the Doha WTO Ministerial Conference in 2001 there was considerable controversy over the entitlement of developing States to take steps to increase the availability of pharmaceutical products used to fight diseases such as HIV/AIDS.[94] Prior to the Ministerial, pharmaceutical corporations commenced proceedings in the South African courts in order to prevent the South African government from affecting patent rights to drugs used to fight HIV/AIDS.

89 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, note 10 above, paras 173-174.

90 Ibid, para 174.

91 Ibid. In the para 174 footnote 178 of the report the Appellate Body referred to the particular difficulties faced by India in complying with the United States requirements.

92 See text accompanying note 385 in Chapter 6.

93 Whilst the focus of such measures will normally be inward, *ie* focussed on the human rights within the developing State taking the measures (and therefore technically beyond the scope of this book), this is not necessarily so. Indeed, the issue of the export to other developing States of pharmaceuticals produced under compulsory licensing regimes (discussed below) does involve measures that would be outwardly directed.

94 Jackson *et al*, note 6 above, 1221-1228.

These proceedings were eventually abandoned.[95] The United States government brought a WTO complaint against Brazil in relation to pharmaceutical patents in relation HIV/AIDS drugs, which was also eventually abandoned.[96] The human right to health has been invoked as a justification for measures taken by developing States directed at the importation and manufacture of pharmaceuticals used to combat diseases such as HIV/AIDS.[97]

The entitlement of developing States to restrict intellectual property rights of foreign corporations is addressed in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS Agreement*").[98] Articles 6, 8(1), 27(2), 30, 31(b), (f) and (h), and 40 of the *TRIPS Agreement* appear to be relevant.

Article 6 of the *TRIPS Agreement* deals with the issue of exhaustion of intellectual property rights.[99] It has been asserted on behalf of developing States that

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95 For descriptions of these proceedings, see Frederick M Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO, 5 Journal of International Economic Law 469, 471 (2002); Susan K Sell, TRIPS and the Access to Medicines Campaign, 20 Wisconsin International Law Journal 481, 501-502 (2001-2002); and Ellen 't Hoen, TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha, 3 Chicago Journal of International Law 27, 30-31 (2002).

96 The United States dispute with Brazil is described by Abbott, ibid, 471-472; and 't Hoen, ibid, 32-33.

97 See, for example, Report of the United Nations High Commissioner for Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, UN Doc E/CN.4/Sub.2/2001/13, 27 June 2001. For a discussion of the human right to property and intellectual property rights see Simon Walker, "A Human Rights Approach to the WTO's TRIPS Agreement" in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, University of Michigan Press, Ann Arbor, 2006, 171, 176-178.

98 Initial support amongst developing States for the *TRIPS Agreement* was for some States at best grudging. Reference was made in Chapter 5 to international attempts to condemn the use of unilateral coercive economic measures. An apparent example of the use of such measures was the action taken by the United States under section 301 of its *Trade Act* to impose sanctions against India and other developing States during the Uruguay Round apparently to punish them for leading developing State opposition to the inclusion of intellectual property protection within the WTO framework. See generally Susan K Sell, Powers and Ideas: North South Politics of Intellectual Property and Anti-Trust, SUNY Press, Albany, 1998; and Amy S Dwyer, "Trade-Related Aspects of Intellectual Property Rights" in Terence P Stewart (ed), The GATT Uruguay Round – A Negotiating History (1986-1994), Kluwer, The Hague, 1999, Volume IV, The End Game (Part I), 465, 495-508.

99 Article 6 of the *TRIPS Agreement*, note 37 above, provides:

> "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."

once a drug is sold lawfully anywhere in the World, Article 6 ensures that the *TRIPS Agreement* does not apply to the importation of the drug into another State.[100] The intellectual property rights are said to be "exhausted" by the initial lawful sale. It has been argued on behalf of the pharmaceutical industry that exhaustion is restricted to sales within the same State. According to this interpretation, the sale of pharmaceutical products in one State does not exhaust intellectual property rights in the products in another State.[101]

If *international* exhaustion is consistent with the *TRIPS Agreement*, parallel importation appears open. Such parallel importation will only be economical if the patent holder engages in price discrimination between national markets and where the price difference between exporting and importing markets is greater than importation costs. The prospect of parallel importation has potential significance to developing States as it may allow for the importation into their territory of pharmaceutical products at lower prices than those charged by patent holders.[102]

Articles 8(1) and 27(2) address justifiable restrictions on intellectual property rights for non-commercial purposes. The restrictions are, however, extremely limited. Article 8(1) provides that:

> "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

The requirement that measures remain consistent with the *TRIPS Agreement* significantly restricts this provision and distinguishes it from provisions such as Article XX of GATT 1994.[103]

Article 27(2) provides that:

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100 See, for example, Abbott, note 95 above, 494. Paragraph 5(d) of the Doha Declaration, discussed below, appears to support this interpretation of Article 6.

101 Arguments in support of this position are collected in Abbott, ibid, 496-497.

102 The practice of price discrimination may result in decreasing the prices charged for drugs in developing States. This has lead to the argument that Article 6 of the *TRIPS Agreement*, note 37 above, to the extent that it discourages price discrimination, may reduce access to pharmaceuticals in developing States and should be reconsidered – Alan O Sykes, Public Health and International Law: TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution", 3 Chicago Journal of International Law 47, 67 (2002).

103 Article 7 of the *TRIPS Agreement*, ibid, is also relevant in the interpretation of other provisions of the agreement. The article (under the heading "Objectives") provides:

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

> "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

The text of Article 27(2) and the *travaux*[104] do not support reliance on the article in order to justify measures designed to increase access to pharmaceuticals in developing States. The article instead appears to be directed at patented inventions that are themselves threats to a society.

Article 30 of the *TRIPS Agreement* provides that:

> "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

This provision has been given a restrictive interpretation by a WTO panel[105] and does not yet appear to have been relied upon by developing States to justify measures designed to increase access to pharmaceuticals.[106]

The provision of the *TRIPS Agreement* that appears to be most significant in relation to the justification of measures taken by developing States to protect the human right to health during a public health emergency, *and more generally*, is Article 31. This article relevantly provides that:

The WTO panel report in *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, 17 March 2000, adopted by the Dispute Settlement Body on 7 April 2000, considered Article 7 relevant to the interpretation of other provisions of the *TRIPS Agreement* but also emphasised the terms of Article 8(1) – see para 7.26.

104 In the 1990 draft *TRIPS Agreement* (prepared on behalf of the Chairman of the TRIPS negotiating group during the Uruguay Round of multilateral trade negotiations) what became Article 27(2) was followed by another paragraph that allowed exclusion from patentability of "certain products, and processes for the manufacture of those products, on grounds of public interest, national security, public health or nutrition, including food, chemical and pharmaceutical products and processes for the manufacture of pharmaceutical products." The paragraph was dropped from the 1991 draft text. See Stewart, note 98 above, Volume III, Documents, 273 and 863.

105 *Canada – Patent Protection of Pharmaceutical Products*, note 103 above, paras 7.30-7.37. There was no appeal lodged against the panel's decision.

106 Sykes, note 102 above, 52.

"[w]here the law of a Member allows for other use[107] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

…

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

…

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

…

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

…"

This provision allows for compulsory licensing in cases of public health emergencies.[108] At the 2001 Doha Ministerial Meeting the assembled State representatives issued a declaration addressing the *TRIPS Agreement* and public health emergencies.[109] The declaration recognised the "gravity of the public health problems afflicting developing and least-developed countries, especially those resulting

107 "Other use" refers to use other than that allowed under Article 30. [Footnote appeared in original.]

108 The terms of Article 31 do not, however, appear to limit the issuing of compulsory licences to cases of public health emergencies.

109 Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, adopted on 14 November 2001. There is already an extensive body of literature addressing the Doha Declaration. This literature includes: Abbott, note 95 above; M Gregg Bloche, WTO Deference to National Health Policy: Toward an Interpretive Principle, 5 Journal of International Economic Law 825 (2002); Steve Charnovitz, The Legal Status of the Doha Declarations, 5 Journal of International Economic Law 207 (2002); James Thuo Gathii, The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties, 15 Harvard Journal of Law and Technology 291 (2001-2001); Henry Grabowski, Patents, Innovation and Access to New Pharmaceuticals, 5 Journal of International Economic Law 849 (2002); Sell, note 95 above; Sykes, note 102 above; 't Hoen, note 95 above; and Frederick M Abbott, "TRIPS and Human Rights: Preliminary Reflections" in

from HIV/AIDS, tuberculosis, malaria and other epidemics."[110] The declaration[111] recognised both that intellectual property protection was "important for the development of new medicines"[112] and the "concerns about its effect on prices."[113]

Paragraph 4 of the declaration records the following agreement of WTO members:

> "We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose."

Paragraph 5(d) of the declaration addresses the issue of exhaustion of intellectual property rights dealt with in Article 6 of the *TRIPS Agreement*. The balance of paragraph 5 is relevant to the issue of compulsory licensing:

> "Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:
> (a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
> (b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
> (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
> …"

Abbott, Breining-Kaufmann and Cottier (eds), International Trade and Human Rights – Foundations and Conceptual Issues, note 97 above, 145.

110 Declaration on the TRIPS Agreement and Public Health, ibid, para 1.

111 Ibid, para 3.

112 See Sykes, note 102 above, 57-59.

113 The United Nations High Commissioner's Report, note 97 above, cites the United Nations Development Report for 2000 and maintains "that generic production of the HIV treatment *flucanazole* in India has kept the price at $55 for 150 milligrammes compared with $697 in Malaysia, $703 in Indonesia and $817 in the Philippines" – ibid, para 44.

Paragraph 6 recognises the difficulties, created by Article 31(f) of the *TRIPS Agreement*, confronting developing States that do not have the industrial capacity to manufacture pharmaceuticals. The declaration calls on the WTO Council for TRIPS to find an "expeditious solution to this problem and to report to the General Council" of the WTO "before the end of 2002". This deadline was missed, but a "solution" was reached on 30 August 2003.[114] On this date the WTO General Council decided to waive obligations under Article 31(f) subject to various conditions designed to prevent re-exportation of pharmaceuticals covered by the waiver.[115] Paragraph 7 of the Doha Declaration addresses technology transfers and transition periods for least-developed States.

Concerns have been expressed about the balance struck between competing policies by the 2001 declaration.[116] The relevance of the declaration to the interpretation of the *TRIPS Agreement* is also the subject of conjecture.[117] It appears unlikely that the declaration could be regarded as an interpretation of the WTO Agreement pursuant to Article IX:2 of the WTO Agreement as the procedure envisaged by that provision does not appear to have been followed. Instead the declaration appears to be relevant to the interpretation of the *TRIPS Agreement* as an agreement between the parties to the WTO Agreement as to the interpretation of the treaty.[118] On this basis it would be appropriate for a WTO panel and the Appellate Body to have regard to the declaration when interpreting the *TRIPS Agreement*.

It does not appear that the Doha Declaration can be relied on to exclude all review of decisions under Article 31. As Professor Abbott has suggested,[119] reliance upon Article 31 of the *TRIPS Agreement* must be in good faith. In addition, where the Ministerial Conference has sought to exclude the possibility of review it has done so explicitly, as in paragraph 5(d) of the declaration.[120]

One critical review issue will be the interpretation given to the words "adequate remuneration" in Article 31(h) of the *TRIPS Agreement*. This will have

114 WTO General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540, decision of 30 August 2003.

115 Ibid. See, in particular, paras 2, 4 and 5 of the decision.

116 Sykes, note 102 above, 66-67.

117 Jackson *et al*, note 6 above, 1226-1227. The United States Trade Representative, Robert Zoellick, apparently described the Doha Declaration as a "political declaration" – Charnovitz, note 109 above, 207.

118 See, for example, Gathii, note 109 above; and Bloche, note 109 above, 842. This rule of treaty interpretation is embodied in Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969). Alternatively, the rule expressed in Article 31(3)(b) may be relevant.

119 Abbott, note 95 above, 494.

120 Paragraph 5(d) of the Doha Declaration, note 109 above, refers to the freedom of WTO members to establish their own regimes for exhaustion of intellectual property rights "without challenge".

major implications for the accessibility of drugs in developing States. Paragraphs 5(b) and (c) of the Doha Declaration have potential significance in this regard and could be used to justify compulsory licences issued on grounds that link the level of compensation to the seriousness of the public health emergency facing a particular developing State. The declaration appears to make it more difficult to argue that the *only* relevant factor in assessing the adequacy of remuneration under Article 31(h) is the "economic value of the authorization". Professor Sykes has suggested that an assessment of adequate remuneration should include consideration of development costs of the drug *and* the cost of prior unsuccessful research done by the patent owner that was aimed at the same problem.[121]

Concerns have been raised about the inclusion in bilateral and regional trade agreements of "TRIPS-plus" provisions that prohibit developing States from taking measures that are consistent with the *TRIPS Agreement*.[122] It appears that TRIPS-plus conditions continue to be inserted in bilateral and regional agreements notwithstanding the Doha Declaration.[123] The prospects of WTO dispute resolution proceedings clarifying the *TRIPS Agreement* in favour of developing States might also be avoided by the use of such agreements.

The important question of research into diseases that afflict the populations of developing, as opposed to developed, States does not appear to have been addressed by recent WTO initiatives. Diseases afflicting developing State populations have been "relatively under-researched".[124] Various proposals have been offered to address this issue.[125]

Article 40 of the *TRIPS Agreement* addresses anti-competitive practices in contractual licensing of intellectual property rights. The article recognises the entitlement of States, *inter alia*, to "prevent or control" abuses of intellectual property rights that have an "adverse effect on competition".[126] Such regulation therefore offers the potential for reduction in prices of, and increases in access to, pharmaceuticals.[127] According to Article 40(2), however, such national measures of prevention or control must be consistent with other provisions of the *TRIPS Agreement*. Thus, whilst the provisions of the *TRIPS Agreement* allowing control

121 Sykes, note 102 above, 68.

122 See, for example, Sell, note 95 above.

123 Ibid, 519-520.

124 See, for example, the report of the High Commissioner for Human Rights, note 97 above, paragraph 38. Professor Sykes asserts that this "dearth of research" is "attributable in significant part to heretofore weak intellectual property protection of pharmaceuticals in developing countries" – Sykes, note 102 above, 65.

125 See, for example, Grabowski, note 109 above, 858-860.

126 See Frederick M Abbott, "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 44 above, 279.

127 Ibid, 297.

of anti-competitive practices offer some potential benefits in terms of access to pharmaceuticals, there remain significant concerns, not least of which, for developing States, is the cost in establishing and enforcing *both* intellectual property law *and* laws controlling anti-competitive practices.[128]

(b) The TRIPS Agreement and Traditional Knowledge

Article 27(3) of the *TRIPS Agreement* allows States to impose restriction on the patentability of plants and animals. It has been noted, however, that there is no mention in the *TRIPS Agreement* of "the need to protect cultural heritage and technology of local communities and indigenous people."[129] This omission of the *TRIPS Agreement* has been criticised on the grounds that it "could have an impact on the enjoyment of human rights, in particular cultural rights".[130] A State (developing or otherwise) that seeks to protect cultural rights in a manner that adversely affects rights protected under the *TRIPS Agreement* would appear to be unable to defend such protective measures under the agreement.

(c) Agriculture and a Human Right to Food

The interests of least-developed and net food importing developing States have been recognised in WTO instruments.[131] In 2000 Mauritius made a formal submission to the WTO Committee on Agriculture in which it argued that the negotiations in the area of agriculture provided for in Article 20 of the *Agreement on Agriculture* should take account of the human right to adequate food.[132] Mauritius referred to Article 11 of the *International Covenant on Economic, Social and Cultural Rights* and instruments prepared under the auspices of the Food and Agricultural Organization and the Organisation for Economic Co-operation and Development that dealt with food security.[133]

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128 Ibid, 296-297.

129 See the report of the High Commissioner for Human Rights, note 97 above, para 26.

130 Ibid.

131 See, for example, the Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, reprinted in World Trade Organization, The Legal Texts, note 8 above.

132 WTO Committee on Agriculture, Note on Non-Trade Concerns, G/AG/NG/W/36/Rev.1, 9 November 2000, Attachment 5. The invocation of the right to food by Mauritius is discussed in Gabrielle Marceau, WTO Dispute Settlement and Human Rights, 13 European Journal of International Law, 753, 787-788 (2002). See also Christine Breining-Kaufmann, "The Right to Food and Trade in Agriculture" in Cottier, Pauwelyn and Bürgi (eds), Human Rights and International Trade, note 44 above, 341; and Shelley Edwardson, "Reconciling TRIPS and the Right to Food" in Cottier, Pauwelyn and Bürgi, ibid, 382.

133 WTO Committee on Agriculture, Note on Non-Trade Concerns, ibid, 44-46.

As a significant number of developing States are faced with chronic food shortages, the human right to an adequate standard of living (including adequate food) will be of particular importance to such States in WTO negotiations on agriculture. Mauritius specifically raised concerns as to the inadequacy, from a developing States perspective, of permissible agricultural measures designed to protect non-trade values which are listed under Schedule 2 of the WTO *Agreement of Agriculture*.[134] In particular, Mauritius noted that lack of resources ensured that many of the measures described in Annex 2 were beyond the reach of developing States. It remains to be seen whether the Doha Round negotiations will address such developing State concerns.

7. Conclusion

The review undertaken in Chapter 6 concluded that existing WTO provisions are consistent with an entitlement to take human rights related trade measures. Article XX of GATT 1994 appears to provide the most secure foundation for such linkage.

In the context of Article XX and GSP regimes, developing States may find themselves the target of human rights related trade measures that are, in a legal sense, unavoidable. No amendment of the WTO Agreement is necessary in order to allow such trade measures to be imposed. Indeed, if the analysis contained in this chapter and Chapter 6 is correct, amendment of the WTO Agreement would be necessary to preclude such measures.

Beyond these areas where human rights related trade measures may be permissible, developing States do, in a sense, control the agenda. Under the provisions which regulate the amendment of the WTO Agreement, developing State support would be necessary before amendments could be made allowing further accommodation of such measures. Developing State opposition to increased formal cooperation between the International Labour Organization and the WTO reflects opposition to any changes in that direction.

Developing States, however, may face a dilemma similar to that which was faced by India and other developing States in relation to the negotiations over the *TRIPS Agreement*.[135] Developing States may be faced with a choice between two

134 Ibid, 52-3.

135 Any comparison with the dilemma faced by India and other developing States under GATT 1947, regarding unilateral measures would be undermined if the Appellate Body categorically found against the legality of outwardly directed human rights related trade measures. The dilemma described above arises most dramatically for developing States if the analysis in Chapter 6 and this chapter (so far as GSP human rights conditionality is concerned) is correct. For a similar argument made in relation to environmental measures, see Daniel C Esty, Greening the GATT: Trade, Environment, and the Future, Institute for International Economics, Washington DC, 1994, 181. On the obligations under the WTO Agreement regarding unilateral measures – see the panel report in *United States – Sections 301-310 of the Trade Act 1974*, WT/DS152/R, 22 December 1999, adopted by the Dispute Settlement Body on 27 January 2000. For

scenarios – continuing United States and European unilateralism in circumstances of uncertainty as to whether human rights related trade measures are justifiable under Article XX of GATT 1994 and the *Enabling Clause*; or alternatively, acceptance of more detailed multilateral rules governing the use of human rights related trade measures, which may result in some reduced competitiveness but, presumably as a condition for developing State acceptance, would also impose additional disciplines on the use of such measures.[136]

a sceptical assessment of the advantages derived by developing States as a result of the deal they made over the TRIPS Agreement, see Sell, note 95 above, 493-494.

136 It remains to be seen whether domestic human rights constituencies in developed States are as effective as a lobby as the pharmaceutical industry was during the Uruguay Round in support of *TRIPS Agreement*.

Chapter 8

Conclusions

In Chapter 1 it was indicated that this book would advance two broad propositions:

1. In relation to human rights related trade measures that are not subject to the rules contained in the *Marrakesh Agreement Establishing the World Trade Organization* ("the WTO Agreement") or similar rules in other treaties, *international law is generally permissive*; and
2. In relation to human rights related trade measures that are subject to the rules contained in the WTO Agreement or similar rules in other treaties, *there is less scope to lawfully impose human rights related trade measures. The scope to lawfully impose such measures, however, remains significant.* In addition, the jurisprudence of panels and the Appellate Body of the World Trade Organization ("WTO") provides a basis for concluding that concerns expressed about negative consequences of allowing such measures (such as the risk of unsubstantiated claims of human rights violations being used as a cover for essentially protectionist measures) are often overstated.

In relation to the first proposition, the analysis in Chapters 5 and 6 demonstrated that principles of non-intervention in the internal affairs of another State have no significant application to human rights related trade measures. Rules of international law governing permissible exercises of jurisdiction are also not generally violated by such trade measures. Rather, the relevant international legal principles are those that protect the autonomy and independence of States to control the movement of persons and goods into and out of their territory. The starting point under general international law is therefore essentially permissive – States enjoy a wide discretion to restrict trade for a range of purposes including concerns over the violation of human rights in other States.

States have, however, through the exercise of their autonomy and independence, regulated their discretion to restrict international trade through treaties such as the WTO Agreement. Obligations to ensure respect for human rights under human rights treaties and general international have also restricted this discretion.

In relation to the second proposition, the analysis in Chapters 6 and 7 demonstrated that the WTO Agreement's regulation of State discretion to restrict international trade does not preclude the imposition of all human rights related trade measures. The continuing entitlement to take human rights related trade measures under the WTO Agreement is based, in part, on the peremptory character of human rights norms analysed in Chapter 4, and on the relevance of those peremptory norms to the interpretation of the WTO Agreement. This interpretation is also required by other, albeit related, factors.

As a part of the international legal system, it is inconceivable (and in all likelihood legally impossible) for the rules and procedures enshrined in, and operating under, the WTO Agreement to be applied in isolation from international obligations such as those enshrined in Article 41 of the *Articles of State Responsibility* (regarding serious breaches peremptory norms), due diligence obligations to prevent the violation of particular peremptory norms and obligations not to aid or assist another State that is violating its obligations under the Charter of United Nations. Obligations owed by non-State entities directly under international law, such as those that exist in respect of crimes against humanity, must also remain relevant. The relationship between international responsibility for crimes against humanity and responsibility for systematic and widespread violations international human rights obligations is of particular importance in this context.

The complexity of rules and principles of international law and the interactions between them seems to increase by the day. This creates many tensions not least those of an institutional character when institutions responsible for administering different areas of international law find that their responsibilities overlap. Such tensions have led to anxiety regarding fragmentation of international law. But as the International Law Commission's work on fragmentation has emphasised, such complexity and tension has not undermined the coherence and systemic integrity of the international legal system. There are, if you like, *both* centrifugal *and* centripetal forces as work. The virtue of coherence, which conceptions of the rule of law seek to express and secure, is amongst the latter.

In Chapter 4 there was consideration of the rules and principles of international law that have been developed to maintain the coherence of the international legal system. The Study Group on fragmentation of international law emphasised, in particular, the "principle of harmonization", which was described as "a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of obligations".[1] The Study Group also emphasised the importance, in cases of apparent or actual conflict between different "special regimes" of international law, of independent

1 International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, 408, para 251(4).

dispute resolution, independent, that is, from each of the relevant regimes.[2] The International Court of Justice is the logical forum to provide such independence, although consent to jurisdiction remains a serious obstacle.

The drafters of the WTO Agreement understood that the parties to the treaty could not achieve a *rule-based* approach to international trade without situating the WTO Agreement itself within the context of general international law.[3] This context includes fundamental values of the international community as reflected in peremptory and related norms, and the Charter of the United Nations. WTO panels and the Appellate Body are bound by a similar discipline as they interpret and apply the rules contained in the WTO Agreement. International human rights norms form part of this context of general international law. In this general context one also finds the entitlement to employ human rights related trade measures.

This is not to suggest that a continuing legal entitlement to employ human rights related trade measures is not without its difficulties. Anomalies were, for example, noted in Chapter 6 regarding potential reliance on rules governing safeguard measures and against the use of subsidies. These anomalies included the inability to target safeguard measures at products originating from a particular State in which human rights violations are occurring and the requirements that the extent of safeguard measures and countervailing duty correspond to actual or potential injury to industry within the State imposing the trade measures rather than to the extent of human rights violations in the target State. The difficulties that arise when attempting to enlist such commercially oriented rules for non-commercial purposes were emphasised in Chapter 6.

Similar anomalies, however, do not arise in relation to justification of human rights related trade measures under Article XX of the *General Agreement on Tariffs and Trade* 1994 and equivalent provisions in the other agreements annexed to the WTO Agreement. Indeed, the *chapeau* to Article XX and the "nexus" requirement identified by the Appellate Body in the *Shrimp Turtle Case*[4] have the potential, in conjunction with the concept of human rights obligations owed *erga omnes* and the existence of universal jurisdiction in relation crimes under international law, to offer justification of human rights related trade measures in a manner that avoids protectionist or other abuse of Article XX. The potential for abuse of human rights

2 Ibid, 417-418, para 251(28); and International Law Commission, Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi ("ILC Study Group Report on Fragmentation"), UN Doc A/CN.4/L.682, 13 April 2006, 142 and 166, paras 280 and 323.

3 See, for example, Article 3.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*, annexed to (see Annex 2) and an integral part of the WTO Agreement.

4 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, adopted by the Dispute Settlement Body on 6 November 1998, para 133.

related trade measures was made apparent by the analysis of United States and European Union trade measures in Chapter 5.

The potential for abuse of human rights related trade measures was addressed by the second proposition summarised above. Representatives of developing States have expressed concerns about the abuse of human rights related trade measures. The potential for such abuse, however, appears to be significantly reduced by provisions of the WTO Agreement as interpreted by the Appellate Body in the *Shrimp Turtle Case*, the *Asbestos Case*[5] and other decisions.[6] Rules of international law requiring the protection of human rights also provide a basis for interpreting the WTO Agreement in a manner that reduces the prospects of abuse.

Fidelity to rule of law criteria (reflected in different rules of international law that regulate international trade *and* require the protection of human rights) will minimise the extent to which legal justification might be provided for trade measures that invoke human rights concerns but which are predominantly motivated by a desire to protect producers within the States imposing the measures from economic competition from producers in the target State.

Probably the most serious anomaly is the potential for human rights related trade measures to themselves lead to the violation of international human rights obligations. The rule of law abhors all forms of arbitrariness. Yet general international law, in particular international human rights obligations, and international trade rules, provide mechanisms to avoid this problem.

Related to this issue is the efficacy of human rights related trade measures. It has been noted on a number of occasion that, depending on their design, "sanctions" can be reasonably effective (as the WTO's ultimate reliance on the authorisation of trade sanctions tends to demonstrate).[7] Empirical research also suggests that the closer the level of economic integration, the greater the effectiveness of sanctions.[8]

This study has provided analysis that is relevant to the design of human rights related trade measures, particularly in Chapters 4, 5 and 6. But as the International law Commission's fragmentation study group recognised in its 2006 report, there

5 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 16 February 2001, adopted by the Dispute Settlement Body on 5 April 2001.

6 See, for example, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004, adopted by the Dispute Settlement Body on 20 April 2004.

7 See, for example, Emilie M Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 International Organization 593 (2005).

8 Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, Economic Sanctions Reconsidered, 2nd ed, Institute for International Economics, Washington, 1990 – Volume 1, 99.

is a limit to what technical legal analysis can achieve.[9] Empirical and political assessments are also required to fully understand the potential and the dangers of human rights related trade measures. But, it is submitted, such assessments also need to be considered in light of thorough international legal analysis of the relevant rules and principles of international law. To make a contribution to the existing body of international legal scholarship on human rights related trade measures has been the ultimate aim of this book.

9 ILC Study Group Report on Fragmentation, note 2 above, 245, para 484.

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