HUMAN RIGHTS AND NON-INTERVENTION IN THE HELSINKI FINAL ACT

by

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BIOGRAPHICAL NOTE

Gaetano Arangio-Ruiz, graduated in Law at the University of Naples in 1941.

Secretary with the "Società italiana per l'Organizzazione internazionale" from 1946 to 1960.

"Libero docente" in International Law in 1950.

"Chargé de cours" at the College of Europe for the year 1952-1953.

Titular Professor of International Law at the University of Camerino from 1952 to 1955.

Titular Professor of International Law in the Faculty of Law of the University of Padua from 1955 to 1968. In the same Faculty "chargé de cours" of Constitutional Law from 1955 to 1958 and "chargé de cours" of International Organization from 1959 to 1968.

From 1968 to 1974 Titular Professor of International Law in the Faculty of Law of the University of Bologna.

At present, Titular Professor of International Law in the Faculty of Law of the University of Rome. In the same Faculty "chargé de cours" of International Organization.

Visiting Professor of International Organization at the Law School of the University of Virginia in 1965.

Visiting Professor of International Law at the European centre of the "School of Advanced International Studies" of Johns Hopkins University from 1967 to 1975.

Lecturer at the Hague Academy of International Law in 1962, 1972 and 1977.

Legal Adviser with the International Refugee Organization, Italy, from 1947 to 1949.

"Secrétaire-rédacteur" at the Hague Conference of Private International Law in 1950.

A member of the Italian delegation to the Eighth and Ninth sessions of the Hague Conference of Private International Law.

Legal adviser to the Italian Nuclear Energy Commission since 1959. An expert or delegate for Italy at meetings and conferences for the adoption of conventions concerning the civil uses of atomic energy, and particularly the Paris Convention (1960) on civil liability for nuclear damage, the Brussels (1962) Convention on the liability of operators of nuclear ships and the Vienna Convention on civil liability for nuclear damage.

Legal expert with the Italian Delegation to the Eighteen Nations Disarmament Committee, Geneva, from 1962 to 1966.

Legal expert with the Delegations of Italy to the 21st, 22nd, 23rd, 24th, 25th and 26th sessions of the United Nations General Assembly.

Representative of Italy on the United Nations Special Committee on the Principles of International Law concerning Friendly Relations and Co-operation Among States from 1964 to 1970. Rapporteur of the same Committee in 1969.

Member of "Consiglio del Contenzioso Diplomatico" of the Ministry of Foreign Affairs, Rome; of the International Law Association; of the American Society of International Law and of the Board of Directors of "Società Italiana per l'Organizzazione Internazionale".

Legal Adviser to the Italian Delegation to the Conference on Security and Co-operation in Europe (CSCE), 1972-1975. Legal Adviser to the Italian Delegation to the Belgrade Meeting of CSCE (1978). Italian Delegate to the Montreux Meeting of the Legal Experts of CSCE participant States on the Peaceful Settlement of International Disputes (1978).

PRINCIPAL PUBLICATIONS

La cambiale nel diritto internazionale privato, Milan, 1946.

"Il trattamento processuale del diritto straniero", *Istituto di studi legislativi*, Rome, 1948.

"Rapporti contrattuali fra Stati e organizzazione internazionale", *Archivio giuridico Filippo Serafini*, 1950.

Gli enti soggetti dell'ordinamento internazionale, Milan, 1951.

La persona giuridica come soggetto strumentale, Milan, 1952.

"Gli accordi risolutivi di controversie nel diritto internazionale", *Comunicazioni e Studi dell'Istituto di Diritto internazionale e straniero* dell'Università di Milano, 1952.

"La dinamica della base sociale nel diritto internazionale", *Annali della Facoltà giuridica* dell'Università di Camerino, 1954.

"Cittadinanza comune dei contraenti e ordinamento plurilegislativo", *Rivista di diritto internazionale*, 1957.

"Litispendenza e competenza del giudice del luogo di conclusione o di esecuzione del contratto nella Convenzione italo-francese del 1930", *Rivista di diritto internazionale*, 1957.

"La questione cinese", *Studi in onore di Tomaso Perassi*, 1957.

"Arbitrato (diritto internazionale publico)", *Enciclopedia del diritto*, Vol. II (1958).

"Assegno bancario (diritto internazionale privato)", *Enciclopedia del diritto*, Vol. III (1958).

"Responsabilità internazionale degli Stati per danni nucleari", *Rivista di diritto internazionale*, 1959.

"Cambiale (diritto internazionale privato)", *Enciclopedia del diritto*, Vol. V (1959).

"Il trattato Euratom e l'accordo nucleare Italia-Stati Uniti", *Atomo, petrolio, elettricità*, 1959.

"In tema di esecutorietà delle obbligazioni cambiarie", *Rivista di diritto internazionale*, 1959.

"La legge nucleare italiana", *Diritto ed economia nucleare*, 1960.

"Fournisseurs, transporteurs et exploitants dans la réglementation de la responsabilité civile pour accidents nucléaires", *Atomo, petrolio, elettricità*, 1960.

"Principi fondamentali delle convenzioni in tema di responsabilità civile per danni nucleari", *Comunicazioni e studi*, dell'Istituto di Diritto internazional e straniero dell'Università di Milano, Vol. X (1960).

"Il regime giuridico del mare e l'affondamento di scorie radioattive", *Europa nucleare*, 1961.

(with F. Berlingieri) "Il progetto di convenzione (Bruxelles) sulla responsabilità degli armatori di navi nucleari", *Il Diritto marittimo*, 1961.

(with F. Berlingieri) "La Convenzione di Bruxelles sulla responsabilità degli armatori di navi nucleari", *Il Diritto marittimo*, 1962.

"Some Preliminary Reflections on the International Responsibility of States for Nuclear Damage", in *Progress in Nuclear Energy*; Series X, Vol. 3 (Nuclear liability), ed. J. L. Weinstein, Pergamon Press, 1962.

"Controversie internazionali", *Enciclopedia del diritto*, Vol. X, 1962, pp. 381-447.

"Corte internazionale di giustizia", *Enciclopedia del diritto*, Vol. X, 1962, pp. 1037 ff.

"Some International Legal Problems of the Civil Uses of Nuclear Energy", *Hague Rec.*, 107 (1962-III), pp. 503-638.

Political Action so Far Taken to Solve the Problems of Utilizing the Ocean Depths, a report to the "Symposium on the Exploration and Exploitation of the Sea-bed and its Subsoil", organized by the Consultative Assembly of the Council of Europe, Strasbourg, 3-5 December 1970.

Reflections on the Present and Future Régime of the Sea-Bed. Rome. Academia dei Lincei. 1969.

"Conseguenze della decolonizzazione nel diritto internazionale". *Atti del Convegno della S.I.O.I. sulle Conseguenze internazionali della decolonizzazione.* Padua. 1968. pp. 151-176.

"L'individuo e il Diritto Internazionale". *Rivista di diritto internazionale.* 1971.

Diritto Internazionale e personalità giuridica. UTET. Turin. 1971 ; reprinted by Cooperativa Libraria Universitaria. Bologna. 1972.

"The Normative Role of the General Assembly of the UN and the Declaration of Principles of Friendly Relations. with an Appendix on The Concept of International Law and the Theory of International Organization", *Hague Rec.*, 137 (1972-III), pp. 419 ff.

"L'Etat dans le Sens du Droit des Gens et la Notion du Droit International". independent reprint from *Oesterreichische Zeitschrift für öffentliches Recht.* Vol. 26 (1975). Cooperativa Libraria Universitaria. Bologna. Piazza G. Verdi. 2/A. 1976.

SOME ABBREVIATIONS

AF	*Annuaire français de droit international.*
AJIL	*The American Journal of International Law.*
BYBIL	*British Year Book of International Law.*
Hague Rec.	*Recueil des cours de l'Académie de droit international de La Haye.*
ICLQ	*International and Comparative Law Quarterly.*
René Cassin Liber	*René Cassin, Amicorum Discipulorumque Liber, Volumes I-IV, Paris, Pedone, 1969-1972.*

CHAPTER I

INTRODUCTION

1. Our chapters are to deal with an old *querelle* conspicuously revived since the conclusion of the Conference on Security and Co-operation in Europe (CSCE). I refer to the *querelle* – legal and political, *de lege late* and *de lege ferenda* – over the impact of the principle of non-intervention upon the international rules concerning respect for, and promotion of, human rights and fundamental freedoms, and, more generally, upon any international rule of a humanitarian character. That *querelle* seems bound to acquire new momentum in the years to come, in connection with the implementation of the Final Act of the CSCE.

Solemnly signed at Helsinki on 1 August 1975, by the 35 powers participating in the CSCE, that Final Act contains a considerable number of provisions covering humanitarian matters in a wide sense. Within the first part of the Act – the so-called First Basket on "Questions relating to Security in Europe" – these matters are covered in the "Declaration of Principles Guiding Relations between Participating States". Human rights are dealt with therein under Principles VII ("Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief") and VIII ("Equal rights and self-determination of peoples"). Other important provisions touching upon human rights are placed in the third part of the Act, the so-called "Third Basket", entitled "Co-operation in Humanitarian and Other Fields". Further provisions expressly or implicitly relevant for the international protection of human rights among the 35 States of the CSCE are present in the sixth paragraph of the preamble to the "First Basket", in the preamble to the declaration of "guiding" principles and in the ninth principle, concerning "Co-operation among States".

At the side of all these provisions, and among the "guiding principles" of the cited declaration, the Final Act includes, as a sixth principle, the principle of "non-intervention in internal affairs". And it is particularly – though not exclusively – the presence of this principle, not to mention a few sparse references to internal or national matters or prerogatives, that has given new impetus, within the circle

of the CSCE countries, to the argument over the impact of non-intervention upon the protection of human rights.

2. The contrasting attitudes from which the argument originates are not really very distinct in their normative terms. One would hope that some precision may be forthcoming from the imminent Belgrade confrontation. The opposing positions can only be roughly summed up.

According to a number of Western CSCE governments the various humanitarian clauses of the Final Act – notably Principles VII and VIII of the declaration together with the provisions of the Third Basket – are to be implemented as well as any other portion of the Final Act. Consequently, these clauses fall under the "procedural" provisions of the Final Act concerning both bilateral and multilateral co-operation among the CSCE States and the so-called review conference soon to be held at Belgrade (*infra*, para. 23). We would add that the same clauses fall also under the general rules of international relations concerning the right or liberty of any State to express approval or disapproval of the conduct of any other State and in particular the right or liberty of any State to demand from any other compliance with international obligations, to protest against alleged violations and possibly to claim reparation for any ascertained violation. This would be without prejudice, furthermore, to any other procedural ways and means available to a CSCE State under any relevant international instrument other than the Helsinki document and concerning the implementation of human rights and fundamental freedoms – or self-determination (*infra*, paras. 21 et seq. and 26-27).

According to the Warsaw Pact governments the matter of human rights would seem to fall, totally or in part – if we understand their position correctly – among the "internal" or "domestic jurisdiction" matters, with regard to which each State would be the "sole judge". In such matters international law and the Final Act itself would prohibit intervention. Consequently – it is contended – any act of a CSCE State announcing, censuring or protesting against infringements or alleged infringements of human rights on the part of another CSCE State would constitute not only an unfriendly act, but a violation of international law and of the Final Act. This legal condemnation would extend to any diplomatic steps taken at bilateral or multilateral level in order to secure compliance with the humanitarian provisions of Principles VII and VIII, or of the Third Basket. Equally condemned would be any consideration or discussion of the implementation of such provisions at the now imminent Belgrade Conference. In other

words – if our understanding is correct – unlike the other provisions of the Final Act, the human rights provisions would not create, in favour of the participating States, any title – legal, moral or political – to claim compliance or to protest against non-compliance vis-à-vis the other participating States. Any participating State would be the exclusive judge of its performance with regard to the humanitarian commitments embodied in the Final Act. *A fortiori*, the Belgrade meeting would be deprived of any role in so far as respect for human rights and fundamental freedoms is concerned.

Official or semi-official manifestations of attitudes such as these are so frequently reported in the press of the free world since about the end of the summer of 1975 that we need not waste time with citations. It need only be noted that the attitudes described clearly place themselves, whatever their merits, in the varied class of defences, pleas and exceptions to which governments rightly or wrongly resort in order to resist, in the name of sovereignty, deeds or words of other States or international bodies allegedly intervening without title in their "internal matters" or in "matters falling within their domestic jurisdiction". For an impressive set of precedents let me refer you to the valuable literature on the subject [1] with the only proviso that you try to distinguish as appropriate between the aspects of defences or pleas which are resorted to as a shield from undesired action by an international organ and the aspects of the same defences or pleas used as a shield against actions or initiatives coming from one or more States. Only the latter interest us here.

Another general annotation to be made is that the recorded cases you find in the relevant literature show that the defences represented by the principle of non-intervention or the plea of domestic jurisdiction have been used so widely in the practice of governments of the last decades – especially with regard to matters of human rights or self-determination – that it would be difficult to find a member State of the United Nations which at one time or another did not resort to the *exceptio* of domestic jurisdiction for its own sake or for the sake of some friendly State. It could be found, however, that, either in general or with regard to certain matters – such as, for example, human rights or self-determination of given peoples – some State or States distinguished themselves for resorting to that defence more frequently than others.

As regards, in particular, the defences resorted to by a number of the States participating in the CSCE, they might be a surprise from the point of view of the forcefulness with which they are being put

forward : but they would not be a surprise for anyone who happened to follow that second phase of the CSCE which went on in Geneva from September 1973 to July 1975 and during which the "humanitarian" clauses of the Final Act were proposed, argued and drafted [2]. Those attitudes are also in conformity with well-known doctrines of Soviet writers on international law and relations.

3. The negative impact of the principle of non-intervention would be even greater according to the views put forward in less official, albeit noteworthy, quarters. For the sake of brevity I shall confine myself to a couple of samples. One is the Report on European Security adopted this year (1977) by the Assembly of the Western European Union (WEU). The other is a recent publication of the Polish Institute of International Affairs.

In the third section of the first document, after recalling the "débat" and "polémiques" connected with the United States "campagne en faveur des droits civils" and the "réactions suscitées à l'Est par des faits et gestes qui ont été interprétés comme une ingérence pure et simple dans les affaires intérieures", and after pointing out the difficulties that might arise

> "de l'acte final d'Helsinki et de ses trois « corbeilles » dont les clauses, d'une part *interdisent* ... toute intervention ... dans les affaires intérieures et extérieures relevant de la compétence nationale d'un autre Etat participant ... et, d'autre part, *précisent* ... que « Les Etats participants *respectent* les droits de l'homme et les libertés fondamentales... »",

it is stated by the Rapporteur [3] that :

> "Non seulement depuis Helsinki, mais depuis bien plus longtemps, on discute dans le monde entier pour déterminer où commencent effectivement les interventions dans les affaires intérieures d'un autre Etat. On n'a encore *jamais trouvé* de réponse précise. Il existe une marge d'interprétation qui est toujours et avant tout fonction de l'état des relations et, partant, de la confiance qui existe entre les différents pays."

After noting further that this uncertainty exists in particular within the Helsinki Final Act, the document continues :

> "Le débat qui s'en est suivi s'est élevé également à propos de l'existence d'une certaine contradiction relevée par quelques commentateurs, à l'intérieur des principes généraux de l'Acte

> d'Helsinki, précisément entre le point VI qui *pose le principe* de non-intervention dans les affaires intérieures des Etats participants et le point VII qui *invite au respect* des droits de l'homme et des libertés fondamentales. Une telle *contradiction*, si elle existe effectivement, est la conséquence de l'état réel des rapports politiques internationaux sur lequel a été construit l'Acte d'Helsinki ; elle nous invite donc surtout à comprendre que son dépassement est lié, avant tout, au maintien et au développement de la détente et qu'en tout cas, il ne pourra être que le fruit d'une longue évolution [4]."

In partly similar terms a contrast between the principle of non-intervention and the humanitarian clauses of the Final Act – which include, it better be repeated, not only the (seventh) principle cited in the just-quoted passage but also Principle VIII (on self-determination) and the whole Third Basket of the Helsinki document – is evoked in a book published last year under the auspices of the Polish Institute of International Affairs [5]. According to a passage in that volume [6]:

> "the declaration on Principles of the CSCE does not explain – and actually *could not* do so – the relationship between *respect* for human rights and the *obligation* to respect the right of other States to determine their internal affairs, among which are matters related to population. Though the development of international law leads inevitably to a narrowing down of the freedom to determine internal affairs coming within the jurisdiction of a given State, nevertheless a precise definition of what matters comes within the scope of international law, and what so far do not, leaves quite some doubts and possibility for dispute [7]."

In spite of a few *nuances*, both pieces – that of the Western European Assembly's and that of the Polish Institute's – seem to go, if possible, beyond the governmental positions tentatively summed up in the preceding paragraph. The CSCE governments involved seem to have chosen to condemn as unlawful, in view of an alleged contrast with the principle of non-intervention, some or any *actions* undertaken by a CSCE participating State or States with a view to seeking to obtain compliance or to correct non-compliance by other CSCE States with humanitarian obligations [8]. Those same governments do not seem to put into question – in so far as we have been able to see – the *validity* of such humanitarian obligations. To put it

less imprecisely – albeit in terms not quite correct from the technical point of view – the Warsaw Pact governments which invoke the principle of non-intervention do so in order to condemn actual or virtual *procedural* initiatives of other States regarding the implementation of obligations deriving from the Final Act's humanitarian provisions. They do not seem to question the existence and the validity of the legal, political or moral obligations themselves [9]. The *querelle*, in other words, would seem to involve, according to the interested governments, the *procedural*, not the *substantive* aspect of the humanitarian provisions of the Final Act. The substantive obligations – whatever their nature (*infra*, para. 5 *(a)*) – would thus survive the impact of Principle VI on non-intervention.

Be that as it may of the attitude of the governments, the two last-quoted comments seem to question the very existence, or validity, of the *substantive* obligations themselves. Incompatible with the "duty not to intervene" would be, according to the cited Western European Assembly report and according to Symonides, not just the ways and means resorted to, or suggested by, certain Western governments in order to secure compliance but the very existence of any international obligation, on the part of a CSCE State towards another, to respect human rights (*plus* fundamental freedoms *plus* self-determination). According to the tenor of the quoted passages, the impact of the principle of non-intervention would be such as to exclude the *possibility* of international *obligations* in the field of human rights and fundamental freedoms. The Final Act provisions concerning human rights would be thrown simply out of existence – squeezed out, so to speak, of the Final Act.

4. The nature of the *querelle* suggests that our attention be focused, amongst the clauses of the Final Act, upon that Principle VI of the Helsinki Declaration which defines non-intervention. Considering the threat which non-intervention would represent, according to the cited attitudes and opinions, to the effective internal implementation, if not to the validity, of the human rights provisions, our attention must be concentrated on the meaning of that term [10].

Indeed, the ultimate objects of our concern are the more numerous humanitarian undertakings contained both in Principles VII (human rights and fundamental freedoms) and VIII (self-determination) and in the provisions of the so-called Third Basket. These humanitarian clauses, however, interest us here not so much in view of an analysis of their merits – a task that would better be left to the doctrine of comparative public law – as in view of the exact determination of the

impact that the principle of non-intervention may exert upon their application among CSCE States. In order to deal with these questions the definition of non-intervention is paramount.

Before getting to that problem, however, a look at the main Helsinki provisions on human rights and self-determination will be indicated. It will serve the purpose of a rough assessment of the main features of the provisions, the existence and implementation of which is being jeopardized by the *exceptio* of non-intervention. It should also permit the identification of the main features which those provisions have assumed as a consequence of the fact that they were debated in the course of a confrontation between the governments which are most representative of the main conflicting ideologies of our time. In no other forum as in the CSCE, have Western Democracy and Communism faced each other more directly in a debate over matters which, like human rights and fundamental freedoms – and self-determination – lie at the core of their difference.

5. Before touching upon the interpretation of any part of the Helsinki Final Act – whether about human rights, non-intervention or any other matter – two points must be taken up. These points concern respectively the nature of the Final Act and the relationship between its various parts. They shall not retain us longer than is strictly indispensable.

(a) It is common knowledge that in spite of the frequent use by laymen of terms such as "Helsinki Accord" or "Helsinki Agreement" the participating States apparently agreed not to confer upon the Final Act the legal character of an international treaty [11]. In addition to passages in some of the recorded statements made by various Ministers or Heads of State at Helsinki during the phase of signature, and in addition to a number of unrecorded statements made by delegates during the laborious drafting phase at Geneva, the Final Document itself does contain a number of formal elements to the effect that it is meant to be a political rather than a "legal" instrument, in particular in the effect that it is not a treaty. The main one among these elements seems to be the so-called "disclaimer" of legal value, namely the formal request addressed to the Finnish Government to signify to the United Nations Secretary-General in unequivocal terms, while transmitting to him a copy of the Final Act, that the Act would not be susceptible of registration as a treaty under Article 102 of the Charter. Other elements are generally indicated to be : the denomination "Final Act" ; the indication, in the title of the Declaration of Principles ("Basket One"), that the ten principles are to "guide" – not govern – the

relations between the participating States ; the use, in that decalogue and elsewhere, of the verb "will" instead of the normative "shall" : the general wording of the document, particularly the language used in the general preamble and in the final clauses. Furthermore, and unlike the final clauses of treaties, those of the Helsinki document do not contain any indication concerning the instrument's entry into force.

From the lawyer's point of view, most of these elements are, in a measure, relevant as pieces of evidence of the lack of intention on the part of the participating States, as drafters and signatories of the document, to consider the Act as a treaty in a formal sense. Of minor and perhaps controvertible significance, on the other hand, is in our opinion the term "Final Act". The non-binding character of the ordinary final acts of international conferences derives essentially from the role of authentication performed by those instruments combined with the fact that the text is subject to possible (but not certain) ratification by States. In the case of the Helsinki Final Act, the signatures being those of Heads of State, Heads of Government or Foreign Ministers, and not just the signatures of negotiating or drafting plenipotentiaries (as is the case with the signatures to the final documents of ordinary conferences), one could well assume – were it not for the mentioned disclaimer – that the Final Act was a "direct" agreement between the top-ranking persons who signed it at Helsinki, any ratifications being superfluous.

While leaving this question unprejudiced we had better take provisionally the view, for the present purposes, that the Final Act is a set of political enunciations which in part reiterate existing international rules – adding to them a solemn reciprocal promise of compliance – and in part would remain mere declarations of intent or programme ; intent or programme, however, expressed at such a high level, after such a detailed negotiation and in such elaborate terms as to render a bit futile a discussion of the technical question whether one is in the presence of a treaty. It could even be contended, with regard to this question, that the Final Act was meant to be something *more* than just an ordinary treaty.

Be it as it may for that issue, it had better be made clear at the outset that the definition of the "legal status" of the Final Act does not affect significantly the terms of our present problem. In the first place, most of what is stated in the declaration of principles with regard to human rights and self-determination on the one hand, and with regard to non-intervention on the other hand, is – regardless, and independently of, the Helsinki Final Act – a part of existing legal rules and obligations,

to be treated as such regardless of its repetition in a supposedly non "legal" instrument. A problem would arise only with regard to those formulations of the Final Act that in any manner differ in substance from existing written or unwritten rules or principles. But the merits of the opposing stands (concerning the impact of non-intervention on the international protection of human rights) remain very much the same whether one reads the two sets of provisions of the Final Act (those on human rights and those on non-intervention) as legal texts formulating strict obligations or as political or moral enunciations. In either case, there are problems of interpretation and juxtaposition of coexisting legal, political or moral propositions. The result is bound to be the same, regardless of whether it is expressed and acted upon in political, moral or legal terms or – more plausibly – in terms which variously combine the political, moral and legal facets. With this understanding, we shall treat therefore our problems as one of legal interpretation. We shall address ourselves further on to other consequences of the problematic *status* of the Helsinki final instrument.

(b) The relationship among the various parts of the Final Act is covered expressly, in part, by a paragraph 1 of the final clauses of that declaration providing that

> "all the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking account of the others".

Considering that we are dealing precisely with a question of relationship between different provisions of the Final Act, it is important to take good note of this clause. It must be stressed immediately, however, that interdependence and interaction among the declaration's principles – as among *any* elements or parts of the whole Final Act – needed really no mention. It goes without saying as a general rule of logic which applies to any piece of writing or discourse.

This facile consideration is not without practical importance. It purports that interdependence and interaction apply not just, as indicated in the clause, to the principles – and in particular to the three principles we are dealing with – but also to our three principles (and all the other principles) on the one hand, and *any other part* of the Final Act, on the other hand. It applies in particular – in so far as human rights, self-determination and non-intervention are concerned – to the relationship between each one of these principles, and their

combination, on one side, and Basket Three texts on the other side. We noted earlier that, although more solemnly and organically formulated in the declaration of principles, human rights and self-determination are present in almost all the texts composing that Basket. It was also noted earlier that provisions relevant for human rights are to be found under other principles, notably under Co-operation and in other parts of the Act. We are dealing, in fact, not just with the Helsinki *Declaration* – only a *part* of Basket *One* of the Final Act – but with the Helsinki Final Act as a whole.

We can now proceed, within the limits and for the purposes indicated, to a brief reading of the main human rights provisions of the Final Act.

CHAPTER II

HUMAN RIGHTS AND SELF-DETERMINATION IN THE HELSINKI FINAL ACT

Section 1. The Substantive Clauses

A. Respect for Human Rights and Fundamental Freedoms in the Declaration

6. The first humanitarian text for us to read – in the light of the original written proposals from the USSR, Yugoslavia, France and the United Kingdom (for the Nine) and the Holy See [12] – is Principle VII of the cited Declaration of (ten) Guiding Principles.

The first paragraph of this formulation commits the participating States to respect the fundamental freedoms of thought, conscience, religion and belief, listed in the title. The four freedoms are spelled out, in combination with the condemnation of any discrimination in their enjoyment, as the most elementary requirements of civilized life. They are meant logically to precede those civil, political, economic, social, cultural and other rights and freedoms which are indicated in the second paragraph as deriving from the "inherent dignity of the human person" and as "essential for his free and full development" and the "effective exercise" of which the CSCE States are to "promote and encourage". The derivation from the inherent dignity of the human person applies *a fortiori* to the four fundamental freedoms of the first paragraph. The emphasis on the "inherent dignity" is drawn (in addition to the United Nations Charter) from the first preambular paragraph and from Article 1 of the Universal Declaration of 1948 and from the second preambular paragraph of the 1966 Covenant on Civil and Political Rights. It is meant to stress that fundamental rights and freedoms belong to the human person *ab origine* as if they were a matter of natural law. The individual's fundamental rights – essential for his "free and full development" – must be considered as accruing to him prior to the very setting up of that structure of society which is the State.

The four classes of rights listed in the second paragraph coincide with those enumerated in Article 18 of the United Nations Covenant

on Civil and Political Rights. However, the phrase "and other rights and freedoms" indicates that the list is not an exhaustive one.

7. The third paragraph, on freedom of religion, is an interesting example of East-West diversities and of the difficulty of achieving compromise in such vital matters as fundamental freedoms.

The Holy See proposed in Geneva that one spell out the participating States' undertaking to "ensure" the freedom in question here. The Eastern European delegations felt unable to commit themselves to anything more than "recognize and respect". This watering down was easily accepted by the Holy See, presumably in view of the fact that, thanks to the obvious connection of the third paragraph (through the phrase "within this framework") with the previous paragraph's phrase "will promote and encourage", the participating States' undertaking would go beyond the mere recognition and respect anyway.

A more serious difficulty – concealed now between the lines of the text – arose in connection with the lay implications of the statement on religious freedom, notably of the term "belief". This term, which also appears, together with religion, in Article 18 of the cited Covenant (as in Article 18 of the Universal Declaration) proved to be unpalatable to the USSR delegation. Fearing that behind the word "belief" one discovers freedom of thought and opinion, they tried to find drafting devices which would help confine the scope of the text to the merely religious aspect [13]. The difficulty for Ambassador Mendelevich was aggravated by the fact that in the same text the Holy See had rightly injected the freedom of the individual to profess and practise (religion) "alone or in community with others". If "belief" could be understood to include – as it obviously does include – freedom of thought and opinion, freedom to profess and practise "in community" could be understood to add, on top of freedom of thought and opinion (possibly political), freedom of nothing less than political association and labour association. The USSR representatives seemed unable to conceive the possibility of accepting a text resembling so much an acceptance of political "pluralism" and other "Western" freedoms *unaccompanied* – as the whole Principle VII obviously was – by any contextual escape clauses or reservations of the kind which reduce (or are alleged to reduce) the scope of the rights and freedoms provided for in the 1966 Covenant on Civil and Political Rights [14].

The "impasse" was solved, it seems, by maintaining in the Western languages the word "belief" and by using for the Russian text a word which, according to Western experts in that language at Geneva, had

the more religious connotation of the English "faith", the expression "in community", however, being felicitously maintained everywhere. All this to the Holy See's apparent satisfaction. Ignoring as we do the Russian language, we are unable to assess the real extent of this linguistic discrepancy. This discrepancy was the object of interpretative statements made on 20 July 1975 in the First Commission of the Geneva phase of the CSCE and recorded in the *Verbatim Records* of the day's meeting. According to such statements the different terms used in the various official languages would seem to be equivalent, in spite of the difference in wording. Be that as it may, the USSR also managed, it seems, to translate the verbs "profess and practise" by the single Russian verb "izpovedovatj" or something sounding like that. According to the same linguistic experts, this term would refer to the practice of *religion* rather, or more, than to the profession or practice of *opinion*.

In a sense, the West would not really have given up anything in any case, both in view of the fact that freedom of thought and opinion is covered elsewhere in the formulation of the seventh principle [15] and in view of the fact that freedom of association falls among the second paragraph's rights. Moreover, the wider term "belief" is conspicuously stressed thanks to its presence also in the title. Furthermore, the fact that *all* the texts other than the Russian one carry the word "belief" could hardly be overlooked in case of dispute. It is highly regrettable, on the other hand, that a discrepancy – if there is a discrepancy – had to be accepted between the Russian text and the others.

8. The fourth paragraph is a general provision on minorities, committing the participating States to grant to the individual members equality before the law, "to afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms" and, "in this manner", to "protect their legitimate interests in this sphere".

Although, according to the Yugoslav proposal from which this paragraph originates, the minorities contemplated were only those ethnic or linguistic minorities which have their mother country *in another State*, this limitation, which would exclude, *à la rigueur*, autochtonous minorities, does not emerge clearly from the text.

An interesting aspect of this formulation is that minorities are considered not so much collectively, *qua* ethnic units, but rather – as in Article 27 of the 1966 Covenant – in their individual components. On one hand, this is a positive element. Even in the protection of minorities one places first the individual human person and not the group. On the other hand, the protection of the minority becomes

merely a matter of equality or non-discrimination in the enjoyment of human rights with the rest of the people. The problem of the preservation of the minority's ethnic identity and related issues are not taken care of directly. As in the corresponding article of the cited 1966 Covenant, one tried presumably to avoid encouraging minority groups to set themselves up, nationally or internationally, as distinct units vis-à-vis the State.

9. The fifth paragraph, together with the sixth, is perhaps the most significant element in the whole formulation on human rights. Considering its capital importance for the philosophy of the CSCE and for détente, we shall revert to it, as well as to paragraph 6, further on (para. 11).

The seventh paragraph is a vital instrumental provision [16] originating from a British proposal vainly opposed by the USSR [17]. By confirming "the right of the individual to know and act upon his rights and duties", this text is likely to prove to be one of the most important among the undertakings embodied in the Final Act. The participating governments are committed to disseminate among their peoples the information necessary for them to know their rights and freedoms; and they must ensure adequate legal remedies for any violation of human rights, including obviously any violation committed by local or central authorities. Considering the lack of any CSCE provision for remedies directly accessible to individuals against the violation of human rights in a participating State [18], the contents of this paragraph represents a *minimum*.

10. The eighth and last paragraph covers the relationships between the Helsinki human rights formulations and existing international instruments on human rights.

The Eastern European governments had sought to avoid referring to the United Nations Universal Declaration. They preferred the 1966 Covenants in view of the numerous "escape clauses" that they contain. I refer to the clauses of the Covenants which expressly leave room for restrictions of the rights contemplated in the Covenants' articles [19]. In spite of this, the Universal Declaration has been placed almost at the top and together with the United Nations Charter, precisely where it belonged. Furthermore, the additional reference to the Covenants – obtained by the USSR in exchange for the mention of the Universal Declaration – is drafted in terms of "fulfilment of the obligations" deriving therefrom (*infra*, para. 25).

11. Viewed in its entirety, the formulation of item VII of the Helsinki Declaration appears to be, especially if one compares it with

the formulations contained in the main proposals which were tabled before the CSCE in 1973-1975 [20], a valuable condensation of the essential tenets of Western – European and American – thought and constitutional practice.

While the importance of economic and social rights is fully recognized (also with a view to ensuring a universal and more effective enjoyment of the civil and political rights and freedoms themselves), no concession has been made to totalitarian doctrines which purport the subordination of individuals to society or the collectivization of individual interests. In addition, the participating States commit themselves not just to a theoretical, "on paper", respect of individual rights and freedoms. They also commit themselves to the promotion and encouragement of the effective exercise of such rights. We have seen that an express recognition has been secured of the instrumental right of each individual to learn about his rights and freedoms, and of his further right to act upon such knowledge in order to be able to defend them.

Thanks to these features, the Helsinki formulation on human rights is one of the most significant, if not the most significant – together with self-determination – of the ten principles in the declaration [21].

As a Western comment rightly notes, the very fact of having obtained the inclusion in the declaration, on an equal plane with the others, of the principle of respect for human rights (and the principle on self-determination),

> "constitutes a fundamental element in support of the Western view, according to which security and détente depend, *inter alia*, on the way in which this respect is ensured and promoted in all countries".

The wording stresses this link when it recognizes, in that fifth paragraph we earlier set aside, that :

> "respect for human rights and fundamental freedoms is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among the participating States" (*infra*, para. 61 et seq. and 68 et seq.).

This link between respect for human rights and détente is further emphasized in the sixth paragraph, under which the participating States undertake to co-operate within and without the United Nations – obviously at an international level – in the field of human rights.

In the same sense provide paragraphs 1 and 3 of the formulation of the principle on co-operation among the participating States.

B. "Third Basket" Clauses

12. To the impressive "soft law" achievement [22] represented by the eighth paragraph considered in the previous subsection, there must be added the direct and indirect impact of the texts constituting the so-called "Third Basket" of the CSCE, namely the third part of the Final Act.

Introduced by a preamble covering the whole Basket, these provisions are distributed among four chapters entitled respectively Human Contacts (Chapter I), Information (II), Co-operation and Exchange in the Field of Culture (III) and Co-operation and Exchanges in the Field of Education (IV), each chapter being preceded by a "mini-preamble", as opposed to the general preamble to the whole Basket. The importance of this whole part of the Act and its relationship to the general "guiding" principles on human rights and self-determination is manifest if one considers just the variety of the subtitles included under each chapter and the importance of the covered areas. The chapter on *Human Contacts* includes : contacts and regular meetings on the basis of family ties ; reunification of families ; marriage between citizens of different States ; travel for personal or professional reasons ; improvement of conditions of tourism on an individual or collective basis ; meetings among young people ; sport. The chapter on *Information* : oral information ; written information ; films and broadcast information ; co-operation in the field of information ; improvement of working conditions for journalists. The chapter on *Cultural Co-operation and Exchanges* : extension of relations ; mutual knowledge ; exchange and dissemination ; access ; contacts and co-operation ; fields and forms of co-operation ; national minorities or regional cultures. The chapter on *Educational Exchange and Co-operation* : extension of relations ; access and exchanges ; science ; foreign languages and civilizations ; teaching-methods ; national minorities or regional cultures.

13. The undertakings set forth in the Third Basket are not exempt from limitations or alleged limitations deriving either from the guiding principles themselves [23] – such as the restrictions or alleged restrictions attached to the principles of equality [24], of co-operation [25] and compliance with international obligations [26] – or from restrictive or allegedly restrictive clauses attached to those undertakings them-

selves. One such clause is the reference to "mutually acceptable conditions", *subject* to which the participating States might seem to be committed to carry out the humanitarian undertakings in question [27]. Another clause is the reference to future agreements [28].

However, any real or supposed restrictions of the Third Basket obligations must be weighed and assessed as against the greater depth of human rights commitments which the various texts of Basket Three implicitly bring about thanks to their more specific, detailed character [29]. Some of the provisions of Basket Three – provisions of a kind generally lacking even in the international instruments concerned exclusively with human rights – indicate actions, matters, interests, goals or results far too concrete, in spite of the vagueness of the corresponding undertakings, for them not to enhance the significance, and the degree of effectiveness, of the general provisions of Principle VII and of any other principle – such as Principle VIII – relevant from the so-called "humanitarian" objectives of the CSCE. It would seem, in other words, that a number of, if not all, Basket Three paragraphs perform, with regard to the principles on human rights and self-determination, the same specifying and strengthening function that would have been performed by an equivalent number of additional paragraphs or subparagraphs within the very formulation of Principles VII and VIII. As such they are apt perhaps better to resist any restrictive action deriving from more or less contextual limiting clauses (see also *infra*, para. 25*quater*).

C. Principle VIII of the Decalogue : Self-Determination

14. The first paragraph of guiding Principle VIII of the Helsinki Declaration [30] sets forth the right of self-determination in its widest terms : not without showing, on the other hand, the justified concern of all the participating States for the preservation of their territorial integrity against secession. It is to be noted, however, that this concern is expressed more mildly, in a sense, than in the 1970 Friendly Relations Declaration [31]. One regrets at the same time not to find in the Helsinki formulation, at the side of the safeguard phrase against secession, that reference to the "representative" character of governments which had fortunately slipped into the safeguard clause of the Friendly Relations Declaration. I refer to the sentence "conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of *a government representing the whole people belonging to the territory*. . .". But this is a purely

drafting "gap" amply compensated, as will be shown immediately, by more than equivalent safeguards of the free choices of peoples.

15. Paragraph 2 is most important. It has preserved the essence of the original Netherlands proposal [32], which spoke of the right of peoples "freely to choose, to develop, to adapt or to change" their internal or external political status.

Strongly opposed by the Soviet Union [33], the verbs "adapt" and "change" did not meet the necessary unanimity. The three original verbs had to be substituted by a simple "determine", the same verb used in the Friendly Relations Declaration. But this simplification does not diminish in the least the dynamic implications of self-determination. Apart from the fact that a people's right to "determine" their "internal or external political status" obviously implies the right to change their "internal or external political status" – such expression amply including that people's political, economic or social régime – there are in addition the words "all peoples", "always", "when and as they wish" (*infra*, para. 19).

While not inciting anybody to start a revolution anywhere, these words prove *ad abundantiam* that the Helsinki formulation envisages self-determination of peoples – not of States [34] in the widest sense. Firstly, it is a matter of "internal" as well as "external" status. It is not just a matter of ensuring a people's independence from *foreign* domination. It covers unambiguously the choice of one's political, economic and social régime. Secondly, self-determination includes the right of each people to effect any *change* of political, economic or social régime. The idea of choice – and of a *permanently open* choice – has thus been maintained. The implications of the word "adapt", which might be deemed not covered – as on the contrary they undoubtedly are – by the language considered so far, are taken good care of by the phrase "to pursue as they wish their political, economic, social and cultural development". And the right "in full freedom to determine" surely dismisses as arbitrary any conservative reading that the rulers might attempt to make of that phrase.

A number of Western delegations at Geneva had proposed – *ex abundanti cautela* – that self-determination be further qualified as "inalienable", a term apparently unacceptable to the USSR. But such a precision would have been superfluous. To say that "all peoples always have the right" – as the adopted text reads – is tantamount to saying that the right of self-determination does not exhaust itself in any given "choice" of political, economic or social régime. And that means that it is inalienable.

16. The third paragraph performs the same function as paragraph 5 of the principles of human rights considered previously. It stresses the relevance of respect of self-determination for the development of détente and co-operation among the participating States.

The original Yugoslav proposal concerning the tenor of the last phrase of this paragraph condemned colonialism in any form and "oppression", just as the proposal reproduced earlier (*supra*, footnote to paragraph 14) demanded "the eradication of any form of subjugation or of subordination contrary to the will of the peoples concerned". The phrase had to be modified into "elimination of any form of violation of the principle" because the USSR delegation found the word "oppression" unacceptable [35].

17. Viewed in its entirety, the concise Helsinki formulation on self-determination appears particularly felicitous from the point of view of the most important among the issues identifiable in the doctrine and practice of self-determination in international law and relations. I refer to the question of the scope of self-determination in space, object and time ; and to the question of the "status" of the principle from the view-point of the law of nations.

With regard to the sphere of self-determination in space, the Helsinki formulation represents, as compared to the formulation embodied in the United Nations Declaration of Principles of 1970, the consolidation – beyond any doubt or any peril of involution – of that universal scope of self-determination of which the 1970 Declaration represented only one of the early and rather timid manifestations.

Self-determination had been unilaterally applied in the United Nations practice of about 25 years – and is often still applied – as if it just meant self-determination of peoples under colonial domination [36]. The sacrosanct cause of decolonization had not been, though, the only purpose of the United Nations Charter emphasis on self-determination. The San Francisco documents show that that emphasis resulted not just from the anticolonialist attitudes of the United States and the Soviet Union – as distinguishable, not without qualifications, from the attitudes of a few European colonial powers – but also from the condemnation, shared by the whole free world, of any totalitarian régimes and any form of alien subjugation of peoples, colonial or metropolitan. The Charter provisions on self-determination must therefore be read as asserting self-determination in favour of any peoples subjected either to any form of foreign domination or to any form of despotism. In other words, the Charter's self-determination

was the internal as well as, the external self-determination, the former taking care of freedom from totalitarian rule – obviously not just Nazi or Fascist – and the latter taking care of the freedom of any oppressed people, whether "colonial" or "metropolitan". This is not only a question of the *ratio* of the principles and of *travaux préparatoires* of the Charter. The main point is that there is nothing in the relevant articles of the Charter to suggest that self-determination was to be understood as a principle or doctrine of less than universal application of which independence from abroad and freedom at home are the two facets.

More than on the basis of a restrictive interpretation it has been therefore simply by a partial – I mean literally partial – implementation of the Charter that United Nations bodies had tended – and still tend, in a measure – to apply self-determination exclusively or preferably to colonial peoples [37]. Considering, however, that there was neither an incompatibility nor a contradiction between recourse to self-determination in favour of colonial peoples in order to ensure their liberation from colonial domination, on the one side, and recourse to the same principle in favour of the external and internal self-determination of any people – metropolitan or colonial – on the other side, the incomplete application of the principle did not really alter, in our view, the universal scope of the Charter principle. There was not an outright denial of such a universal scope. There was not either a *legal* restriction of the principle by practice. Legally speaking, there had just been a period of application of the principle in a relatively narrow area within which, for a number of reasons, it was less difficult to enforce it. Such a partial application might have contributed in preventing (as we fear it may have) the development of the Charter conventional principle into a principle of general, customary international law. But surely it did not restrict, as a matter of treaty law, the universality of the principle as enshrined in the Charter. It was therefore no novelty when in the late sixties a group of delegations to the Special Committee entrusted with the drafting of the Friendly Relations Declaration managed to introduce into that Declaration the notion of the universal scope of self-determination.

Indeed, according to the opinion of some commentators, the 1970 Declaration on Friendly Relations would not have really taken a stand in favour of the universal scope of self-determination [38]. In our view, however, in spite of the presence of elements which at first sight seem to support this view, the 1970 formulation on self-determination

marks a clear departure from the narrow application of the principle. First of all the relevant part of that declaration repeatedly indicates that the right of self-determination is to benefit "all peoples" and that the corresponding duty is incumbent upon "every" State. Secondly, it is stated expressly that self-determination is the right of peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development", every State having the duty "to respect this right" in accordance with the provisions of the Charter", such provisions being universal in scope. Of universal application is, in the third place, the paragraph according to which "every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter". A provision of that tenor could hardly be restricted to colonial peoples.

There are, to be sure, in the text provisions concerning exclusively the peoples under colonial rule (such as the second, fourth, fifth and sixth paragraphs). That such an emphasis on colonial peoples is only of a residual "partiality" of application in favour of colonial peoples seems to us to be proved by the tenor of the safeguard of the territorial integrity of States contained, as noted earlier, in the seventh paragraph of the formulation in question [39]. In stressing that nothing in the formulation should be understood as justifying or encouraging actions that would dismember or impair the territorial integrity of States, that paragraph adds the precision that this "safeguard" only applies to States which, by being "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" conduct themselves "in compliance with the principle of equal rights and self-determination of peoples as described above". It would be very difficult, in our view, to regard a clause containing such a condition as a safeguard of the integrity of colonial empires [40].

18. Be that as it may the interpretation of the 1970 formulation, there is no doubt that the Helsinki formulation sets forth a concept of self-determination which is universal in space and universal in subjective scope.

(i) In addition to the tenor of the text we have just read, one must consider the sphere of the European Security Conference. This sphere is so decidedly European-American that the proclamation in the Final Act of a concept of self-determination of a merely anticolonial or otherwise restricted scope would have been totally out of place.

(ii) Furthermore, there are *travaux préparatoires*. These show that

the delegate of a major power to the CSCE preparatory phase in Helsinki – it was the Spring of 1973 – had contended forcefully [41] that the principle of self-determination was a matter deprived of interest within the framework of the relations among the 35 participants in the CSCE. Europe, he stated, was by that time completely and thoroughly self-determined, the evidence of this accomplishment being perceptible to anyone endowed with a minimum of common sense. Nowhere in Europe – he intimated – was there a trace of that colonialism which afflicted less fortunate continents [42]. The very fact that the inclusion of self-determination in the declaration followed a debate in the course of which everybody agreed that within the CSCE framework there was not a single people awaiting decolonization in the strict sense – although there were certainly peoples in dramatic want of freedom – indicates that while maintaining in the world context the universal scope of self-determination, the Helsinki formulation is aimed *primarily* if not *exclusively* at the condition of the metropolitan populations of the participating States themselves and of any subdivisions thereof.

As in the field of human rights it is thus the concept of self-determination prevailing in the free world that is embodied in the Final Act.

19. Other aspects under which the scope of the Helsinki formulation of self-determination is highly remarkable are : *(a)* the dual – internal and external – dimension of the principle ; and *(b)* the more precise connotation that the external dimension acquires thanks to the presence of the internal dimension. Universal in space or "subjective scope", the Helsinki self-determination is also universal in objective scope.

(a) In its noted internal dimension [43] the Helsinki version of self-determination covers the form of government or political régime, the economic and social régime and the development of culture. Every participating State is thus committed by the signature of the Final Act to ensure to its people the right freely to make all the choices they may wish in the pursuit of their political, economic and social development, including the choice of a new constitution, of a new government or of a new way of political, economic, social or cultural life. From the internal viewpoint the Helsinki self-determination merges thus – as becomes self-determination properly understood – with human rights and fundamental freedoms. It is actually an all-embracing fundamental right or freedom itself. Its very exercise presupposes the enjoyment of civil and political rights and liberties vis-à-vis any central or local

authority in the State. Self-determination presupposes in particular freedom of political association and freedom of expression. And the noted permanence of self-determination means that just as there is nothing final or irreversible, either in the preference for a conservative or labour government in Great Britain, or in the preference for Christian Democrats in continental Europe, there is nothing final or irreversible in the establishment of a "dictatorship of the proletariat" or in the establishment of a dictatorship of persons allegedly representing the proletariat in any country, West or East, South or North.

(b) As regards the external dimension, it acquires in the Final Act the different connotation deriving from the fact that in the European-North American area of the CSCE the problem is not, as a rule, to secure the *acquisition* of independence, but rather to *safeguard* existing independent statehood. And the unprecedented emphasis of the text on the internal dimension of self-determination deepens this additional safeguard by extending it from the mere preservation of statehood to respect for the independent (internal or external) choice of the *people*. By emphasizing the duty of each participating State to respect the free choice of *its own* people vis-à-vis the rulers, the Helsinki formulation *a fortiori* emphasizes the duty of every participating State to respect the free choices of the *people* of *other* States. To the normative guarantee of the political independence of *the State* the Helsinki formulation adds thus an analogous guarantee of the political independence of the *people itself*. In order to comply with the principle of self-determination, in other words, the rulers of the participating States must not *just* refrain from conculcating in any manner the freedom of political, economic, social and cultural choice of the other States, namely of the governments of such States. They must also – and mainly – refrain from conculcating the freedom of political, economic, social or cultural choice of the *peoples* of such other States.

This is bound to make life more difficult for any doctrines of "limited sovereignty" (such as the so-called Brezhnev doctrine) explicitly or implicitly relying upon the consent of the victim State's rulers as a justification for the exercise of military or non-military coercion with a view to maintaining, restoring or altering the victim State's régime. Consent by existing or more or less "improvized" rulers will not necessarily be an adequate justification. The attitude of the people towards any such rulers, the attitude of the people towards the State or States exercising an external coercion, in particular the attitude of the people with regard to the issue or issues from which the relevant

situation has arisen and developed would have to be taken into account in the first place (*infra*, paras. 43, 49, 51 and 55-66). In particular, the elements in the second paragraph of Principle VIII – "always" and "when and as they wish" – support the Western view that treaty obligations which purport to impose the so-called socialist "internationalism" (or the like) upon given States must not affect the respect by all the CSCE States of the right of the peoples of all these States to exercise self-determination "at any time" (*infra*, paras. 54 et seq.). Together with human rights, together with "co-operation" and together with other elements in the Final Act, self-determination constitutes thus one of the foundations of the evolutionary concept of security, as against the static concept based upon the mere recognition of the immutability of existing realities.

20. Considering the so-called "disclaimer" of legal value by which the Final Act is accompanied, and considering further the supremacy recognized to the United Nations Charter – especially in the last paragraph of the tenth principle of the declaration – one would not expect that it bring about any direct novelties with regard to the "status" of the principle of self-determination from the viewpoint of international law. I address myself now to two questions. One is the question whether self-determination is a matter of law or a matter of morality or policy, namely whether the granting of self-determination to a people constitutes, for a State or government, a duty deriving from a principle of general or conventional international law or whether it is only a matter of morality or expedience. The other is the question whether, assuming that to grant self-determination were a matter of international legal obligation, the corresponding international right should be understood as the right of State A to claim from State B that the latter State respect any peoples' self-determination or whether that right should be understood as an international right of each people towards its State or any other State. The latter alternative would obviously imply (in addition to the international legal nature of the principle) the elevation of peoples to the "rank" of international persons at the side of States or governments.

On the latter question we are only able to confirm the view expressed here on a previous occasion that the acquisition by peoples of legal personality in international law would be a very problematic and in any case quite revolutionary event which no treaty could produce [44]. On the other issue, namely on the question whether self-determination is the object of a moral or political matter or a matter of obligation under existing international law, our view has been

modified by further reflection since we last expressed ourselves here on the subject [45]. We do believe that respect for self-determination is, by virtue of the United Nations Charter, the object of a contractual obligation of the member States. This, however, is not a consequence of the Helsinki formulation but merely an effect, in our opinion, of the United Nations Charter. The Helsinki formulation represents, however, together with United Nations resolutions on the subject, in particular with the cited part of the Friendly Relations Declaration, a significant contribution to the interpretation of the Charter in the sense indicated.

The fact that the Helsinki formulation alone would not *per se* be decisive for the interpretation of the Charter with regard to self-determination does not diminish the high value of that formulation in the theory and practice of the principle. From the viewpoint of the policies of self-determination between the CSCE countries, it will be far less easy for a government to get away either with the argument that self-determination only affects the fate of colonial peoples or with the argument that once a people (or any section thereof) has really or allegedly exercised self-determination by establishing a given régime – or a régime characterized by given features – it has done so once and for all. Thanks to the work done at Helsinki and Geneva, any retrograde notions such as these are politically condemned as between the participating States, also in the relations between each CSCE government and its people. And this is bound to exert a positive influence upon the development of a general international law of self-determination.

In the first place, the very fact that a sharply diversified group of States as the CSCE participants recognize the universality of self-determination is bound to favour the widening of the contractual principle of the Charter by the formation of a corresponding principle of *international* custom under which *all* States would be under an obligation to respect the internal and external self-determination of their own people and all the others. Secondly, any rule or principle that may develop or evolve will do so under the sound influence of the Final Act's concepts of the universality and permanence of the right of self-determination. Any such developments in the area of general international law will depend, however, not so much on the simple signature of the Final Act or its existence as on the way in which its relevant provisions will be implemented.

Section 2. The Implementation of the Humanitarian Provisions of the Final Act

21. Although the Helsinki document does not set up *ad hoc* machinery, either for the hearing of individual claims or petitions for human rights within the CSCE area or for the processing of human rights claims put forward by the CSCE States, the humanitarian provisions of the Final Act are not entirely lacking in implementation devices.

According to the Helsinki clauses concerning the follow-up to the CSCE, the participating States, having "considered and evaluated the progress made" at that Conference, and intending to implement the provisions of the Final Act . . . in order to give full effect to its results

> "declare their conviction that 'they should make further unilateral, bilateral and multilateral efforts and continue, in the appropriate forms set forth below, the multilateral process initiated by the Conference' " [46].

The idea of a continued effort is also stressed in the (IX) principle of the Declaration under the title of Co-operation. The first paragraph of that principle states that :

> "the Participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the Charter of the United Nations. In developing their co-operation the participating States will place special emphasis on the fields as set forth within the framework of the Conference on Security and Co-operation in Europe" [47].

In addition, an undertaking to co-operate in the specific area of human rights is contained in the sixth paragraph of the principle (VII) on respect for human rights and fundamental freedoms [48].

As regards the ways and means through which the CSCE States propose to pursue the above ends of implementation and co-operation the participating States indicate *first* – in the cited provisions on "follow-up" – their

> "resolve, in the period following the conference, to pay due regard to, and implement the provisions of the Final Act of the conference : *(a)* unilaterally, in all cases which lend themselves to such action ; *(b)* bilaterally, by negotiations with other participating States ; *(c)* multilaterally, by meetings of experts of the

participating States, and also within the framework of existing international organizations".

Secondly, the participating States :

> "resolve to continue the multilateral process initiated by the Conference : '*(a)* by proceeding to a thorough exchange of views both on the implementation of the provisions of the Final Act and of the tasks defined by the conference, as well as, in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of co-operation in Europe, and the development of the process of détente in the future' and '*(b)* by organizing to these ends meetings among their representatives beginning with a meeting at the level of representatives appointed by the ministers of foreign affairs. This meeting will define the appropriate modalities for the holding of other meetings which could include further similar meetings and the possibility of a new Conference."

Albeit often overlooked by commentators, these undertakings, together with the cited provisions of Principle IX and paragraph 6 of Principle VII, are of great relevance in the argument over the impact of non-intervention on the humanitarian obligation of the CSCE States. As they envisage distinctly *implementation* and *review of implementation* we had better look into both aspects before reverting to non-intervention.

22. To begin with *implementation,* it is expressly and even emphatically stated that the participating States should co-operate *inter sese* in implementation, both bilaterally, by means of negotiations, and multilaterally, through meetings of experts and existing international bodies.

Albeit generical, and in certain formulations even tautological, the concept of co-operation has acquired a comprehensive meaning in international practice. It indicates an intensity of contact which goes beyond the mere *peaceful* relations or even *friendly* relations. It encompasses : *(a)* bilateral and multilateral contacts, occasional or periodical ; *(b)* utilization of existing international organs ; *(c)* possible creation by further agreement of new international machinery and participation therein.

The part of the "follow-up" chapter concerning the implementation of the Final Act – leaving aside, for the moment, the verification thereof – goes thus pretty far if it envisages expressly such forms of co-

operation as *(a)* and *(b)*[49]. That the creation of new machinery – not mentioned in the Act – is for the time being set aside is confirmed by *travaux préparatoires*. It is worth noting, however, that through the forms of co-operation expressly envisaged (and the chances of further agreement offered by the review conferences, and possibly by a new conference), the creation of machinery is a subject that could come up for discussion and agreement at any time.

Back to human rights and fundamental freedoms – and to self-determination – the implementation of the Final Act with regard to these matters lies fully and unconditionally in the area of all the forms of co-operation expressly or implicitly envisaged in the part of the follow-up chapter of the Final Act considered so far.

In addition to the obvious *datum* represented by the fact that that chapter covers *equally* all the undertakings deriving from the Final Act, whatever their object – and it covers in particular all the principles of the declaration and all the clauses of the Third Basket as well as those of the First and Second – one must consider the emphasis placed upon co-operation in the area of human rights by the recalled sixth paragraph of the formulation of Principle VII of the declaration. Compared with Principle IX on general co-operation – to which it adds up – this undertaking clearly strengthens the participating States' pledge to a *common effort* in the promotion of respect for human rights.

Combined with the follow-up provisions under discussion, this clause accentuates, as amongst the CSCE States, the normative and institutional implications of Article 56 of the Charter. Under that article the member States of the United Nations are committed "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". The latter article includes, as everybody knows, the *promotion* by the United Nations of "universal respect for, and observance of, human rights and fundamental freedoms for all . . .". It is hardly necessary to recall that this article represented, in 1945, the main conquest of the successful war against Nazi-Fascism (*infra*, paras. 61 et seq., 65).

23. The second "follow-up" device contemplated in the Final Act for the implementation of its provisions is "a thorough exchange of views" among the participating States both "on the implementation of the provisions of the Final Act and of the tasks defined by the conference" [50], and the organization "to these ends" of "meetings among . . . representatives", the first of these meetings to be held in Belgrade in 1977 and further meetings of the same kind, including a

new conference, to be considered and defined on that occasion. The Belgrade meeting is to commence pretty soon.

The Final Act goes thus decidedly beyond the forms of co-operation in implementation considered in the preceding paragraph. The aim pursued here is the *verification* of the implementation of the legal and/or moral or political commitments made by the participating States. This with a view to securing the continuation of the "regional" process of the CSCE.

Back again to human rights, all the signs – the same as those noted in the preceding paragraph with regard to co-operation in implementation – show that the humanitarian provisions were naturally considered to be among the most appropriate and the most likely to come up for verification of implementation (*infra*, para. 65).

Section 3. The Human Rights Clauses of the Helsinki Document and Existing International Instruments in the Field. A Few Points

24. Before moving to non-intervention, the Helsinki Principles VII and VIII and the clauses of Basket Three – the cost of which has been considerable, in terms of time and patience, for the diplomats engaged in the operation (1973-1975) – must be weighed briefly also in relation with other international instruments concerned with human rights, both with regard to substance and with regard to procedure. A look at this relationship appears indispensable in view of the fact that the problematic nature of the Final Act leaves room, whether one accepts it as a juridical instrument or as a merely political document, for the continued operation, between States participating in the CSCE, of any humanitarian rules in force.

At the time when the 35 States of the CSCE signed the Final Act, the field of human rights and humanitarian matters in general was covered already by a huge *corpus* of international "hard" and "soft" law [51]. The places of honour were occupied indisputably by the United Nations Charter itself, by the Universal Declaration of 1948, by the 1950 European Convention on Human Rights with its Protocols, by the 1966 Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (with Protocol), all referred to expressly except the European Convention, in the Final Act. But the list of relevant instruments is richer. It should open (to say the least) with the London agreement of 8 August 1945 on the punishment of crimes against humanity, crimes against the peace and war crimes in a narrow sense : and it should include, for example, the Genocide

Convention, the four Geneva Conventions of 1949, the European Social Charter of 18 October 1961, the Convention on the Status of Refugees of 28 July 1951 with its Additional Protocol of 31 January 1967, the Convention on the Status of Stateless Persons of 30 August 1961, the Convention on the Nationality of Married Women of February 1957, the Convention on Abolition of Slavery of 25 September 1952 (amended by the Protocol of 7 December 1953), the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956, the General Assembly Declarations on the Rights of the Child (resolution 1386 (XIV) of 1959), on the Granting of Independence to Colonial Countries and Peoples (resolutions 1514 (XV) of 1960 and 1803 (XVIII) of 1962), on the Elimination of All Forms of Racial Discrimination of 1963 (resolution 1904 (XVIII) preceding the Convention of 21 December 1965), and the Convention on the Statute of Limitation of Crimes against the Peace, War Crimes and Crimes against Humanity of 26 November 1968 : not to mention the series of International Labour Conventions and the numerous instruments adopted by regional agencies (Organization of American States, Organization of African Unity, Arab League) or by occasional conferences. Notable among the latter the Algiers Universal Declaration on the Rights of Peoples of 4 July 1976. Everybody knows, furthermore, that substantial additions to the above instruments have been made by the recent conventions on humanitarian law, while major institutional improvements would be forthcoming if the United Nations managed to create a High Commission for Human Rights. It is within the context and in the light of such a *corpus* of humanitarian rules in a wide sense that the relevant provisions of the Helsinki Final Act must be read in order to assess their real impact on the relations and co-operation among the CSCE States.

Within the context and in the light of all this, the clauses of our Final Act appear indeed to be – while undoubtedly advanced as a synthesis and politically significant (*supra*, para. 4 at the end) – anything but unprecedented. Considering actually the existing framework – from the viewpoint of the specifics of the international protection of human rights as well as from the viewpoint of the general features of international relations and international law of the last 50 years – it would have been surprising (and in contradiction with the proclaimed policy of détente) that the Final Act of Helsinki does not cover problems of human rights, self-determination and human contacts. After these subjects had been – and were still

being – so extensively and at times intensely dealt with in agreements and other instruments *amongst the three main "Worlds"* composing the United Nations membership – West, East and Third World – to leave those same subjects out of the CSCE would have thrown a dark shadow on that achievement. The least that could have been said would have been that the matter could not be the object of negotiation, let alone agreement, between the Western democracies and the Communist countries. It is, to say the least, superficial – and we shall revert to this point further on – to maintain that the Final Act's provisions on human rights represent a departure from the ordinary pattern of international relations and law (*supra*, para. 3 and *infra*, paras. 58 et seq.).

As regards the relationship between the humanitarian provisions agreed on and the main existing international instruments, only a few annotations will have to suffice for the present purposes.

25. We begin by the substantive aspect.

In the first place one must consider the provisions of Article 1.3, 13.1 *(b)*, 55-56, 62.2, 68 and 76 of the United Nations Charter, not to mention the fundamental statement of the second subparagraph of the preamble, concerning human rights ; and Articles 1.2 and 55 on self-determination. Leaving out self-determination, with which we dealt earlier (paras. 14 et seq., esp. 20), the articles concerning human rights are considered by a number of commentators, either as purely *de lege ferenda* statements, which did not create any international obligations [52], or only as sources of an obligation generally to respect, observe or promote human rights, but not of any concrete obligations concerning single, specific human rights or freedoms [53]. In contrast with the first view, we agree with Lauterpacht. While rejecting the implications that this author assumes with regard to the personality of individuals in international law (*infra*, paras. 58 et seq.) we agree with his statement that, whether explicitly or by implication, the Charter provisions on human rights do bind the member States to respect human rights and freedoms notwithstanding the absence of a "*machinery* of compulsion" (italics added) aimed at the "protection" of human rights [54]. As regards the second view it is of course true that the Charter does not define the rights and freedoms which every member State is bound to ensure. But if this can be said to affect, in a measure, the clarity of the obligation (as also Lauterpacht admits) it does not make such an obligation – to be conceived in our view as a strictly inter-State or inter-power obligation – any the less concrete or specific with regard to any human right or freedom of such an essential

character as to affect the inherent dignity of the person. After the French and American Revolutions, after the national liberation movements of the nineteenth century, after the Russian Revolution of 1917 – and within the framework of the permanent co-operation inaugurated amongst member States by the United Nations Charter as an immediate aftermath of the defeat of the Nazi and Fascist dictatorships – there was hardly a necessity for the drafters of the Charter further to specify the obligation to respect human rights by listing freedoms of thought, speech and belief, or freedoms from fear or from want, or freedoms from tyranny and oppression. While such rights and freedoms could more appropriately be specified in *ad hoc* instruments with a view to better ensuring a reasonable degree of uniformity of application and reducing differences between member States, lack of specification in the Charter itself could not honestly be envisaged by governments – in the circumstances – as an obstacle to the recognition of the general obligation. No lack of specification could affect the essential validity of an international obligation the content of which resulted, *either* from the civil, administrative and constitutional practice of the member countries which were governed by representative and "pluralistic" régimes *or* from the more or less exhaustive statements contained in the constitutional charters and equivalent instruments existing, whatever their degree of effective application, in the numerous countries governed by different régimes. In so far as the *international* obligation to respect *essential* rights and freedoms was concerned, no State participating in the Charter could have claimed in good faith in 1946 any more than it can claim in good faith after the declaration of 1948 or after the Covenants of 1966 that the Charter articles relating to humanitarian matters were not specific enough for member States to consider themselves reciprocally bound to respect such rights and freedoms. The absence in the Charter of rules setting up an international United Nations *implementation machinery* – accessible either to every member State *versus* another or directly to individuals *versus* States – does not affect the existence of such an obligation of every United Nations member State towards another.

With the Charter provisions in question the humanitarian clauses of the Final Act interact in two ways. On the one hand they emphasize the importance and vitality of those provisions by the express reference to the Charter in the last paragraph of Principle VII of the Helsinki Declaration. On the other hand they increase, by that reference, their own weight.

25 *bis*. It should be added that this general obligation of member

States is such that its transgression constitutes a violation of the Charter, and thus a violation of international law, regardless of whether it qualifies or not under the frequently used concept of "gross violation" of human rights.

The fact that the United Nations has managed to act with vigour and a certain effectiveness in a few cases of "gross violations" of human rights justifies, in our view, *neither* the notion, (i) that there are no other "gross" violations than those (well known) in which United Nations bodies have managed to act more or less effectively, *nor*, (ii) the notion that the Charter is not concerned – or not equally concerned – with less qualified violations.

(i) As regards the first point, the United Nations has naturally been able to act more effectively in a number of cases thanks to the fact that larger numbers of member States were willing to recognize the seriousness of certain violations and/or the potential danger to the peace represented by the situations in which these violations took place. I refer to the well-known instances of Namibia, South Africa and Rhodesia. But equally serious and systematic infringements of human rights are taking place in other quarters or continents – and to the detriment of whole metropolitan populations – which escape United Nations condemnation merely because Charter rules are being *applied* in an incomplete manner. This does not mean, in our view, that in such cases there are not gross violations (or no gross obligations !). The United Nations "partiality" in the field of human rights is analogous to the "partiality" of application – but only of *application* – of the principle of self-determination noted *supra*, paragraph 17.

(ii) As regards the equally vital second point – namely "non gross" violations – there is nothing in the United Nations Charter implying that violations of human rights which do not qualify as "gross" and take place in circumstances in which they do not determine (or do not determine as obviously or directly) a threat to the peace are condoned by the Charter. In particular, the possibility for the United Nations to circumvent their lack of a general enforcement power in the field of human rights, by having recourse to the finding that given situations constitute threats to the peace, is a positive asset which should not be renounced in the field of human rights or in any other. This does not imply, however, that whenever such a finding does not materialize, there are either no violations or no obligations susceptible of violation. Apart from the absurdity of making the existence of an obligation dependent on the dimensions of its . . . violation, one would thus

throw out of existence a good many among the obligations set forth in the Charter in many areas. It seems more correct to understand, with regard to human rights, that their universal observance everywhere was considered by the authors of the Charter as a *general indirect condition* for the maintenance of *peace and security* (and *friendly relations* among States). The fact that some particularly "gross" violations of human rights represent *actual* threats to the peace does not mean that whenever no such threat is involved there is no violation (or, as some theories seem to imply, no obligation !).

The truth seems thus to be that the Charter obligation to respect and promote human rights covers the "gross" cases as well as the "small" ; or, more precisely, that there is no such distinction. For obvious reasons we must set aside here any discussion of the distinction, accepted in the ILC project (Article 19) [55], between "international *crimes*" and "international *delicts*" as applicable to human rights (Article 19.3 *(c)*). We only wish to stress incidentally that the examples indicated in the cited provision – felicitously non-exhaustive – should be very carefully considered in the light of *both* the comprehensiveness of the concept of "serious breach on a widespread scale of an international obligation" concerning human rights, *and* the distinction between what is "serious" and "widespread" and what is or appears to be less "serious" and "widespread". Human beings are delicate objects of State conduct in whatever their numbers.

25 *ter*. Another matter, of course, is the question whether the Charter obligations concerning human rights have now moved from the sphere of conventional law into the higher sphere of customary law binding all States, as asserted by the International Court of Justice in the *Barcelona Traction* case [56].

This is not the occasion, of course, for us to express a considered opinion on the difficult question whether such general rules of customary international law are actually in existence. The Court's *dictum* itself is not a very clear one, either with regard to the nature of the general obligation to respect human rights *erga omnes* States (as distinguished from the obligation of a State "vis-à-vis another State in the field of diplomatic protection") [57], or with regard to the sources of the general obligation in question [58], or with regard to the value of the "legal interest" which "all States have . . . in its observance" [59]. Here we must reserve our judgment. We want to note, however, that in so far would an *erga omnes* legal obligation exist to respect human rights as there also existed the correlative right or "legal interest" of *omnes* States. Such a right or legal interest, in its turn, should be such – for

the right and the obligation to exist – as to confer upon every State some legal capacity to claim compliance and thus *indirectly* protect the victims of infringements, irrespective of nationality, even if such capacity were *not* to include – as would be difficult to demonstrate that it include – title to a reparation comparable to the reparation to which a State is entitled in the field covered by the diplomatic protection of nationals. For the *erga omnes* obligation (and the correlative right) to exist, it would not instead be indispensable that *ad hoc* provision be made (as in the European Convention and other instruments) for every State to be able to "lodge a complaint" *with an international body*[60]. Most international rights of States are unaccompanied by such provisions : which does not purport that the States having title to the right do not have *any* capacity to *seek* compliance with the corresponding obligation. There is, of course, "protest" : but there are other means as well (*infra*, paras. 64 et seq.)[61]. The International Court of Justice has made here perhaps – with respect – some confusion (or failed to distinguish) between the "capacity to protect" and the "problem of admissibility" of a claim, on one side, and the title to reparation and to given kinds of reparation, on the other side. It is also making some confusion between "capacity to protect" and to claim compliance, on one side, and the availability of international institutions and procedures through which a State (or possibly the individuals themselves) can seek compliance, on the other side.

Be that as it may, of all this, the Helsinki texts of Principles VII and VIII represent, together with the Third Basket – and disclaimer of legal value notwithstanding – a set of interpretative and specifying statements. Their presence may prove to be of some value as a further piece of evidence of the weight and significance of those provisions and *possibly* as a contributing factor to the "universalization" of the relevant Charter rules into those general rules of customary international law of which the International Court of Justice problematically asserted the existence in the *Barcelona Traction* Judgment[62].

25 *quater*. Also with regard to the 1948 Universal Declaration on Human Rights, Principles VII and VIII represent, as noted by others, a contribution to the specification of the humanitarian obligations set forth in the Charter and possibly a contribution to the development of the Charter provisions into customary rules applicable amongst all States[63]. It has been noted that the relevant paragraph of Principle VII of the Helsinki Declaration refers to the Universal Declaration as a source of *obligations*.

With regard to the United Nations Covenants on Human Rights, the view has been expressed that the reference contained in the last paragraph of Principle VII might prove to be – in that it expresses not an indiscriminated *renvoi* (to positive *and* negative clauses), but a commitment to observe their positive provisions – a weakening of the "escape clauses" of those Covenants [64]. In addition, as already noted by others, the Helsinki Principle VII – and this is a reason why its reading must be complemented by the reading of the whole Final Act – may be of help, together with the Third Basket commitments, in the interpretation/application of certain provisions of the United Nations Covenants, thus contributing to the reduction of the negative effects of the "escape clauses" [65].

From the viewpoint of the *quality* of its substantive content (although not from the point of view of procedure) the seventh principle of the Helsinki Declaration can well stand comparison, as a *synthesis* of essential tenets, with the European Convention on Human Rights signed in Rome on 4 November 1950.

With regard to all the coexisting instruments, the Final Act's provisions considered in the first section of the present chapter are to be considered, in our opinion, as cumulative, whatever were to be the nature – juridical or non-juridical – of the Helsinki document. This means that the humanitarian clauses of Principles VII and VIII, and those of the Third Basket, must be always understood as adding to, never as detracting from, previous international undertakings in the field of human rights.

26. Of greater relevance from the point of view of our present task is the relationship between existing instruments or rules and the Final Act with regard to the *implementation* of human rights obligations. There are here first of all the contractual ways and means of implementation of human rights obligations, namely those ways and means which may be available to the CSCE States under any applicable international humanitarian instrument of a conventional nature or under the United Nations Charter itself; secondly the ways and means available to those States (for the same purpose) under general international law.

With regard to contractual instruments I refer you to the numerous studies on the matter [66]. I would just recall, for a tentative comparison with the Helsinki provisions on implementation and verification and in view of an assessment of the impact of the principle of non-intervention of a State *versus* another:

(a) The implementation measures of the European Convention on

Human Rights (Articles 19 to 59); of the European Social Charter (Articles 21 to 29); of the Convention on the Elimination of all Forms of Racial Discrimination (Articles 8 to 16); and of the 1966 Covenants of Human Rights (Articles 16 to 23 of the Covenant on Economic, Social and Cultural Rights and Articles 28 to 45 of the Covenant on Civil and Political Rights) and those of the Optional Protocol to the Covenant on Civil and Political Rights. One should also consider, *inter alia*, the measures contemplated in Articles 22 to 34 of the Statute of the ILO, Article VIII of the Statute of UNESCO, etc. These are all, obviously, more or less *ad hoc* procedures aimed at securing, or attempting to secure, compliance with international obligations to respect *either* human rights and freedoms or self-determination in general *or* specific human rights or freedoms relating to particular fields, such as labour or culture.

(b) The implementation "facilities" of humanitarian obligations which may be available to a CSCE State under the Charter of the United Nations.

26 *bis*. To begin with the category of more-or-less specific, *ad hoc*, means, the implementation systems mentioned under *(a)* above differ quite considerably among themselves in sphere of application. In addition to the variations deriving from the degree of States' participation in each instrument, there are variations depending on the presence or absence of an acceptance by any State of implementation measures or of given implementation measures, whenever such measures are either qualified as optional in the principal instrument itself (as is the case with the settlement procedure instituted by Articles 41 and 42 of the United Nations Covenant on Civil and Political Rights) or placed in an international instrument distinct from the principal, as is the case with the protocols to the European Convention of 1950 and of the protocol to the 1966 Covenant on Civil and Political Rights. In each particular case arising between the CSCE States one will have therefore to see whether any of the instruments in question is actually in force between the CSCE States concerned. Once that condition was met, there would be no doubt that the implementation means envisaged would be applicable. Title for applicability would derive both from the relevant instrument *per se* and from the Final Act's provisions themselves such as the provisions on "follow up" envisaging multilateral co-operation within and without existing organizations and the statement of the eighth paragraph of Principle VII of the declaration. That paragraph surely refers to *any* instruments

which may be in force between any CSCE States when it pledges the participating States to

> "fulfil their obligations as set forth in international declarations and agreements in this (human rights) field, including, *inter alia*, the International Covenants on Human Rights, by which they may be bound".

All the instruments non-exhaustively mentioned under *(a)* above are thus recalled for the purposes of implementation as well as from the point of view of substance.

As you know, the various multilateral instruments possibly relevant provide for different kinds of implementation procedures, which may be classified, *grosso modo*, into three main types [67]. The milder and most frequent measure is the submission of periodical implementation reports by the participating governments and the consideration thereof by permanent or *ad hoc* bodies, such consideration possibly to be followed by "compliance recommendations" to the States themselves [68]. Another type of measure is the procedure for the settlement – or contributing to the settlement – of the disputes between participating States with regard to the application of the substantive human rights provisions, such procedures ranging from mere fact-finding to some form of conciliation, and possibly (but less frequently) arbitration or judicial settlement. The third and most advanced form, although the most infrequently accepted, are the procedures open to the direct presentation of individual or group complaints, petitions or allegations to an international body, for such a body to consider the case and proceed either by way of an opinion or recommendation or, less frequently, by decision.

Compared with the general implementation and verification measures contemplated in the Helsinki Final Act (*supra*, paras. 21 et seq.), all three types of measures are, so to speak, more "penetrating". In the measure in which they happened to be applicable between any CSCE States, one could presume in general that the Final Act's substantive provisions on human rights and self-determination – together with the substantive provisions of existing instruments they expressly or implicitly recall – are more extensively and effectively guaranteed by the procedural devices of those same existing instruments than by the "follow-up" devices "newly" envisaged in the Final Act itself. The latter are obviously less exacting upon States.

26 *ter*. In addition to the duty of member States to co-operate in the field of human rights and freedoms (and self-determination) set forth in

Articles 55 to 56, the most relevant Charter provisions for purposes of implementation of human rights obligations – whether the latter derive from the Charter itself or from other instruments or rules – are the articles and rules under which United Nations bodies may operate in the field (Assembly, Economic and Social Council, Human Rights Commission, etc.). In addition to the right directly or indirectly to participate in the activities of such bodies, in addition to the right to co-operate under Article 56 and in addition to the right to take any initiatives permitted by the rules governing the said activities, every member State of the United Nations enjoys the right to take an initiative under Article 35 with regard to disputes or situations – obviously including disputes or situations relating to the implementation of human rights obligations – with a view to provoking United Nations action (in a general sense) within the framework of Chapter VI, Chapter VII or Article 94 of the Charter itself. A Member may also promote United Nations humanitarian action under Articles 10 to 14 of the Charter. Any CSCE State participating in the United Nations is so entitled both by nature of its membership in the Organization and by nature of the explicit *renvoi* to the Charter contained in the cited eighth paragraph of Principle VII of the Declaration. Further references to the United Nations or to the Charter are to be found in paragraphs 3 and 4 of the preamble to the declaration, in paragraph 1 of Principle IX and in paragraph 3 of Principle X. Any CSCE State can thus bring to the United Nations any issue it may wish to take with another CSCE State with regard to the latter's performance in the field of human rights or self-determination, whether under the Charter itself, under the Covenant of 1966 or under any other instrument that the claimant State may consider relevant for it to draw a substantive right to see human rights respected. The object of the claim of a CSCE State before the Council or before the Assembly could naturally be not only the merits of the conduct of another CSCE State with regard to human rights, but also a State's degree of compliance with the obligation to co-operate in the field within and without the organization as set forth in Article 56 of the Charter and in the Final Act's *renvoi* to co-operation within and without existing international organizations.

This emphasizes the role of the United Nations as a general machinery of co-operation in the implementation of the Final Act (as of any other international instrument of security or co-operation) : and it goes without saying that the role of the United Nations finds a complement in the role which any United Nations Specialized Agency

could play in ensuring or facilitating co-operation between CSCE States in the area of its humanitarian activity.

Compared with the means of implementation and verification directly envisaged in the Helsinki document (bilateral and multilateral co-operation of the CSCE States in general and CSCE review and verification meetings, such as the imminent Belgrade meeting), the means available under the United Nations Charter are normally wide open to the information media and to the public. They thus acquire a higher degree of effectiveness as a deterrent against violations and as an instrument of pressure for compliance. At the same time, and because of this very feature, United Nations procedures might presumably prove to be less palatable to CSCE States (as to any other States), in proportion. It would seem thus likely that CSCE States prefer the relative "privacy" of bilateral or multilateral diplomacy (in a narrow sense) and the "closed doors" procedure practised rather successfully during the three phases of the main CSCE conference and extended to all future meetings, including the Belgrade meeting. But all will depend, of course, on the kind of relations that will develop between CSCE States as long as the process of détente hopefully proceeds and gains momentum in Europe and elsewhere.

As regards the relationship between implementation procedures under the United Nations Charter or under contractual *ad hoc* instruments, on the one side, and Final Act "follow-up" procedures, on the other side, we would be inclined to believe that the two sets of procedures could be resorted to – *le cas échéant* – cumulatively. The lack of institutionalization of the CSCE and the problematic nature of the Final Act seem to exclude that CSCE implementation procedures possess a "primacy" in time, in the sense that a CSCE State would have to resort to CSCE procedures *before* taking any possible action under the Charter or any other instrument. Here again, however, things might change according to the actual development of the process initiated by the signature of the Final Act in the summer of 1975.

27. Under general international law and diplomatic usage every State is entitled to claim that another State is violating an obligation to the detriment of the claiming State's right or to protest such a violation. If one accepted the Hague Court's view that respect for human rights and fundamental freedoms is the object of a rule of international custom (*supra*, para. 25 *bis*), the right to claim compliance and to protest violations would belong to every existing State. Were the International Court's view unacceptable, that right would belong to

the States parties to the instrument under which the obligation and the corresponding right is invoked.

The right in question undoubtedly belongs first of all to all the members of the United Nations, the substantive obligations involved – and the "correlative" rights – being those deriving from the provisions of the Charter (cited in para. 25). Every Member of the United Nations is entitled to claim compliance and to protest against violations. It is perhaps worth stressing that any CSCE State participating in the United Nations is so entitled independently from any procedural rules of the Charter, *merely on the basis* of the cited substantive Charter rules concerning respect for human rights and fundamental freedoms or self-determination and the *general rule* of international law under which any State is entitled to protect its rights and seek compliance with the corresponding obligations.

A similar title – to claim compliance under general international law – derives for all participants, from any other instrument setting forth international obligations (of a State towards other States) to respect human rights and fundamental freedoms – or self-determination. This applies, for example, to the substantive humanitarian obligations deriving, for any CSCE State, from the United Nations Covenants of 1966 and/or the European Convention to which it was a party. Also these obligations – as between any CSCE States reciprocally bound by them – are subject to the general rules of international law with regard to implementation, regardless of any *ad hoc* procedures made available to single individuals or groups, or to States themselves.

Considering that under general international law States are also entitled, within limits to be discussed (*infra,* especially paras. 36 and 68), to resort to some non-military measures of coercion, the means of implementation directly considered by the Final Act are again, in comparison, among the "mildest". The Final Act remains, in absolute, very respectful of the susceptibilities of the sovereign powers. By the "review" meetings the Final Act goes just a bit beyond the *simplest* among the most friendly and conciliatory diplomatic procedures represented by *appeal* to compliance and *protest* against violation.

27 *bis.* The arguments which are being opposed against the validity of the human rights clauses of the Helsinki Act are often so absurd that it is not superfluous to add that the considerations developed in the present section concerning the humanitarian *obligations* of participating States, whether such obligations were created or simply recalled by the Final Act itself, apply with equal force to the corresponding *rights*

of all the other participating States to see those obligations honoured.

As everybody knows, the lack of institutionalization of the so-called "society" or "community" of States excludes the possibility of international obligations vis-à-vis a corresponding collective entity situated "over and above" States and possibly vested with international personality. It follows that the *pendant* of any international obligation of a State is simply the "correlative" right of one or more other States.

The situation is not any different with regard to the humanitarian obligations incumbent upon States. Were one to admit with the International Court that respect and promotion of human rights and fundamental freedoms are the object of a customary rule addressing itself to *all* States (*supra*, para. 25 *ter*) every State would be invested with the correlative right to see those obligations honoured. Were one not to accept that doctrine, and believe that human rights obligations are only a matter of a treaty law, the correlative rights will be vested only in the States which participate in the United Nations Charter, in the United Nations Covenants, in the European Convention or in any other relevant instrument. The same should be said of the Final Act.

However, the existence of the "correlative" right, which is but the "positive" facet of the juridical relationship of which the obligation to respect human rights is the "negative" side, is cast into serious doubt by some writers on the ground that, unlike the case of violation of the rules on the treatment of foreign nationals, where the State to which the person belongs is entitled to obtain reparation, no such title would exist in favour of a State with regard to the violation by another State of the latter's human rights obligations to the detriment of its own (the latter's) nationals. For the "correlative right" to exist the relevant instrument or rules should provide for the creation of some international body to which at least a State – if not the individuals themselves – could resort in order to put in a claim against the offending State.

We do not believe this view to be a correct one. Apart from the fact that in the absence of a corresponding international right of one or more other States there would be no international obligation either, a State may well be entitled to a right under international law even if the right is of such a nature that its violation would either not give rise to any title to a reparation or give rise to a title to reparation of a kind different from the reparation which a State can claim for damage suffered by one of its nationals. Human rights obligations are certainly not the only kind of international obligations the violation of which does not give rise to a title to a reparation of the kind normally

attached to the responsibility of a State for the violation of the rules concerning the treatment of foreign nationals. This is not the occasion for us to expand on the question of damage as an indispensable, or as a *possibly* dispensable, condition of the international responsibility of States. The International Law Commission is still working on the matter. In the case of infringement of human rights obligations the States participating in the instrument from which the obligation derives *do suffer*, in our view, *a damage*. There are moral damages ; and there is mainly the concrete damage involved in the short or long term dangers to peace and security which derive from lack of adequate respect for human rights and freedoms anywhere. That would constitute a sufficient basis for the title of any contracting State to enjoy the "correlative" right and seek satisfaction thereof (however difficult it might prove to be to determine reparation in case of non-compliance).

Nor is in our opinion an obstacle – to the existence of the "correlative right" – the fact that a redress procedure before an international body was not available (*supra*, para. 25 *ter*). Again, this is not a condition *sine qua non*. There are other means through which a State can seek satisfaction – at least *some* satisfaction – of its rights.

It has been stated that :

> "Among the community of States Parties to the United Nations Covenant on Civil and Political Rights which have made declarations under Article 41.1 the right to seise the Human Rights Committee of an allegation that the other State is not giving effect to the Covenant is . . . an *actio popularis*" [69] ;

and it has been added, quoting a well-known *dictum*, that :

> "In acting under Article 41, the complaining State is, similarly as a State Party to the European Convention on Human Rights, 'not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather bringing before the Commission an alleged violation of the *ordre public* of Europe', which, transposed into the setting under the Covenant, means seising the Human Rights Committee of an alleged non-compliance with the standards defined therein. The same applies, of course, in the case of inter-State complaints under the Racial Discrimination Convention [70]."

Would a consequence of this discourse be that where the procedure of Article 41.1 of the Covenant did not apply and where the whole

Covenant were not in force there would be no *ordre public* (of the United Nations universe) and therefore no *actio popularis*, and thus no claim to compliance and no claim for non-compliance with the human rights obligations deriving from the Covenant or from the United Nations Charter ?

In our opinion, it might be that the high degree of affinity at present existing with respect to fundamental rights among the States participating in the European Convention of 1950 justifies the notion of the existence of an *ordre public* of Europe. But even if such were the case, it would be difficult to apply the same notion among all the States which are likely to participate in the United Nations Covenant on Civil and Political Rights. Be that as it may, we believe that even if there were such things as an *ordre public* of Europe and an *ordre public* of the United Nations together with the corresponding inter-individual community, or any *Ersatz* thereof any State complaining of a human rights infringement under the cited article of the Covenant or under Article 24 of the European Convention, complains of a violation of *its own right* in the only – or at least the first – place. It does so precisely on the basis of international law as it applies in a *State to State* relationship (*infra*, paras. 58 et seq.) and not as a matter of *actio popularis* within a legal order of *mankind* or of any portion thereof. If – as is quite possible – the same State's complaint qualifies simultaneously as an *actio popularis* (on behalf of individuals) within some legal system *other* than international law itself as properly understood, so much the better. So much the better, in particular, if one were able to identify a *regional public law* of Europe or a *universal public law* of the United Nations within which such *actiones populares* by States on behalf of individuals could find their place. But no enthusiasm for international or supranational *actiones populares* should help any State to get away with the notion that there is no right of a State to seek and obtain compliance with the Charter, the Covenant or any other source of international obligations to respect human rights.

Indeed, it is just on the basis of absence of procedural devices that some governments – and writers – deny the existence of the "correlative" right. But under such a doctrine there would remain really little room, if any, for international obligations in the field of human rights except in favour of foreign nationals.

Although the existence of a "correlative" right went without saying for the Final Act as well as for any other relevant instrument, it was given useful expression in the second of the so-called "final provisions" of the Helsinki Declaration of Guiding Principles :

"The participating States express their determination fully to respect and apply these principles . . ., in all aspects, to their mutual relations and co-operation, *in order to ensure to each participating State the benefits resulting from the respect and application of these principles by all*[71]."

CHAPTER III

NON-INTERVENTION BY A STATE IN THE INTERNAL OR EXTERNAL AFFAIRS OF ANOTHER STATE

Section 1. The Codification of Non-Intervention in the American Hemisphere (1933-1948)

28. In order to deal properly with non-intervention one better first look at what there was, with regard to that principle, prior to its formulation (1973-1975) as one of the ten "Guiding Principles" in the Declaration of the Helsinki Final Act. As an express formulation of a distinct principle the definition of non-intervention was in a sense, at the CSCE, an imported product, especially so in comparison with human rights.

We shall thus consider in the following order, yet as briefly as possible : (i) the codification of the principle in the Americas ; and (ii) its development in the "law of the United Nations". Then we shall revert to the Helsinki definition.

It is common knowledge that the initiatives which ultimately led to the codification of non-intervention were taken mainly by the Latin American Republics in order to achieve the condemnation of forms of resort to force short of war which, since about the time of their access to statehood, had afflicted their relations with Europe and – mainly – with the United States [72]. As noted on a previous occasion [73], the main cause of the relatively greater frequency of resort to force short of war in Latin America was – and, in a measure, still is – the relatively higher degree of inequality in military weight existing between single Latin American Republics one the one side and certain European powers or groups of powers – or the United States – on the other side. It was mainly because of this factor, combined, of course, with other elements of a political, economic, social and cultural nature, that while in the relations among the powers of Europe forcible actions by one party against another resulted as a rule into full-scale war, similar actions by outsiders in Latin America resulted rarely in a war. It is easy to perceive that the very concept of forms of coercion "short of war" is linked with episodes of the kind of those for which a number of European powers

and/or the United States took – and take – the responsibility in Latin America. This is how an autonomous principle of non-intervention was codified mainly – at least until about the Second World War – within the inter-American region [74].

The phases of that development – in so far as conventional international law is concerned – were essentially the pre-Montevideo (1933) period, the Montevideo Convention on Rights and Duties of States of 1933, the Buenos Aires Conference of 1936, and the Bogotá charter of the Organization of American States (1948).

29. Leaving aside, for the sake of brevity, that preparatory period which goes back to Bolivar [75], one of the main initial formulations of non-intervention was the first article of Project VIII, 1925, of the American Institute of International Law, that project being entitled the "Fundamental Rights of American Republics". According to the relevant article, submitted in 1927 to the Rio Session of the International Commission of American Jurists :

> "No nation has a right to interfere in the internal or foreign affairs of an American Republic against the will of that Republic. The sole lawful intervention is friendly and conciliatory action without any character of coercion." [76]

The International Commission of Jurists did not manage, however, to adopt that text at the Rio Session (1927). It adopted instead a formulation which is based exclusively on the term "interfere". It read : "No State has the right to interfere in the internal affairs of another." [77] Interesting variations had been put forward at the Rio Session by Haiti and Mexico, by Paraguay and by Argentina [78].

It was thus on the basis of the quoted shortened formulation that the matter of intervention was discussed at the Sixth (1928) Panamerican Conference at Havana, marked by a struggle between the Latin Americans, who aimed at the approval of a doctrine of "absolute non-intervention" that might have gone so far as to condemn even the exercise of the diplomatic protection of citizens abroad, on the one hand, and the United States which resisted such a doctrine, on the other hand. The United States delegation proposed instead a formulation spelling out, together with a general statement on the right of nations to independence, to the pursuit of happiness and to development "without interference or control from other States", the duties of States towards foreigners and the right of diplomatic protection and "interposition" [79]. Failing agreement, the matter was left for a more propitious occasion [80].

30. Less inconclusive, albeit once more unsuccessful, was the attempt made at the Seventh Panamerican Conference of Montevideo in 1933. That conference saw the adoption of a Convention on Rights and Duties of States, Article 8 of which provided that "No State has the right to intervene in the internal or external affairs of another" [81]. Article 11 partly developed that general statement by specifying that :

> "Les Etats contractants consacrent comme norme de leur conduite l'obligation précise de ne pas reconnaître les acquisitions territoriales ou les avantages spéciaux obtenus par la force, que celle-ci consiste en l'usage d'armes, en des représentations diplomatiques comminatoires ou en un autre moyen quelconque de *coercition effective*. Le territoire des Etats est inviolable, et il ne peut être l'objet d'occupations militaires ni d'autres mesures de force imposées par un autre Etat, ni directement ni indirectement, ni pour aucun motif pas même d'une manière temporaire." [82]

This time the United States, now under F. D. Roosevelt's presidency, accepted the condemnation by joining the convention. In voting in favour, however, Secretary of State Hull made a lengthy statement which amounted, according to Bemis, to saying that the United States reserved its rights by "the law of nations as generally recognized". This was obviously a substantial reservation in favour of the lawfulness of practices then not prohibited under general international law as accepted outside of the American hemisphere [83].

It had been on the eve of the same conference that the Argentine Foreign Minister, Saavedra Lamas, had presented his project of an Anti-War Treaty of Non-Aggression and Conciliation [84]. After proclaiming the condemnation of wars of aggression and the undertaking to settle "disputes and controversies" . . . only "through the pacific means established by international law (Article I) after renouncing force, in particular, for the settlement of territorial questions and proclaiming the non-recognition of non-pacific territorial arrangements or acquisitions (Article II), the parties to that treaty stated in Article III that in case any of the States engaged in a dispute

> "fails to comply with the obligations set forth in the foregoing article the Contracting States undertake to make every effort in their power for the maintenance of peace. To that end, and in their character of neutrals, they shall exercise the political, juridical, or economic means authorized by international law ; they shall bring the influence of public opinion to bear : but in no

> case shall they resort to intervention, either diplomatic or armed. The attitude they may have to take under other collective treaties of which the said States are signatories is excluded from the foregoing provisions." [85]

There followed, in Articles IV to XIV, the provisions concerning the conciliation procedure which was the main object of the treaty. "Excessive diplomatic intervention" was also condemned, again within a context of renunciation of force combined with the acceptance of a principle of peaceful settlement of disputes by consultation/negotiation [86].

In adhering to the Saavedra Lamas Anti-War Treaty, the United States reiterated the reservation made in accepting the Montevideo Convention on Rights and Duties of States [87], and the Senate reiterated the reservation when it ratified both the Anti-War Treaty and the convention [88].

31. It was again within the context of renunciation to force combined with peaceful settlement that the "triumph of absolute non-intervention" [89] was finally consummated at the special Inter-American conference held at Buenos Aires (on Roosevelt's initiative) in 1936. As everybody knows, that conference produced, *inter alia*, three relatively interrelated instruments consisting of a convention for the Maintenance, Preservation and Re-establishment of Peace (23 December 1936), a Special or Additional Protocol Relative to Non-Intervention and a Declaration of Solidarity in case of Disturbance to the Peace of America. The first convention provided for consultation and co-operation in the event that the peace of the American Republics was menaced. The protocol Relative to Non-Intervention – accepted this time by the United States without reservation – provided that (Article I):

> "The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties. The violation of the provisions of this Article shall give rise to mutual consultation, with the object of exchanging views and seeking methods of peaceful adjustment",

and Article II added that:

> "It is agreed that every question concerning the interpretation of the present Additional Protocol, which it has not been possible to settle through diplomatic channels, shall be submitted to the

> procedure of conciliation provided for in the agreements in force, or to arbitration, or to judicial settlement." [90]

By the Declaration of Solidarity,[91] the American Republics, after proclaiming "their absolute juridical equality", their unqualified respect for "their respective sovereignties and the existence of a common democracy throughout America", confirmed the consultation pledge made in the convention and reiterated, within the context of four leading principles, that *(b)* "Intervention by one State in the internal or external affairs of another State is condemned". The other three principles read :

> "*(a)* proscription of territorial conquest and that, in consequence, no acquisition through violence shall be recognized ; . . . *(c)* forcible collection of pecuniary debts is illegal ; and *(d)* any difference or dispute between the American nations, whatever its nature or origin, shall be settled by the methods of conciliation, or unrestricted arbitration, or through operation of international justice." [92]

The next main step was to be 12 years later, the inclusion of the principle of non-intervention, in a rather elaborate formulation, in the Charter of the Organization of American States (Charter of Bogotá). By Article 18 of that treaty (1948) :

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

By Article 19 :

> "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."

Section 2. The Concept of Non-Intervention as Codified in the Inter-American System

32. Notwithstanding the variations in wording which have succeeded each other from the early stages of the Inter-American

codification up to the Charter of Bogotá, the condemnation of intervention has rested upon the combination of three elements without which the word "intervention" and the equivalent term "interference" [93] would mean any action of a State towards another.

These elements are, in the following order :

(i) the nature of the action and the instruments or form thereof ;
(ii) the object or "target" of the action ;
(iii) the purpose of the action.

An implied element is of course the condition that the action of the intervening State is not consented to, or even requested by, the State against which it is committed. We shall revert to this condition further on, in connection with the Helsinki formulation of non-intervention (*infra*, paras. 52 et seq.). In the paragraphs that immediately follow we shall deal with each one of the listed elements (i-iii).

33. From the viewpoint of their nature, the actions condemned by the principle are coercive actions.

Doubly explicit in the (private) draft of 1925, where the element of coercion was stressed both by the indication that the condemned action was to be carried out "against the will" of the victim State and by the indication that the only lawful form of intervention was "friendly and conciliatory action without any character of coercion", the presence of coercion was implicit in the (private) Rio formulation of 1927 [94] to become explicit again in the Montevideo Convention of 1933. This was achieved by the explanation (of Article 8) contained in Article 11 of that Convention.

In Articles I and II of the Buenos Aires Protocol of 1936, the definition seems to be confined again – as in Rio – to the sole word "intervention". However, explicit wording from which coercion results to be an indispensable element of condemned forms of intervention is contained not only in Articles I and II of the Protocol, but also in the other two instruments adopted at the same Buenos Aires session of the Panamerican conference. Articles I and II of the Protocol mention consultation, diplomatic channels and even conciliation, arbitration and judicial settlement as means for settling every question of interpretation or application of the Protocol itself. In their turn, the Declaration of Solidarity and the Convention for the Maintenance, Preservation and Re-establishment of Peace – both adopted as noted at the same (1936) conference – made it abundantly clear that diplomatic or third-party settlement procedures were not only lawful but actually the object of a general commitment to the use

of methods of peaceful settlement, such commitment appearing clearly as meant to coexist with the proclamation of the principle of non-intervention.

Within the framework of the various instruments adopted at Buenos Aires one could thus find more than just the negative rule on non-intervention. There were also positive enunciations about peaceful settlement of disputes resembling the essence of what was to be the third paragraph of Article 2 of the United Nations Charter. This gave the principle of non-intervention a more precise dimension. It made clear, in particular, that the prohibition extended neither to "diplomatic" intervention nor to any other peaceful, commonly accepted, means of direct intercourse or negotiation, or to such advanced, binding, "third-party" settlement procedures as arbitration and judicial process.

34. As regards the *instruments* of the prohibited coercion, the formulations of the principle – up to that of 1936 included – considered in the first place military occupation or territorial conquest, two kinds of action that always come foremost also in the general prohibition of force. This indication, however, was a part of a more general condemnation of the use of force – "direct or indirect" – obviously including so-called indirect aggression. In addition, the earlier definitions included threat of force "représentations diplomatiques comminatoires" and other means of "coercition effective". While the first term alluded essentially to ultimatum, the second one alluded, *subject* of course to the presence of *further elements* we shall deal with in the following paragraphs, to forms of economic or political pressure to be identified in due course. This is the sense that could reasonably be attributed to the "other means" of "*coercition effective*" within the general framework of the term "intervention" refined by the concept of coercion on one side and by the exclusion of the means of diplomacy and peaceful settlement on the other side. The general idea was probably to condemn, in addition to armed force, the practices known as measures of coercion "short of war" in general, including particularly – subject to limitations we shall revert to – forms of economic or political pressure.

More explicit, albeit in some parts redundant, is the language used in the Charter of the Organization of American States (Bogotá, 1948). Article 18 formulates the general definition in the same terms used in the Buenos Aires text of 1936 ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State"), where the only

novelty is the phrase "for any reason whatever" (*infra*, para. 36). The following Article 19 clearly covers the forms of coercive measures of an economic or political character which were implicitly condemned, as just noted, in previous formulations. Prohibited forms of economic or political pressure presumably include, together with any measures (especially economic) apt to bring about such drastic effects on the victim State as to amount to acts of military aggression, covered as such implicitly and unconditionally [95] – self-defence excepted – by any comprehensive condemnation of war or force (*infra*, para. 40), also those less drastic coercive measures of an economic or political character which were nevertheless susceptible of being used to "force the will" of the victim State and to obtain from it "advantages of any kind" : as such, in our view, not "innocent" and not discretionary. The delimitation of this class of economic or political measures is briefly illustrated *infra*, paragraph 36.

Rather obscure, always within the framework of the definition of the *means* or *instruments* of coercion, is, in the OAS Charter, the second part of Article 18, according to which the principle condemns not only the use of military force, but also "other forms of interference or attempted threat against its political, economic and cultural elements". As a literal interpretation would hardly satisfy – especially as regards the expression "attempted threat" [96] – one must have recourse to what the civil lawyers of continental Europe refer to as the "logical" and the "systematic" interpretation methods. The combined use of these methods suggests that the phrase in question, following as it does the prohibition of *armed* intervention and preceding the prohibition of economic or political intervention, covers those non-overt uses of armed force which are known under the expression "indirect aggression" (and consisting essentially of assistance to violent subversion) and the threat of force : both forms of coercion being not covered, either by the first half of Article 18 or by Article 19.

In addition to its conformity with the "systemic" relationship between Articles 18 and 19, the suggested interpretation is the only one compatible with the history of the principle of non-intervention and its raison d'être [97]. Unless understood in the sense of a threat of force or indirect aggression, the phrase "any other form of interference and attempted threats" would have to mean *any form* of interference *tout court* : and since *external* affairs are protected – as will be shown further on – just as well as *internal* affairs, "interference" pure and simple would have inescapably to be understood to extend to any practice of diplomacy or peaceful settlement. One would have to

conclude that the Latin American Republics, in drafting Article 18 of the Charter of the Organization of American States, did not believe any more, in 1948, in what their jurists believed in 1936. They would not have believed any more that "l'action amiable et conciliatrice sans aucun caractère de contrainte" – *a fortiori* the normal practices of bilateral or multilateral diplomacy, including the procedures of peaceful settlement of disputes, lawful in 1925 to 1936 were no longer lawful in 1948 [98].

An argument in the same direction is supplied by the Declaration of Mexico at the Inter-American Conference on Problems of War and Peace – a meeting of plenipotentiaries held (at Mexico City) from 21 February to 8 March 1945, in view of the drafting of the OAS Charter. According to the Declaration of Principles adopted on that occasion, non-intervention was still formulated in terms of ". . . no State may intervene in the internal or external affairs of another" [99]. In the imminence of the adoption of the Bogotá Charter (1948) intervention was thus still described by the term of art (which implied coercion) and by the cumulative/alternative reference to internal and/or external affairs.

35. As regards the object of intervention, the definitions considered are concordant in the sense that the condemned action may affect either the *internal* or the *external* affairs of the victim State.

Internal *and* external (or foreign) affairs are mentioned quite constantly in all the texts of Latin American origin, ever since the private project of 1925 ("internal or foreign"). The private draft of 1927, in which only internal affairs were mentioned, seems to be one of the rare exceptions of this period, if not the unique one [100]. *Both* classes are expressly indicated in the Montevideo (1933), Buenos Aires (1936) and Bogotá (1948) formulations as well as in the Mexico City (1945) definition (and in the 1949 Declaration which was to be drafted, with Latin American participation, by the ILC of the United Nations).

Although the distinction between the internal and external affairs of a State is far from absolute – and even questionable in many ways from the standpoint of international law (*infra*, paras. 58 et seq.) – the co-presence of a category of external affairs is significant in two ways. In one way, by safeguarding from intervention also matters pertaining to the external conduct or interests of the State, the definitions under review extend the area of the prohibition to a wider *spectrum* of target matters. Obviously, the area of prohibition would have been horizontally narrower if intervention had been condemned with regard to matters of internal conduct only. On the other hand, the very

inclusion of external matters has also the effect of containing the area of the prohibition and of preserving the area of lawful action in proportion. "External" or "foreign" matters are indeed the matters in which it is most usual for a State's conduct to be influenced by the diplomatic action of one or more other States. Considering that it would be simply absurd that innocent diplomatic action was to be condemned, the presence of external affairs in the "target-area" adds *strength* to the notion that only coercive action by one State towards another is condemned under the principle of non-intervention. Here again actions exempt from coercion such as the ordinary practices of bilateral and multilateral diplomacy remain, together with any initiative towards the use of peaceful settlement procedures, well outside of the area of prohibited intervention. And this could not but apply also to the case where the object of diplomatic action or settlement procedure falls into the category of "internal" affairs. In other words, whether the matters affected by the intervenor's action are "external" or "internal", the ordinary practices of diplomacy will not be hit by the prohibition [101].

36. The third qualifying element of prohibited intervention – and the hardest to deal with – is the aim or purpose of the action of the intervening State or States. Although this element has made its first appearance in the Bogotá Charter of 1948, it would be very difficult to admit that it was not implicitly present in previous enactments. Be that as it may, it was to become an express feature of all the definitions of unlawful intervention since that of 1948 included.

As mentioned in a previous paragraph, the Charter of the Organization of American States expressly prohibits, in addition to intervention by armed force, intervention by "coercive measures of an economic or political character in order to *force the sovereign will* of another State and *obtain from it advantages of any kind*" (*supra*, paras. 32 and 34). As we noted in the cited paragraph, it is in this provision, placed in Article 19 of the Bogotá Charter, that first appeared in express form those coercive measures not involving armed force which were only implicitly condemned by the less articulate formulations of non-intervention adopted prior to the Bogotá Charter. But in addition to the express *extension* of the prohibition to economic and political coercion, Article 19 of the Charter of the OAS also envisaged the express *limitation* of the prohibition to those measures of economic or political coercion which were taken in order to "force the will" of the victim State and "obtain from it advantages of any kind". Economic or political measures not aimed at *both*, "forcing the will" of

the victim State *and* obtaining from it "advantages of any kind", are thus exempt from the prohibition. It is therefore essential to understand the meaning of these two elements.

"Forcing the will" seems not to raise major difficulties of interpretation within the limits of our present problem. Complicated in other respects by the practical and theoretical issues connected with the distinction between coercion of the individual or organ and coercion of the State itself and with the distinction between "absolute" and "relative" violence, it seems unquestionable that in so far would a measure of economic or political coercion – as distinguished from physical violence – be condemnable as it was apt to condition the will of the victim State and thence its conduct with regard to a matter of direct or indirect interest for the intervenor.

Albeit of non-immediate clarity, the expression "advantage of any kind" (that the intervenor aims at securing) constitutes a further distinctive element to be added to the "coercion of the will". The phrase "advantage of any kind" would seem to mean, notwithstanding its latitude, any kind of *undue* advantage, namely any kind of advantage that the intervenor would not be entitled to as a matter of right under international law. Kinds of undue advantages, the pursuit of which would condemn the action, are an acquisition of territory, a concession to explore or exploit natural resources, the acquisition of a military base. On the contrary, whenever the purpose of economic or political pressure was to secure compliance with an international obligation in favour of the intervenor, no *undue* advantage would be sought. To read the word advantage without qualification – as encompassing even the advantage of securing the satisfaction of one's right – would be, in the case of "innocent" – and discretionary – economic or political measures (*supra*, para. 34), simply absurd.

While expressly including economic and political coercion among forms of prohibited intervention, Article 19 of the OAS Charter thus leaves some room for a reasonable use of economic or political measures in order to obtain compliance with an international obligation, whether as a matter of primary obligation or as a matter of an obligation to make reparation for a wrongful act. It should be equally obvious, on the other hand, that under that same article the lawfulness of the sought advantage would not be sufficient to save from condemnation a measure of economic and/or political coercion which was either out of proportion to the lawful purpose pursued or of such a nature and weight as to amount to an act of military aggression (*supra*, para. 34 and, also with reference to Article 2.4 of

the United Nations Charter and to the definition of aggression, *infra*, para. 40).

It seems reasonable to assume that in so far as economic and political measures were deemed to be already condemned by implication – as we would believe them to be – under the less articulate formulations of non-intervention prior to the Charter of the OAS, the prohibition would be equally confined – within the limit just indicated – to forms of economic or political intervention aimed at securing *undue* advantages. This should apply *a fortiori* to the subsequent formulations of non-intervention which include a clause similar or identical to that of Article 19 of the OAS Charter.

37. The definition of non-intervention attempted in the preceding paragraphs is endorsed by the "raison d'être" of the principle in the American hemisphere.

Latin America had been and was suffering from such actions by European powers or by the United States as those described, *inter alios*, by Alvarez [102], Bemis [103], Yepes [104] and Thomas [105]. Diverse as they were from the point of view of dimension and aims, those episodes were of such nature that the Latin American Republics would have had no reason, in order to protect themselves against their repetition, to seek the adoption of a principle of international *law* covering all the practices that the doctrine of international *relations* labels as intervention or interference.

As used in the ordinary language these terms cover any deeds or words by which a State acts or reacts towards one or more other States. This common usage fully justifies the well-known *dictum* according to which, from the literature concerning *intervention* of a State *versus* another – or, for that matter, *interference* – one must "draw the conclusion that intervention can be anything, from an address of Lord Palmerston to the House of Commons to the partition of Poland" [106]. But this is the *layman's* understanding of intervention – of unlawful *or lawful* intervention – or at most the technical meaning of that term as used by the student of international relations : a meaning which does not necessarily imply a condemnation. When it comes instead to the words or deeds covered by the principle of non-intervention as codified in the Americas up to the time of the Charter of the OAS, the condemned actions are *all but only* those, among the words and deeds covered by the ordinary terms intervention or interference, which fall within the concept of non-intervention as a term of art, namely as a legal term. This term only covers words or

deeds characterized by the simultaneous presence of the features briefly considered in the preceding paragraphs.

38. It is in view of the described features, and in the sense implied therein, that we would concur in defining prohibited intervention as "dictatorial interference" in the internal or external affairs of the State. As we understand it, the term "dictatorial" indicates the coercive character of the action combined with *either* the attempt at territorial integrity or political independence of the victim State – such attempt being inevitably associated with the use or threat of force – *or* with the attempt to secure undue advantages by "forcing the will" of the victim State, or both.

It would be therefore incorrect to assert that the prohibition of intervention, as codified in the American hemisphere, restricted in any manner the ways and means of diplomatic intercourse.

Such ways include, *inter alia*: request for information, warning of possible infringements of international obligations, protests against alleged violations [107], general or specific suggestion of adjustment of conduct with international legal rules, demands for restitution or reparation, suggestion of resort to negotiation [108], conciliation, mediation, arbitration or judicial settlement, third-party offer of good offices or mediation, suggestion of recourse to regional settlement procedures or resort thereto, resort to United Nations bodies under the Charter or other instruments [109], *requête* to the International Court of Justice [110], and any similar acts of bilateral or multilateral diplomacy constitute as many instances of innocent diplomatic action that surely could not be labelled, *per se*, as forms of unlawful intervention. The principle of non-intervention is not violated either by an appeal of one State to another, whether public or private, to adopt any lawful course of behaviour or to accomplish an act – such as an act of leniency – which the appealing party may deem to be *désidérable* albeit *not* due on the part of the State to which the appeal is addressed. Equally lawful, albeit possibly unfriendly, are any critical evaluations privately or publicly made by the officials of one State with regard to the régime or government of another State, or given aspects or policies, or given actions or omissions, thereof [111]. Among the latter would fall the instances presumably referred to by Winfield's phrase "a speech of Lord Palmerston's in the House of Commons".

To be sure, the preoccupations of the Latin American Republics in the critical period of the late nineteenth and early twentieth century led to occasional outbursts against "diplomatic intervention" or to attempts at securing a condemnation of "excessive diplomatic inter-

vention" [112] (at the side of those "représentations diplomatiques comminatoires" which were condemned in Article 11 of the 1933 Convention on Rights and Duties of States (*supra*, para. 30). "Interposition", particularly in connection with the diplomatic protection of nationals was also the object of attack by one side and of defence by the other side. Concomitant instruments and *travaux préparatoires*, however, concur with common sense and with the described *ratio* of the principle of non-intervention to prove that all these diplomatic devices went intact through the process of codification of the principle under discussion. By suggesting that one extend the prohibition to "excessive diplomatic intervention" or to "représentations diplomatiques comminatoires" one really sought to condemn the element of coercion by threat (of military or other force) which may accompany otherwise innocent diplomatic representations [113].

A piece of evidence supporting this interpretation is to be found – assuming it was wanted – in the 1949 reporting by the International Law Commission on the work it had devoted to the draft Declaration on Rights and Duties of States. As noted earlier, that Declaration includes a statement of the principle of non-intervention, reproducing the shortest formulations of the twenties and thirties : "Every State has the duty to refrain from intervention in the internal or external affairs of any other State." The main point of interest to the present discussion is that the Panamanian original draft on the basis of which the Commission proceeded to the elaboration of the Declaration included an Article 8 dealing with diplomatic protection of nationals under the title "Diplomatic Intervention". The discussion by the Commission [114] of that article – an article finally left out of the draft declaration – shows that the members of the ILC shared the view that the matter covered by the proposed article fell *wholly outside* of the subject-matter covered by the principle of non-intervention. That principle, originally covered by the distinct Article 5 of the same comprehensive Panamanian draft, was finally covered by Article 3 of the text adopted by the Commission ; but neither text touches upon the matter of *diplomatic* protection or intervention. In discussing the title and the drafting of the Article 8 which Panama had proposed in order to cover this subject, the Panamanian jurist himself, Mr. Alfaro, stated that the word " 'intervention' must be replaced, wherever it appeared in Article 8, by the word 'intercession' or 'interposition' " : this, he added, "in order *to avoid any confusion with the intervention mentioned in Article 5 of the* (Panamanian draft) *declaration*" [115]. Article 5 was the article which was to be finally adopted by the Commission as Article 3 on the duty to refrain from intervention.

Section 3. Non-Intervention and the Law of the Covenant (1919-1945) and of the United Nations Charter

39. At the time when the principle of non-intervention was taking shape in treaties among the Republics of the American hemisphere a rule of the same denomination did not exist at general – "universal" or quasi-universal – level. The tendentially "universal" instrument within which the inter-American legal principle of 1936 could have found a place was the League of Nations Covenant. But although that instrument condemned – with exceptions – wars of aggression (Articles 12 to 16) and, less decidedly, the threat of war (Articles 16, 10 and 11), which were part of the acts constituting, according to the inter-American definition, forms of prohibited intervention, it did not condemn all such acts. Furthermore it did not use the term "intervention". Nor was this term used in the Covenant's provision (para. 8 of Article 15) which, by excluding the League's competence to make recommendations with regard to disputes over matters of domestic jurisdiction, was the antecedent of Article 2.4 of the United Nations Charter. Be that as it may of Article 15.8 which is inapplicable, in our opinion, to intervention by States the prohibitions contained in the cited rules of the Covenant condemning resort to war or threat undoubtedly covered part of the ground covered by the inter-American prohibitions of intervention as formulated in 1936 and 1948. The common ground was to be further enlarged by the instruments which were adopted during the inter-war period in order to fill in the "gaps" of the Covenant. I refer mainly to the Pact of Paris (Briand-Kellogg) of 1928.

There remained, with the inter-American principle of non-intervention, substantial differences. The Covenant did not seem to condemn any use or threat of military force short of war. Far less did the Covenant (or the Paris Pact) condemn coercion effected by political or economic pressure of a certain degree. These "gaps" in the League system were not less serious, from the inter-American point of view, than the "gaps" generally lamented by the Europeans : and they would have been wide enough for the prospective victims of intervention in the American hemisphere to seek the protection of the law by an *ad hoc* principle even if the United States had become a member of the League of Nations [116].

40. Be that as it may of the League period, the acts of coercion covered by the inter-American principle are at present covered, albeit not under the denomination of non-intervention, by the United

Nations Charter. As just noted, the Charter does use the term "intervene" in Article 2.7, with regard to the activities of the United Nations. Yet there are sufficient reasons to believe that this provision does not address itself at all to the intervention of a State in the affairs of another. This kind of intervention is covered instead within the Charter, though under a more general denomination, by the sweeping prohibition spelled out in Article 2.4.

Indeed, Article 2.4 of the Charter explicitly condemns, not just war, but force, violence ; it condemns not just war, or violence or force, but also the threat thereof. It condemns such actions, not only when intended against the territorial integrity but also when intended against the political independence of another State. Article 2.4 condemns, in addition – by its last phrase – any threat or use of force which either *per se*, namely by the use or threat of force itself, or because of the effects of such use or threat of force, were incompatible with the purposes of the United Nations. As everybody knows, those purposes range – according to Article 1 of the Charter – from the safeguard of peace and security to the peaceful settlement of disputes ; and from the development of friendly relations among nations to the respect for equal rights and self-determination of peoples, to economic, social and cultural co-operation – notably in promoting human rights and fundamental freedoms for all – and to the harmonizing of the action of nations. If the threat or use of force is condemned not only when used to the detriment, actual or potential, of the territorial integrity or political independence of another State, but also when used inconsistently with such an impressive list of purposes, it represents surely a very thorough condemnation of coercion.

It is thus justified that everybody agrees that Article 2.4 condemns not only the direct use of armed force but the indirect or covert use of armed force (the so-called "indirect aggression"). It is also justified to believe, in our opinion, that the term force means more than just *armed* force. Indeed, the prohibition contained in Article 2.4 embraces also measures of economic or political pressure applied *either* to such extent and with such intensity as to be an equivalent of an armed aggression *or*, in any case – failing such an extreme – in order to force the will of the victim State and secure undue advantages for the intervenor [117].

Whatever the situation may have been at the time of the League, it would be difficult not to see that notwithstanding the failure of the Latin American attempt to obtain the inclusion of a principle of non-intervention *as such* among the Charter principles [118], the actions

prohibited under the inter-American definitions of 1936 and 1948 are also prohibited under the Charter. In other words, when, in 1948, the American Republics adopted that OAS Charter which was to embody the most articulate among the definitions of non-intervention considered so far, the area of prohibition redundantly covered by that text conformed in substance not only with the area of prohibition covered less articulately by previous regional definitions of non-intervention itself, but also with the area covered, under a different and wider denomination, by the United Nations Charter prohibition of quasi-universal application. Whoever had opposed the Latin American attempt had done so pretty much in vain.

It was of course regrettable that some textual co-ordination was not achieved between the two principles, either at San Francisco or at Bogotá. We noted here on a previous occasion that the coexistence of the two unco-ordinated formulations is detrimental to the problematic effectiveness of both principles [119]. There is little doubt, however, that the substance of the inter-American prohibition has been covered since 1945 by the United Nations Charter. That such was the case was to be confirmed just one year after Bogotá by the express inclusion of non-intervention – as recalled earlier (para. 38) – in the draft Declaration of Rights and Duties of States. There is no indication, in the ILC reports, that in the course of the discussion of paragraph 3 of that draft, any members of the ILC entertained any doubt that the principle of non-intervention should be dealt with taking the most accurate account of the United Nations Charter. There is actually abundant evidence to the contrary [120]. It would have been indeed absurd that the drafters of a text codifying existing rights and duties of States and meant to be recommended as a code of conduct to the Members of the United Nations (possibly to be extended to non-members under Article 2.6) include into the prohibition actions not prohibited under the United Nations Charter or leave out of the sphere of prohibition actions prohibited by that instrument.

41. Although it never set itself really to the task of attempting some co-ordination between the Inter-American distinct definition and the more general prohibition embodied in Article 2.4, the United Nations has not failed to play a role in the codification of non-intervention. Its main explicit contributions – following the 1949 draft Declaration (*supra*, para. 38) – have been General Assembly resolution 2131 (XX) of 21 December 1965 on the "Inadmissibility of Intervention", etc., and the relevant part of resolution 2625 (XXV) of 24 October 1970 by which the Assembly adopted the Declaration of Principles of

International Law concerning Friendly Relations and Co-operation among States [121].

As the formulation of the "duty not to intervene" in the Friendly Relations Declaration is very close to the text of resolution 2131 (XX), which had been drawn in great part from Articles 18 and 19 of the Bogotá Charter, we had better confine ourselves to a comparison of the relevant part of the Friendly Relations Declaration with the inter-American definition of 1948.

Leaving aside for a moment the denomination of the principle – a not irrelevant point to which we must address ourselves further on [122] – the first paragraph of the Friendly Relations version reproduces almost *verbatim* the tenor of Article 18 of the OAS Charter. The second paragraph, which is modelled on Article 19 of the OAS Charter, contains three variations, namely : *(a)* at the side of economic and political measures *of coercion*, there was added "any other type of measures" ; *(b)* the formulation of the purpose of the use of economic, political or any other type of coercion, namely the phrase "in order to force the sovereign will of another State and obtain from it advantages of any kind" was modified to read : "in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind" ; *(c)* a new provision is added at the end of the paragraph to the effect that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State" ; *(d)* in addition, the Bogotá Charter phrase "use of *coercive measures* . . . in order to force the sovereign will of another State and obtain" is modified to read : "use . . . of . . . *measures to coerce* another State in order to obtain from it the subordination . . .". Further novelties, *inter alia*, are a paragraph (third) to the effect that "The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention" and a paragraph (fourth) reading "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State".

42. Difference *(d)* seems to us to be not very significant. Whether the victim State is subjected to coercive measures forcing his sovereign will "or to 'measures' that 'coerce' it in order to obtain . . . the subordination of the exercise of its sovereign rights" does not seem to make much difference. A widening of the formula would seem at first sight to come from difference *(b)*, namely from the substitution of the

idea of subordination of sovereign rights to the idea of forcing the sovereign will. On the contrary, by indicating more clearly the link between the coercive action and the advantages sought by the intervenor, the United Nations formulation emphasizes the condition represented by the unjust nature of the advantages in question.

An extension of the area of prohibition might also seem to come, *prima facie*, from difference *(a)*, namely from the addition "*any other type* of measures". In our opinion, the measures of "other type" contemplated here are simply a redundance. Considering that all the measures contemplated (economic, political *and* other) are condemned – as well as the economic and political measures *tout court* of the OAS Charter – only in so far as they are such as to coerce the victim State in order to secure undue advantages for the intervenor, the presence of "other" does not seem to add any substance to the prohibition. The redundance is explained by the fact that the resolution in question (as well as 2131) did not undergo any juridical drafting by a technical body.

This consideration also explains the less obvious redundance represented by the express condemnation of "indirect aggression" set forth in the second part of the second paragraph. As a form of armed intervention, "indirect aggression" is surely covered implicitly also by the first paragraph ("armed intervention and all other forms of interference or attempted threats . . .").

43. The third and fourth paragraphs of the Assembly's 1970 formulation on non-intervention – particularly the fourth – are important explicit acknowledgments by the United Nations membership of the close connection existing between the duty not to intervene and the respect of the right of peoples to self-determination.

In condemning the "use of force to deprive peoples of their national identity" as contrary both to the inalienable rights of the peoples and to the principle of non-intervention, the third paragraph seems to refer mainly to intervention against ethnic identity in a wide sense, or *national* independence. The same paragraph would not be without significance or weight, however, in curbing forms of indigenous totalitarian rule directed either to pervert the whole people or to destroy minorities or nationalities within an ethnically composite State.

As regards the more important fourth paragraph, it concerns directly the fundamental political, economic, social and cultural choices of peoples. The word "State" is clearly a material drafting flaw easily corrected by the thought that the United Nations Charter's self-

determination (*supra*, paras. 14 et seq.) – whether that of colonial dependencies or that of the metropolis – is surely for *peoples* not for States: and the Charter prevails over the Friendly Relations Declaration [123]. Another obvious drafting imperfection in the paragraph under consideration is the idea of a State or people choosing not only its political and economic *system* but also a "cultural *system*". The choice of a cultural *system* sounds appalling. In this paragraph – the formulation of which has suffered, as well as the other parts of the text, from the exclusion of lawyers at the drafting stage – one must obviously read "State" as "people"; and the right to choose a "cultural system" must be understood as freedom, of individuals and groups, in any cultural pursuit of their choice. That the peoples are the beneficiaries of this whole provision had fortunately to be made crystal clear in 1975 by Principle VIII of the Helsinki Declaration (*supra*, paras. 14 et seq.).

Notwithstanding these obvious drafting defects, the paragraph now in question felicitously emphasizes the relationship between the principle of non-intervention and the principle of self-determination of peoples. Originally affirmed (in Latin America) for the protection of nations of relatively recent statehood, the principle of non-intervention was often expressed, and substantively conceived, in terms of a right of those very *nations* freely to develop. Even at that time a close connection with the self-determination of peoples was thus present. It is so *a fortiori* in our time, thanks to the place of honour which the principle of self-determination has acquired – albeit always as a classical rule of inter-State (or *inter-power*) conduct (*infra*, paras. 59 et seq.) – thanks to the United Nations Charter, the United Nations Covenants, the numerous Assembly pronouncements, the Helsinki Declaration and the Declaration of Algiers. Its close relationship with non-intervention – stressed in the text now under consideration – is a most important one. We shall appreciate this point in connection with the problem of protecting the wishes and choice of peoples from any conceivable abuse (on the part of their States or governments), of the sovereign possibility of inviting intervention or consenting thereto (*infra*, paras. 52 et seq).

Another feature of this part of the text would appear to be, *prima facie* the presence of the term "interference", frequently used by governments instead of "intervention" in order to reject undesired meddling in affairs they consider to be exclusively "their own". On reflection it does not seem, however, that the presence of that term is such as to purport any widening of the area of prohibited actions. The

only kind of interference – really a synonym of intervention – condemned here is interference by coercive action.

44. Another not negligible novelty of resolutions 2131 (XX) and 2625 (XXV) – and of a few other General Assembly enactments touching upon non-intervention – is to be found in the *denomination* by which the principle is indicated.

In resolution 1815 (XVII) of 1962 the third principle of Friendly Relations to be worked upon by the Assembly had been indicated (following the principle of the prohibition of force and the principle of peaceful settlement and before the "duty" to co-operate and the principles of self-determination, sovereign equality and fulfilment in good faith of international obligations) as "The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" [124]. Under the same title the principle was referred by the Assembly to the Special Committee on Friendly Relations by resolution 1966 (XVIII) of 1963.

The latter instrument indicated the various principles by a mere *renvoi* to the relevent paragraph of resolution 1815 (XVII). In resolution 2131 (XX), as well as in the title of the Assembly's item, the principle was identified as "Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty". In resolution 2625 (XXV) the title of the third principle became "the principle concerning the duty not to intervene in matters within the *domestic jurisdiction* of any State, in accordance with the Charter".

Considering that in both resolutions – 2131 (XX) and 2625 (XXV) – the qualification represented respectively by "domestic affairs" and "matters within the domestic jurisdiction" appears *only in the title* (the *text* of both instruments condemning intervention "in the internal or external affairs" in accordance with the usual denomination of the principle at Inter-American level) the double variant in the title would seem, *prima facie*, not to have any bearing on the concept of prohibited intervention to be drawn from either resolution. However, if one looks into the matter carefully one must reserve one's judgment.

Indeed :

(i) *Travaux préparatoires* of both 2131 (XX) and 2625 (XXV) – notably the General Assembly records of the preparatory phase of the Friendly Relations operation – show abundantly that : *(a)* although the matter under Assembly consideration was surely the principle of non-intervention *by a State* in another State (and not the restriction of the activities of international bodies) and although this point was made

even clearer by the frequent reference to condemnable forms of intervention such as armed attack, organization of hostile expeditions, seizure and occupation of territory, establishment of military bases, "indirect aggression" and other actions which are prohibited not just where carried out with regard to matters falling within the domestic jurisdiction of the victim, but in *any case* (with the only exception of self-defence), the objects of inadmissible intervention were discussed *almost exclusively* with reference to the concept of *domestic jurisdiction* [125] : *(b)* the principle itself was actually formulated mostly in such terms – and in view of the pursuit of such objectives (preservation of sovereignty, independence and political régime) – as to bring the tenor of the prohibition very close to the reservation of matters of domestic jurisdiction in Article 2.7 of the United Nations Charter [126].

(ii) Secondly – and going backwards in time – the resolutions of the United Nations General Assembly which, prior to the Friendly Relations operation, had touched upon intervention by States, were clearly confined to the condemnation of interference with internal affairs. Such had been notably the case of resolutions 380 (V), 1236 (XII), 1237 (ES-III) [127].

(iii) Further back in time, the same identification of the protected sphere with matters of domestic jurisdiction is to be found in a number of instruments (other than inter-American) antecedent to, or contemporary with, the elaboration of resolutions 2131 (XX) and 2625 (XXV) or to the very existence of the United Nations [128].

The above elements seem to suggest that in formulating non-intervention the United Nations membership had in mind either just Article 2.7, or a combination of the Charter prohibition of the threat or use of force, on one side, and Article 2.7 itself, on the other side. The fact that they did not insert the latter element into the *text* of resolutions 2131 (XX) and 2625 (XXV), is, of course, not to be overlooked by anybody trying to discern with accuracy the evolution of the definition of non-intervention. On the other hand, the absence of "domestic jurisdiction" in the *texts* of resolutions 2131 and 2625 is partly balanced by those provisions of 2131 and 2625 which touch upon the political, economic, social and cultural régime of the victim State. Considering, in addition, that both instruments have been adopted by purely political bodies – the emphasis in the *title* upon the element of domestic jurisdiction (in the sense of Article 2.7) cannot be overlooked simply on the basis of the fact – normally decisive in a

legal document – that the same element is not present in the body of either resolution.

Be that as it may of these contradictory signs, the presence, in the cited resolutions, of the term "domestic jurisdiction" (as drawn from Article 2.7) is bound to acquire a significance for us in that a similar element has been added to the usual inter-American language – this time in the text itself as well as in the title – in the Helsinki definition of non-intervention. It would thus seem that this element of domestic jurisdiction, *absent* in the soft-law and hard-law formulations on non-intervention in the Americas, has made first an *uncertain appearance* in the soft-law formulations through which the principle of non-intervention has been imported into the quasi-universal law of the United Nations ; and seems now to have acquired, through the Helsinki formulation, the status of a fully constitutive element of the concept of non-intervention within the framework of the Euro-Atlantic "soft law" of *détente*[129]. In view of that, the significance of the element in question for the definition of non-intervention would be better discussed within the context of the Helsinki formulation. We can content ourselves, for the time being, with the finding that the *texts* of United Nations resolutions 2131 and 2625 confirm the definition of actions prohibited as unlawful intervention, as codified in the Inter-American system, and as covered implicitly by the general provision of Article 2.4 of the United Nations Charter. Any drafting imperfections are easily corrected – considering the non-binding nature of the two resolutions – thanks also to the primacy of the United Nations Charter redundantly recalled in resolution 2625 but deriving automatically from the Charter itself.

Section 4. Non-Intervention in the Helsinki Final Act

45. The formulation of the Helsinki Declaration's sixth principle, entitled "Non-intervention in internal affairs", was, at Geneva, one of the longest to secure *consensus*[130]. It can be divided, for the purpose of analysis, into three elements of unequal length, but equal importance.

(i) Element one is the general definition in the first paragraph *minus* two phrases and *plus* the three further paragraphs (2, 3 and 4) by which the formulation continues and concludes. The portions of the first paragraph to be left out of element one would be the phrase "falling within the domestic jurisdiction" and the phrase "regardless of their mutual relations".

(ii) Another element is represented, precisely, by the first of the

latter phrases, namely the words "falling within the domestic jurisdiction" *plus* the title of the principle: "Non-intervention in internal affairs."

(iii) The last element is just the phrase "regardless of their mutual relations" by which the first paragraph closes.

46. Element one includes, in addition to a statement of very general scope set forth in the main part of the first paragraph, three specifications of that general statement set forth respectively in paragraphs 2, 3 and 4.

The general statement corresponds, with the exception of the phrases set aside as elements two and three, to the essential bulk of the inter-American definitions of unlawful intervention as they evolved, roughly, between 1925 and 1948 through Montevideo (1933), Buenos Aires (1936), Mexico City (1945) and Bogotá (1948). It consists of the term "intervention" and of the specifications of object resulting from the mention of *both* the internal and the external affairs of the victim State. A notable complement is the phrase "individual or collective". It is not insignificant that the condemnation of intervention by a group of States, usually implied in the inter-American definitions (except in the measure in which intervention by a number of States was envisaged within the framework of a collective security system) should have been made explicit in the Helsinki Final Act [131]. Also notable is the absence of the phrase "for any reason whatsoever", obviously left out in order to avoid the ambiguity that its presence might bring about with regard to the scope of that condition of unlawfulness which is the goal of the intervenor's action. Whether the principle of non-intervention is more or less redundant as compared with the prohibition of force, there are uses or threats of military force (Article 51 of the Charter) and uses or threats of economic or political measures (*supra*, paras. 34 and 36 and *infra*, 68) which do not fall under its condemnation.

47. An even more marked improvement is the paragraphs of the Helsinki formulation – second, third and fourth – specifying the general definition of the first paragraph.

Paragraph 2 refers to the use of armed force and to the threat thereof. We obviously face here the worst forms of military coercion. Paragraph 3 speaks of other acts of military, political, economic or other forms of coercion, such acts including, *inter alia*, military measures "short of war" and economic or political pressure, further specifying that the kinds of coercive actions here referred to should be designed – for them to qualify as forms of prohibited intervention –

to subordinate the exercise of the victim State's rights to the interests of the intervening party or parties and to secure for such party or parties advantages of any kind (*supra*, paras. 34 and 36). As well as the prohibition spelled out in paragraph 2, the prohibition formulated in paragraph 3 is confined again to acts of coercion. Paragraph 4 finally confirms this characterization by extending the prohibited area, from the direct and overt actions covered by paragraphs 2 and 3 to those indirect, or covert actions which consist of assistance to terrorist activities "directed towards the violent overthrow of the régime of another participating State". This last paragraph's requirement is thus even stricter than paragraph 3. Paragraph 3 envisages the exercise of coercive actions with a view to forcing the victim to conform its conduct to the intervenor's wishes in order to procure for such intervenor undue advantages of any kind. Paragraph 4 envisages, by the violent overthrow of the vicitm's régime, an action directed against that most essential element of the victim State's structure – that core of the international person – which is the régime, the government of the State. By envisaging the violent overthrow of the régime, paragraph 4 points at the elimination of the very *will* that otherwise would have to be coerced for the intervenor to be able to obtain the specific or general advantages it seeks through intervention.

If one looks at the relationship between paragraphs 2, 3 and 4 – one cannot fail to see that paragraphs 2 and 4, the first and the last of the three, cover two typical manifestations of force in a narrow sense. Paragraph 2 covers the direct use of force or threat thereof, namely aggression or threat thereof. Paragraph 4 covers "indirect aggression". Paragraph 3 covers in its turn, in addition to less drastic military measures the forms of coercion by political or economic pressure that we found to have been one of the most typical of the forms of coercion condemned by the inter-American principle.

48. It seems so far pretty clear – from the combination of the four portions of the first element of the Helsinki formulation – that the CSCE adopted in substance the "classical" definition of prohibited intervention of the Montevideo and Buenos Aires Conventions of 1933 and 1936 developed in the Bogotá Charter and as confirmed in the 1949 definition in the ILC draft declaration. In the Euro-Atlantic text one also notes the omission of those rather obscure "other forms of interference or attempted threats", which had slipped – in our view merely *ad abundantiam* – into Article 18 of the Charter of the OAS and into the corresponding paragraphs of United Nations resolutions 2131 and 2625.

Indeed, as pointed out earlier, even those imprecise and rather problematic expressions – "*other forms* of interference or attempted threats" – do not alter, if one looks carefully at the context and at the raison d'être of non-intervention, the essence of the concept. Even where those imprecise and problematic expressions appear – as in the Bogotá Charter – the essence of non-intervention remains what it was in 1925, 1927, 1933, 1936, 1945 and 1949. It remains coercive action aimed at tampering, to the undue advantage of the intervenor, with the internal and/or the external affairs of another State.

Be that as it may of earlier redundancies, *a fortiori* it will be so within the framework of the more concise Helsinki formulation. The Helsinki formulation is also exempt from such additional obscurities as those noted a moment ago in General Assembly resolution 2131 and in the relevant portion of resolution 2625. As for the close relationship with the principle of *self-determination* (felicitously stressed in resolution 2625) it is ensured, in the Final Act, by the co-presence of Principles VII and VIII, by the more decided universality of self-determination (in its *internal* as well as external aspect) and, albeit unnecessarily, by the expressly declared equality and interaction among principles. We shall revert to this relationship with self-determination very soon.

49. The second element in the Helsinki definition of prohibited intervention, namely the phrase "falling within the domestic jurisdiction" (of the victim State), brings us to an additional qualification of the condemned action. It will be noted that this is the same qualification which had made its appearance in United Nations "soft-law" instruments concerning non-intervention (notably in the title of resolution 2131 and in the title of the relevant part of resolution 2625) and on which we reserved earlier our position (*supra*, para. 44). A brief digression on the concept of domestic jurisdiction is unavoidable.

As everybody knows, paragraph 8 of Article 15 of the Covenant of the League of Nations provided that the League organ should, if one party before it so requested, refrain from recommending a solution with regard to a dispute arising "out of a matter which by international law" was "solely within the domestic jurisdiction of that party". In the advisory opinion rendered on 7 February 1923 (on a request from the League of Nations Council) in the *Nationality Decrees in Tunis and Morocco* case, the Permanent Court of International Justice defined domestic jurisdiction of a State as "matters which, though they may very closely concern the interests of more that one State, are not, in

principle, regulated by international law". As regards such matters, each State is "sole judge" ("seul maître de ses décisions"). The Court added, *inter alia*, that "the 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" [132]. This definition was reiterated or acted upon in subsequent pronouncements.

According to the generally accepted interpretation of the Permanent Court's opinion, domestic jurisdiction would have been thus defined as the area of matters with regard to which a State is free to act at its own discretion, such freedom being *not restricted by obligations* deriving from treaties or customary international law.

The provision of the United Nations Charter which has taken the place of paragraph 8 of Article 15 of the Covenant is Article 2.7, according to the relevant part of which

> "nothing 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 ; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

Notwithstanding the difference in wording, the prevailing interpretation of this provision is the same as the interpretation given to Article 15.8 of the Covenant by the Permanent Court's pronouncement of 1923. This interpretation, which seems to have been endorsed in 1954, not without a certain ambiguity in terminology, by the *Institut de droit international* [133], can thus be still considered to be the generally accepted concept of "domestic jurisdiction".

It is our opinion that the prevailing interpretation of Article 2.7 of the Charter as well as the interpretation on the corresponding provision of the Covenant, including the interpretation of the 1923 "Avis consultatif" of the Permanent Court, is not really correct. Considering, however, that a revision of such interpretation, albeit essential for other purposes, is not indispensable for the purposes of the present discourse (and would take us very far from today's subject) we deem it preferable to accommodate ourselves, for the time being, with the prevailing concept of domestic jurisdiction [134].

In the discussion that follows, therefore, we will abide by the current definition of domestic jurisdiction (or "internal" or "domestic

matters") as the area within which a State is *exempt from international legal obligations* of any kind.

50. Embodied in the definition of non-intervention, the said concept of domestic matters surely operates in the sense of restricting the area of prohibition. If the action by the intervening State is condemned in so far as the matters concerned ("*internal or external* affairs") are within the sphere of domestic jurisdiction – such being the evident impact of the phrase under consideration – it would seem inevitable to conclude, judging from the tenor of the text, that the principle so expressed would *not* condemn actions concerning matters in which the victim State was *not exempt* from international legal obligations.

Prima facie it would thus seem to be lawful for a State to intervene whenever the object of intervention was a matter with regard to which the victim State was bound by an international obligation towards the intervenor. Such a perplexing interpretation, however, should be carefully considered before taking it as a conclusion. It needs qualification from the point of view of both, (i) the *aim* and (ii) the *means* of the action that *prima facie* would be condoned.

(i) As regards the *aim* of coercive action, it should be clear that the mere existence of an obligation of State *A* towards State *B* is not adequate justification for recourse by the latter to an act of intervention. The act would be lawful only in so far as State *B* were seeking respect for his right, State *A* refused to comply and *B* intervened merely in order to obtain its due.

(ii) As regards the *means* of coercion resorted to, the mere circumstance that the intervenor sought compliance with a legal obligation, or redress for a tortious act, could not be deemed to justify – or to justify in an equal measure – the use of *any kind* of instrument of coercion. It is evident, for example, that an armed attack could not be condoned even if it were undertaken in order to secure the enjoyment of immunity from jurisdiction of an envoy of the attacking State. Considering that, for want of badly needed co-ordination between the general prohibition of force (Article 2.4 of the Charter) and the specific prohibition of intervention, the *spectrum* of actions prohibited as unlawful intervention remains so wide as to include aggression, subjugation and other forms of direct or indirect physical action as well as acts of merely economic or political pressure, a line of demarcation is apparently indispensable with regard to the impact of the qualification now under consideration. Of course, to determine with relative approximation which forms of coercion would

be justified, or to what extent, by the fact that they were resorted to outside of the sphere of domestic jurisdiction – to determine, in other words, the whole length of the line of demarcation between the kinds or degrees of coercion that the circumstance now in question would *allow* and the kinds or degrees of coercion with regard to which the same circumstance would *not* exert any extenuating effect – would lead us far from our relatively restricted object. It is self-evident, however, that at least resort to forms of intervention constituting acts of direct or indirect aggression (covered as such by the second and fourth paragraphs of the Helsinki definition of non-intervention could hardly become non-condemnable or less condemnable simply in view of the fact that they were resorted to with regard to a matter in which the victim State was under an international obligation of compliance or reparation and the intervenor was seeking to secure such compliance or reparation. Resort to such actions would not be justified except in self-defence proper.

A different matter, though, would be the resort to non-disruptive forms of that *economic or political* pressure which is contemplated in the third paragraph of the Helsinki definition. Were such – non-disruptive – economic or political measures used in order to obtain compliance with an obligation, or redress for a tortious act, one could hardly speak – provided of course that the measures in question did not amount to a direct or indirect aggression – of condemnable intervention.

In conclusion, coercive measures of an economic or political character fall in our view among the kinds of acts of intervention with regard to which the proviso consisting of the phrase "falling within the domestic jurisdiction" (of the victim State) was in fact called for. It is actually with regard to *such* kinds of measures – together with the threat thereof – that the trend initiated in the United Nations, of combining the concept of non-intervention with the concept of domestic jurisdiction, appears to be felicitous. And it is significant, for the progress towards a more rigorous formulation of the principle of non-intervention at "universal" level, that the authors of the Helsinki Declaration brought that trend one further step forward by adding in the *text* a qualification that in resolutions 2131 and 2625 it appeared only in the title.

51. We get now to the third and last of the three elements of the Helsinki formulation on non-intervention : – the phrase "regardless of their mutual relations". Another short digression will be inevitable.

According to this phrase, the prohibition of intervention by a CSCE

State in the internal or external affairs of another (affairs falling within the latter's domestic jurisdiction in the sense discussed) would not be affected by the kind of relations existing between the States involved. The prohibition is thus to apply, according to this sentence, not just between any CSCE States (or, for that matter, between *any* other States as well) belonging to different alliances or groupings : Nato/Warsaw Pact ; Nato/Non-Aligned or Neutral ; Warsaw Pact/Non-Aligned or Neutral. It is to apply also between States belonging to one and the same alliance or grouping (Nato/Nato ; Warsaw Pact/Warsaw Pact ; Non-Aligned/Non-Aligned ; Neutral/Neutral), infra-group relationship notwithstanding.

Indeed, at first sight it might seem natural that what the principle of non-intervention prohibits between "stranger" States could remain lawful, or less unlawful, when taking place between States bound by an alliance or other special relationship. Between States so related one would suppose that intervention was justified or less unjustified. On the contrary, the phrase now under consideration would seem to mean that in no case would a special relationship make a difference ; intervention would be not less unjustified than it is between "stranger" States.

This statement, however, calls for qualification and development both with regard to the general problem of consent to intervention by the victim and with regard to the kinds of special relationship which may be relevant. The phrase in question might prove to be less significant than it may seem.

52. To begin with the problem of consent, it should be easy to admit that any State is in principle free to seek help from another State – including help by armed force – in maintaining law and order in its territory or for any other purpose [135]. We would find it difficult to accept the notion, put forward occasionally also by States, that intervention would be condemned notwithstanding the fact that it took place in answer to a request from the victim State. To maintain such a drastic position [135a] would imply an obvious restriction of the sovereign choice of a State.

On the other hand, consent by the victim State should present at least two features. It should be genuine and it should not be in contrast with the international obligations of the victim State itself.

Genuineness of consent means that it must have been given freely. Consent to intervention must not be obtained, for example, by an act of coercion amounting itself to intervention.

Lawfulness of consent means that intervention is not to be accepted

or requested in contrast, for example, with an obligation incumbent upon the accepting or requesting State to respect the *self-determination* of the latter State's people or any portion thereof. If the intervening State is also under an obligation to respect the self-determination of peoples – as is the case with the States participating in the CSCE – an act of intervention carried out against the wishes of the people of the victim State would be condemnable even in the presence of a (governmental) request or acceptance from the victim State.

53. Going back to the question of the possible special relations, there may well be relationships the specialty of which purport, expressly or by implication, the acceptance by the "specially related" States of a reciprocal or unilateral right and/or obligation to intervene in given circumstances. Were such the case, one could not reasonably contend that the special relationship would be irrelevant from the point of view of the lawfulness of intervention. In the measure in which the requirement of consent was fully met in any concrete instance, either *ad hoc* or by way of a provision in a general agreement between the "specially related" States, one could say that such relationship would "legalize" intervention.

It should be equally certain, however, that the mere existence of a treaty contemplating a right to intervene would not be unconditionally sufficient. Apart from any specific additional requirement resulting from the treaty itself or other rules in force between the parties – such as a specific, *ad hoc*, request or acceptance, or an *ad hoc* decision by an international body – there may be further conditions the absence of which would exclude "legalization" of intervention. One such condition could be, for example, the duty of either or both States – towards each other or vis-à-vis third States – to respect the "right" to *self-determination* on the part of the people of the State which is the object of intervention.

54. It is on the basis of such essential elements that one should assess the impact of the Helsinki formulation, notably of the phrase at present under scrutiny, upon the so-called Brezhnev or "limited sovereignty" doctrine, applied, *inter alia*, by the USSR and other governments of the Warsaw Pact in the Czech crisis of 1968. Indeed, that doctrine is just a claim of exemption from the principle of non-intervention in favour of the members – or certain members – of the so-called "Socialist Commonwealth" of Nations. One of the best presentations of that claim is that of Professor Tunkin [136].

According to this distinguished Soviet writer, the principle of "non-interference" in force among the "Socialist States" (members of the

"Socialist Commonwealth") would differ in a measure – as well as other "Socialist system" principles vis-à-vis the corresponding general principles – from the corresponding principle of "non-interference" as in operation, for example, between two "Capitalist" States or one "Capitalist" State and a "Socialist" State. It would differ in that it would go "beyond" in two ways : it would be "qualitatively new" and it would reflect "the new type of international relations" existing, according to Tunkin, amongst the "Socialist" States. The "principles of equality and non-interference as principles of proletarian internationalism, include" – Tunkin explains – "not only the mutual obligations not to violate each other's respective rights, but also the duty to render assistance in the enjoyment of these rights, as well as jointly defending them from the infringements of imperialists, in conformity with the principles of socialist internationalism" [137], the latter being "principles of Marxist-Leninist theory" which acquired the character of international legal principles in the process of relations among "Socialist" States.

The lack of perception of this truth would explain, according to Tunkin, the total lack of understanding shown, and the actual distortion of facts effected, by the "bourgeois press", in connection with the Czechoslovak events of 1968, about the doctrine of limited sovereignty of "Socialist" States "supposedly" advanced by the Soviet Union. To use Professor Tunkin's translator's humorous and genially unconventional expression – the "ballyhoo" raised in the bourgeois press on that occasion would have disregarded precisely the special, *positive* content which the principle of non-interference would have acquired – as opposed to the merely *negative* content of non-interference in general international law – within the "Socialist Commonwealth of Nations". Thence the qualification by Tunkin of that "ballyhoo" as "a recurrent action in the ideological struggle against the Socialist countries", thanks to whose understanding of the principle of non-interference, according to a passage of Brezhnev's quoted by Tunkin :

> "Many countries whose sovereignty previously was trampled upon brazenly by imperialist States first acquired genuine independence in the fraternal family of peoples of the world Socialist system" [138].

It would follow, according to this doctrine, that any intervention by a "Socialist" State or group of States in the affairs of another "Socialist" State or group of States aimed at maintaining or restoring the conquests

of "Socialism" (as understood, presumably, by the intervening State or States) would be more than just lawful (as opposed to intervention between States belonging to the "Capitalist system" or belonging to different "systems"). It would be obligatory. It would constitute nothing less than an act of compliance, by the intervening State or States, with a legal duty deriving from the allegedly positive content which the principles of equality and non-intervention would have assumed within the law of the "Socialist Commonwealth of Nations".

55. For a doctrine such as this to be acceptable from the point of view of general international law or the law of the United Nations the entity referred to by Professor Tunkin and others as the "Socialist system" of States or "Socialist Commonwealth" should possess the "status" of a federation. Indeed, were the States participating in the Warsaw Pact, the members of a federal State, there would be no doubt that, subject only to respect by the federal government of the principle of self-determination of the peoples of the member States of the federation (and of the people of the federation itself as a whole), the member States would be entitled and exposed at any time – international law of non-intervention notwithstanding – to the use of federal power, including military power, aimed at the preservation, in every one of them, of the political, economic and social order prevailing under the federal constitution, as understood and applied at the federal, *national*, level. Except for the case of non-compliance with the principle of self-determination – if applicable – by the intervening federal authority, any outsider State would have no title to complain of an unlawful intervention. The action by a federal government (or by a group of member States) vis-à-vis a member State of the federation could not be condemned as an act of intervention. An act of unlawful intervention presupposes the independent existence and distinct personality of the intervenor and the victim. But neither independence nor international personality – nor, for that matter, international relations – would survive the setting up of a federation.

Considering, however, that no such development seems to have taken place amongst the members of the Warsaw Pact, the "Socialist" States of Eastern Europe maintain, in spite of the similarity of régime, their separate political existence and their separate international personalities, which are attested to, *inter alia*, by their participation in the CSCE. As such, those "Socialist" States continue to enjoy and be subject to, notwithstanding participation in the Warsaw Pact and related arrangements, to all the rights and duties deriving for them as equally sovereign members of the "community" of States. In

particular, they continue to be fully subject to the rights and duties deriving from membership in the United Nations.

56. In this light we are unable to accept Professor Tunkin's assertion that the "ballyhoo" raised "in the bourgeois press" (really, in the whole free world) in connection with the Czechoslovak events of 1968 would have been a consequence of "lack of understanding" and of a "distorsion of facts". That reaction followed rather from what we deem to have been a correct evaluation of the conduct of the intervenors in the light of an equally correct interpretation of the relevant rules of international law, notably of the United Nations Charter [139]. Doctrines, such as the so-called Brezhnev doctrine and theories, such as that of Professor Tunkin are based on the arbitrary notion that the international law is divided into a number of systems or sub-systems of States ("Capitalist", "Socialist", "Developed", "Developing", "North", "South" : *et similia*) none of which has been proved to exist as a matter of positive international law. The wrong – and dangerous – theoretical assumptions upon which these especially western doctrines are based have been discussed, *inter alios*, by ourselves at this Academy [140]. Once these assumptions are dismissed – as in our opinion they should be – nothing is left to justify Professor Tunkin's notion that the "Socialist" States or the States of any other group in the United Nations or elsewhere are entitled, or subject to special treatment from the point of view of any principles or rules of general international law or United Nations law – such as a "universal" principle of non-intervention or Article 2.4 of the United Nations Charter – aimed at the protection of the political independence of States.

It follows that intervention or interference by any "Socialist" State in the affairs of another "Socialist" State would not be any less unlawful or condemnable that any act of intervention taking place between States belonging to other groups or to different groups.

Indeed, for such a conclusion to be reached amongst the States participating in the CSCE there was no need that a special provision to that effect be appended to the Helsinki formulation on non-intervention. That conclusion flows as a matter of course from applicable principles and rules, from the distinct international personality of the States participating in the Warsaw Pact and from their membership in the United Nations.

The very same principles and rules provide, in our view, for one certainly conceivable *exception* to the prohibition of intervention as between "Socialist" States as well as between *any other* States. That

exception is the case where intervention was consented to by the State against which intervention takes place. This is the case considered in the preceding paragraph. Two conditions, however, should be met. First, consent should have been freely given, namely a consent determined not by coercion. Second, consent must come from the government in power, such government acting – that must be stressed – in compliance with the principle of self-determination [141]. The condition (of conformity with the principle of self-determination) applies also to the intervenor's action itself.

57. Our *excursus* into the inter-American system in Section 1 of the present chapter was explained earlier by the fact that the Euro-Atlantic non-intervention principle is not an original product of Europe itself, but an imported product. We can now say with assurance that the wording under which the imported product has been inserted into the Helsinki Final Act is such as to preserve the product's original qualities.

The principle of non-intervention proclaimed at Helsinki is clearly and firmly based upon three essential elements : (i) coercion, military, political or economic of the victim State, (ii) with regard to external or internal affairs, (iii) in cases of political or economic coercion, with the wrongful purpose of securing undue advantages for the intervening State. In particular, for intervention to be condemned when it is effected by political or economic pressure it must be applied to a matter falling within the domestic jurisdiction of the victim State, namely (in conformity with the prevailing concept of domestic jurisdiction) to a matter with regard to which the victim State is not bound by an international obligation with which the intervenor is seeking to obtain compliance.

This definition, which is based upon a text agreed upon as a matter of "soft law" by the Warsaw Pact and Atlantic Alliance States together with the Non-Aligned and the Neutrals of Europe, is still far from a rigorous legal definition of non-intervention. In particular, one is still far from achieving an adequate co-ordination between the general condemnation of force contained in the United Nations Charter – as well as in Principles II to IV of the Helsinki Declaration – and that part of the prohibition of intervention which is obviously repetitive of that more general condemnation. A better clarification of the distinction between non-intervention by States and the so-called non-intervention by international organizations also remains to be sought. The road to a general or quasi-universal "hard-law" formulation of the principle appears thus to be still – at a time of unceasing ideological

struggle – a long and arduous one. Nevertheless, the step taken at Helsinki may prove to be a significant contribution, though, for the time being, only as a matter of "soft law", to the attainment of that end. It can at least be said, whatever the shortcomings of the Helsinki definition and the possible errors of our own interpretation, that some steps towards a greater clarity have been taken.

A greater clarity has undoubtedly been achieved with regard to that end of the *spectrum* of prohibited intervention which is represented by the ways and means of ordinary diplomacy. To put it again with the help of Winfield's images, the area of prohibition covered by the principle of non-intervention certainly includes, together with any "partitions of Poland" – *et similia* – any attempt on the integrity or the independence of a State. But it does not include the addresses of Lord Palmerston to the House of Commons unless they contained unjustified ultimatums in the fullest sense of the term.

CHAPTER IV

HUMAN RIGHTS, SOVEREIGNTY AND THE DUTY OF STATES NOT TO INTERVENE

Section 1. Introduction

58. The impact of non-intervention on the international protection of human rights is a part of the general problem of the compatibility of such an international protection – substantive or procedural – with the nature of international law.

Indeed, a major part of the legal weaponry resorted to by governments in order to question either the validity or the desirability of international rules for human rights – particularly the compatibility of such rules with the principle of non-intervention – is represented by the argument that rules of that kind would bring about such revolutionary consequences as the penetration of international law into the "internal life" of States, the elevation of individuals to the rank of international persons at the side of States and restrictions of sovereignty. The way would be thus open to intervention by States in the affairs of other States.

Arguments of this kind seem actually to acquire a particular vigour in connection with the human rights provisions of the Helsinki Final Act. According to some commentators that document would have been too ambitious. While attempting to set a strongly innovative precedent at the level of international law by "centrally" covering not only the "external", but also the "internal" life of States, it would have been actually inapt, as a mere declaration of intent deprived of "sanction" and binding force, to bring about such a major "innovation". It would follow – one would seem to say – that, Final Act notwithstanding, "internal" matters like human rights and fundamental freedoms or self-determination have not been removed from the area of exclusive competence of the State and of municipal law [142]. Supported *prima facie* as they seem to be by certain doctrinal positions, these preoccupations are likely to spread wider in view of the imminence of the Belgrade meeting of the CSCE and to exert not a little weight in the *querelle* over the impact of non-intervention.

A brief digression seems therefore indispensable before tackling this issue. It is necessary to make clear, in particular, in what sense and in

what measure the international protection of human rights could have represented an innovation or a "precedent" in 1975 – and in what sense or measure it may be "in keeping with the natural framework of international law" [143]. It is indeed easy to show, in our opinion, that the international instruments for the protection of human rights do not really bring about revolutionary novelties. They do so neither with regard to the distinction (or alleged distinction) between *"matters"* of "internal" or "external" life of States, nor with regard to the subjects of international law, nor with regard to sovereignty of States. Far less do they affect the structure of the international "system" [144].

Section 2. The International Protection of Human Rights, the "Natural Framework" of International Law and the Adequacy of the Final Act

59. In brief, external sovereignty – which is all that matters from the point of view of international law – is simply the factual existence of the State as an organized independent entity, namely as a power.

(a) As rules of interpower relations, international rules are only able to create legal relationships (rights and obligations) of the States themselves *inter sese* – and not between any State or States on one side and the individuals subject to their control, on the other side.

On the other hand – and this will never be stressed enough – any international obligations of a State towards another State involve individuals. The State (or power) being an organized collective entity, there is not a single obligation of a State which can be complied with, not a single right that can be exercised and not a single legal transaction in which a State can participate which does not presuppose that some individuals "act" or "will" in a certain way. This unquestioned truth, however, does not alter the fact that the individuals in question – State officials or private parties – can only be attained, even when their conduct is most intensely affected by the international rules, exclusively by the internal law of the State. It is always for the municipal law of each State – as a matter of *fact*, and as a merely *factual* consequence of the existence of the State as a sovereign entity – to set forth the rules by virtue of which individuals are ordered to behave in such a manner as to make the State comply with international legal obligations, exercise its international rights or participate in international legal transactions. International law has no *direct* part in this. It addresses itself exclusively to the sovereigns. It has been so in the past and it is so, for good or evil, at present. It will continue to be so until international rules will remain the rules of

international relations and international relations will remain relations between States as factual entities, namely as powers.

(b) From the point of view of international rules in general – and leaving aside for a moment the Helsinki document of 1975 – the distinction between the "external" and "internal" life of the State is a very relative one. Of course, one thing is, for a State, an obligation to reduce its armaments or to demilitarize a province or the obligation to respect the inviolability of a foreign embassy or the life of a visiting head of State, another thing is an obligation to respect and promote the civil and political rights and freedoms or the socio-economic rights of its subjects and the self-determination of its people. In the case of the rules concerning the respect and promotion of human rights or the respect of self-determination there will be a higher degree of influence of international law upon the relations of the State with its subjects : and that influence will be rightly deemed to extend, especially where fundamental freedoms and political rights are involved, to the very structure of the State and, in the long run, to the survival of the State's régime. This explains the reluctance of States to accept advanced international instruments in the field of human rights.

On the other hand, there are no "structural" or "systemic" differences between these so-called "internal" and the so-called "external" obligations. In either case it is a matter of obligation of a State towards one or more other States. It is *not* a matter of international obligation of that State towards the individuals themselves. In either case it is for that State – and for the State only unless otherwise agreed (*infra*, para. 60) – to take care of the necessary internal implementation of the international obligation. The manufacture of weapons will not be reduced, the foreign diplomat or head of State will not be safe, unless something is done within the internal legal system of the State, just as well as no rights or freedoms will be enjoyed by individual nationals, unless the appropriate rules of municipal law are created and applied : and in any case these rules will be created as matters of the exclusive, sovereign prerogative of the "internationally obliged" State (*infra*, paras. 59 et seq.). There is thus nothing structurally different between the allegedly "external" obligation "to disarm" and the allegedly "internal" obligation to allow more freedom to one's citizens. In either case there is just an international obligation, compliance with which requires that some legal provision be made by the State itself within its own – internal – legal system.

(c) Nor is there any alteration in the condition of the individuals in

international law simply because the States of which they are the nationals contract the obligation to respect human rights and fundamental freedoms. "Object" of international legal obligations of States as the human person *was* at the time when the *only* individuals about which international law cared were monarchs themselves and their envoys, "object" of international legal obligations the human person *remains* in the second half of the twentieth century whenever State-created international rules extend their objective sphere to the civil, political, economic and social welfare of all men and women. Just as the lack in the individual of an *international* legal personality is not an obstacle to the creation – at inter-State level – of the most advanced international legal obligations to respect human rights and fundamental freedoms, no alteration of that condition of the individual – foreigner or national – comes about as a consequence of such obligations [145].

The effort of a number of scholars in favour of a recognition of an international personality of the individual as a condition, or supporting element, of the international protection of human rights is, in my own opinion, a doubly wanton struggle. It is a wanton struggle because it is not by the *fiat* of treaties or similar instruments that mankind will move from a "monde de cités à la cité du monde" [146]: and until mankind will have attained (also with the *help*, no doubt, of humanitarian treaties) the stage of "la cité du monde", individuals and peoples will remain, hélas, in spite of any legal fictions, objects of inter-State – *scilicet*, inter-power – contracts or agreements [147]. It is a vain struggle, in the second place, because there is no need for human rights to be internationally protected [148], that individuals or peoples attain the "rank" of international persons at the side of the powers.

Be that as it may of the technicalities to which lawyers address themselves when they argue about "legal personality", there are no international rules or structures that *need* to be altered before humanitarian obligations of States are validly created by treaty (or by custom) and there are no international rules or structures that are actually altered as a consequence of the entry into force of such humanitarian obligations. In particular – and as we have tried to demonstrate elsewhere – there is nothing in the rules of international law concerning respect and promotion of human rights and in the substantive or procedural obligations emanating from them, that really affects either the sovereignty of the States involved or the distinction between international law and municipal law and the exclusive "control" of the latter by each State [149].

60. The structure of international relations and the coexisting sovereignties of States remain unaltered even in the not frequent cases of international instruments envisaging those advanced "implementation measures" thanks to which individuals themselves are able to seek redress before an international organ against violation of human rights committed by their States. Such devices would seem *prima facie* to determine a revolutionary novelty in that they add international legal or quasi-legal remedies to the merely national remedies. One could thus maintain that the States participating in such instruments renounce or seriously restrict the sovereign prerogative which consists of being the exclusive recipients of any individual complaints and the exclusive judges thereof. If one looks into the matter carefully, however, one must admit that in such a case, the State still remains ultimately in exclusive "control". Indeed, in so far will any decision of the competent international body in favour of the claim of an individual or a group be fruitful as it will be implemented *in its turn* within municipal law by the State concerned. At this crucial point the State finds again its sovereign prerogatives *intact*.

Of course, by adopting such advanced instruments one gets closer to the attainment of that ultimate goal, which is to force the contracting States to comply: and this will influence more heavily the very régime of the participating States [150]. No structural alteration takes place, however, as regards the so-called "internal" relations of each State with its own subjects and ultimately as regards the sovereignty or independence of the contracting States. The participating States will remain still very far – as the participants in the implementation system of the 1950 European Convention on Human Rights are far – from moving "du monde des cités à la cité du monde" [151].

61. We must conclude that it is not quite correct to envisage the international instruments on human rights as marking structural *sauts de qualité* of international law and society.

Of course, there is a *saut de qualité* with regard to the content of interests – inter-State interests – which governments pursue when they conclude a human rights treaty. Each contracting State agrees, if it participates in good faith, that it is in its interest to respect human rights and to see human rights respected by each one of the other contracting parties. This evaluation will obviously be favoured by the individuals under the jurisdiction of the contracting States. It is also likely that such individuals contribute – in the measure in which they are willing and allowed by their respective governments – to induce the contracting States to acknowledge their interest to participate in a

human rights treaty. The same individuals will thereafter enjoy the benefits deriving from the agreed international rules or procedures. All this will represent undoubtedly a qualitative step forward in the *content* of international law.

There is no qualitative *saltus*, however, in the *structure* of international law or society. The international rules of human rights do not alter in the least the "constituency" and the nature of international law. "Humanized" in a measure in its *contents*, international law is not "humanized" in the sense it would be human if it were the law of the universal legal community of mankind.

The theories that more or less decidedly admit the existence of such revolutionary effects of human rights instruments, are actually more than just fallacious. Nobly and ingeniously conceived with a view to favouring progress towards the "humanization" of international law, they have – against the best wishes of their authors – a doubly negative effect. They alert more or less conservative governments against real or supposed – but in any case exaggerated – dangers ; and they supply the same governments with arguments, either against the proposals aimed at the creation of international humanitarian obligations as a matter of "reform", or against the validity, the existence, the quality or the dimension of humanitarian obligations set forth in existing instruments. Not a little of what is being said and done against the proper implementation of the humanitarian provisions of the Final Act finds indirect support in the theories in question.

62. It will never be stressed enough, therefore, that the "Founding Fathers" of the United Nations did nothing revolutionary when they adopted provisions on human rights such as those set forth in the cited provisions of Articles 1.3, 13.1 *(b)*, 55-56, 62.2, 68 and 76 and of the second subparagraph of the preamble. Nor was there anything revolutionary in the adoption of the Universal Declaration of 1948 or in the adoption of the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. It was felt through 1966 – as in 1945 and 1948 – thanks mainly to the bitter experiences of the thirties and the Second World War – that international aggression and intervention, on the one side, and totalitarian rule at home, on the other side, were closely related. The maintenance of peace among States and the promotion of liberties within national societies could not be safely dissociated [152]. Experience had taught that it was mainly "the existence of dictatorships which makes wars possible" [153]. It is thus that at the side of aims and obligations concerning more directly the international relations of the member States (and non-members) the

Charter enunciates a number of obligations – always among the States themselves *inter sese* – concerning respect and promotion of human rights and co-operation to those ends.

If an elementary consideration such as this needed to be made it is because many commentators seem to overlook that it was precisely for this reason that human rights were considered in the Final Act of the CSCE. As repeatedly stressed in the document itself and earlier noted here, the humanitarian provisions of the Final Act were motivated by the close relationship that its signatories believed to exist between the matters covered by those provisions, on one side, and European security and co-operation on the other side. For CSCE States to undertake to ensure the human rights and freedoms of their subjects (Principle VII) and the self-determination of their peoples (Principle VIII) and for them to promote freer human contacts across frontiers, was deemed to be as important for détente as for them to undertake to refrain from the threat or use of force (Principle II), to settle disputes by peaceful means (Principle V), to respect their territorial integrity and frontiers (Principles III and IV) or to refrain from unlawful intervention. But this was *not* an *extraordinary, unprecedented* achievement. The same had been done with humanitarian matters in 1945 and *more* had been done with those same matters, subsequently.

Of course, as well as the humanitarian provisions of the United Nations Charter those of the Helsinki Declaration and of the Third Basket are comparatively more incisive than other provisions with regard to the internal life of the participating States. As such, the provisions in question differ in a measure (as well as those of the Charter and other instruments) from rules which, as the prohibition of resort to force in international relations or the obligation to settle disputes peacefully, concern more specifically the external conduct of States. However, if the presence of the former category of rules extends and deepens the matters with regard to which the 35 States of the CSCE are committed towards each other with regard to their conduct, that same presence does not alter in any way the *structure* of the relations among the participating States as compared to the general structure of relations between sovereigns. In particular, the presence in the Final Act of clauses concerning human rights, fundamental freedoms and self-determination does not mean that individuals were placed in Helsinki at the side of States. An indirect human interest is present, anyway, also in principles which at first sight might appear to be strictly inter-State rules. Suffice it to think of the human interest involved in the inter-State undertaking to refrain from the threat or

use or force or to respect the territorial integrity or the frontiers of other States. It is always a matter of obligations of States *inter sese* and not of direct obligation of States towards their subjects or their peoples.

Conservative governments and conservative commentators can thus rest assured that among the CSCE States the international system as an inter-power system remains unaltered in spite of the humanitarian content of some of their undertakings. The humanitarian provisions of the Final Act do not attempt to set up a supranational system. The Final Act's ambitions do not exceed in the least the "possibilities" of the instrument.

63. On the other hand, the fact that the Final Act remains enough "within the system" to allay the fears that the conservatives may entertain that the sovereignty of States be impaired, does not diminish in any measure the importance of the humanitarian undertakings in comparison with the other undertakings set forth in the Final Act. On the contrary. Just as Principles II, III, IV and V of the declaration commit the participating States reciprocally to conduct themselves in a certain manner with regard to the use of force or to the territorial integrity of other States, or with regard to the settlement of disputes, Principles VII and VIII commit the participating States reciprocally to conduct themselves in a certain manner with regard to the enjoyment by their subjects of fundamental rights and freedoms. It follows that the humanitarian commitments are *just as good* and *valid*, and *central*, as all the other ones. The practice of international agreements is so rich in instruments contemplating the interests or the rights and freedoms of individuals as the very centre – and, for that matter, as the *only* object – of purely inter-State legal relationships, that no more need be said in support of the perfect validity of the similar humanitarian undertakings embodied in the Act.

Of course, there is the further issue whether the Final Act would have been apt, as a so-called political instrument, to bind the participating States to respect human rights and fundamental freedoms (together with self-determination). But once it is ascertained that the humanitarian provisions of the Act do not differ in kind from all the others, this question would arise not only for the humanitarian clauses, but for *all* the clauses of the Helsinki document. If Principles VII or VIII are not valid because of the nature of the Final Act, *nothing else* would be valid in that document.

One is probably closer to the truth in believing that if that document were signed in good faith it represents – whether as an agreement or

a declaration of intent – a pledge made by the participating States to abide with particular care, for the sake of détente by rules mostly present, by way of treaty or custom [154], in the existing law of nations. From this point of view the question whether such a pledge was made by a certain kind of legal transaction or by an instrument of a different description is futile. It should amply suffice to say that nothing less than security and co-operation in the Euro-Atlantic area – not to mention the much misused concept of détente – depends on the seriousness with which that pledge will be fulfilled.

Section 3. International Humanitarian Obligations and Non-Intervention by a State in the Affairs of Another

64. Once it has been ascertained that in the international protection of human rights there is nothing incompatible with the nature of international law and the prerogatives of sovereign States, we must look into the specific question of compatibility of humanitarian obligations with the principle of non-intervention of a State in the affairs of another. Considering that on this issue doubts are being voiced and negative positions taken with regard to the *substantive* aspect of the matter – namely with regard to the validity of *substantive* CSCE undertakings concerning human rights (*supra*, para. 3) – as well as with regard to the *procedural* aspect of such undertakings, namely with regard to the ways and means available to the participating States in order to claim compliance with the said obligations (*supra*, paras. 2 and 3), it is better to deal with both substance and procedure. On substance, however, one can be quite brief [155].

Had the argument not been put forward, *inter alia*, in a well-publicized document adopted by the Assembly of the Western European Union, it would be silly even to discuss the compatibility of substantive human rights obligations under *international law* with the principle of non-intervention of a *State* in the affairs of another [156]. One can hardly see how a contrast could arise between the reciprocal obligation of any two CSCE States not to intervene in each other's affairs – internal or external – on the one hand, and the reciprocal obligation of those same States to respect human rights, on the other hand. That every CSCE State is in a measure perfectly able to comply with both its obligation not to intervene and its obligation to respect human rights while perfectly enjoying both the right not to be subject to intervention as well as the right to see human rights respected by the

other CSCE States, is too obvious for words. It is equally certain, however, that each CSCE State is perfectly able, provided only that it so wishes, to comply with the *duty not to intervene* in the affairs of other CSCE States as defined in a preceding chapter while perfectly enjoying the *right to see those same CSCE States respect human rights* as defined in any applicable provisions of the Charter, of the United Nations Covenants, of the European Convention or – *mutatis mutandis* – of the Helsinki Final Act. No contrast is really perceptible – at the merely substantive level we are now dealing with – between the coexisting "negative" and "positive" legal situations of "disadvantage" or "advantage".

For the principle of non-intervention to be an obstacle or otherwise in contrast with the validity of substantive international obligations relating to human rights, it should be identifiable as a restriction, emanating from a not well-determined international "constituency" (composed of the generality of States or of the generality of human beings) upon that liberty of States to assume such obligations which is but an aspect of the general liberty enjoyed by States with regard to the possible object of their agreements. Every lawyer admits, however, that as a general rule a State can validly assume even the obligation to cease to exist by incorporation into, or federation with, other States. *A fortiori* can a State restrict its freedom – or, as a part of the doctrine prefers to put it, its sovereignty (*supra*, para. 59) – by committing itself to respect human rights.

The only conceivable limits to such a liberty could derive from a rule of *ius cogens* which restricted the possibility for States validly to subscribe to treaties with regard to the respect of rights and freedoms of their nationals. But of such a monstrous rule there is no trace in international law. If a *ius cogens* rule exists concerning the treatment by States of their nationals, it is a rule to the contrary, namely a rule condemning as illegal any agreements among States to deny or restrict the rights and freedoms of their peoples or binding States in the sense indicated by the International Court of Justice in the *Barcelona Traction* judgment (*supra*, para. 25*ter*). The very mention of such possibilities may appear to be *otiose*. It appears less futile if one considers how close the world has now been for some time – roughly since the thirties – to Orwell's 1984 [157].

Be that as it may of the international condemnation of such undertakings or practices – and we have no doubt that they are condemned at least under the Charter – there is surely no such thing as a rule of *ius cogens* putting an obstacle in the way of the creation by

agreement of international obligations of States with regard to the protection of human rights in the widest sense, whatever the width or depth of such obligations may be. One cannot doubt either that this conclusion extends to the humanitarian provisions of the Final Act, whether one reads them as political statements pledging the participating States to abide by existing humanitarian legal rules or as moral undertakings or declarations of intent. As noted earlier, the relationship between the humanitarian provisions, on the one side, and the principle of non-intervention, on the other side, remains the same, whether one juxtaposes those provisions and the principle as matters of *legal* obligation or as matters of *political* or *moral* undertaking.

65. Reverting to procedure, we noted earlier that the Final Act, while not envisaging any international machinery for the presentation and discussion of complaints of human rights violations by single persons or groups, does not leave the implementation of its humanitarian clauses exclusively in the hands of the single CSCE States any more than it does so with the provisions relating to other matters. In addition to relying on the general rules of international law and relations, the Final Act envisages two sets of devices. These consist of bilateral and multilateral *co-operation in the implementation* of the Final Act, including co-operation within existing international organizations (*supra*, paras. 21 to 22) and multilateral *verification of implementation* by means of review meetings, the first of these meetings to be held in Belgrade in 1978 (*supra*, para. 23).

As regards co-operation in *implementation*, no doubt could be reasonably entertained that the co-operation in question remains entirely – whether carried out bilaterally or multilaterally and within or without the United Nations or other bodies – well inside the area of the behaviours which all States are entitled freely to hold and to commit themselves to – as they have done by Article 56 of the Charter and by the Final Act provisions on implementation. Such co-operation would have to be carried out even if the Final Act had made no provision for co-operation in implementation. The more it must be so in the presence of "follow-up" clauses the tenor of which indicates that the participating States were very far from the idea that once they had signed the Final Act the application of its provisions should be reserved to each one of the participating States alone. No obstacle arises certainly from the principle of non-intervention of a State against another.

As regards in particular those forms of co-operation which involve initiatives or actions before existing international organs (*supra*, paras.

26, 26*bis* and 26*ter*), the question will arise whether and at which point any such initiatives, or actions encounter an obstacle in the written or unwritten rules protecting the so-called "domestic jurisdiction" of the target State from the action of the international organ. Being concerned here *only* with the problem of *State/State intervention*, we leave this question aside: not without noting, however, that the General Assembly at least has not paid, in the vast majority of cases, much attention to the plea of "domestic jurisdiction".

66. In dealing with *verification* of implementation, the Final Act draws obvious insipiration, in expressly providing therefor, from that general rule of international law under which any State entitled to a right is also entitled as a matter of course to seek and claim compliance with the corresponding obligation and thus to verify implementation (albeit from "outside"). This general right would belong to each and all of the CSCE participating States even in the absence of any express provision therefor. The general rule needed no confirmation at Helsinki or elsewhere. In addition, verification of implementation is obviously implied – and very much so – in the provisions concerning co-operation in implementation. Such co-operation – bilateral, multilateral and within the framework of existing organizations (not to mention possible meetings of experts) – obviously includes *both* co-operation in correcting or eliminating misunderstandings, distortions or gaps in the application of substantive obligations *and* co-operation in pointing out, and eventually protesting, any violations of such obligations. This inevitably includes verifications by any "innocent" means such as the perusal of ordinary news items, or the reports of diplomatic envoys.

So much the better, anyway, if the States participating in the CSCE have deemed it expedient further to provide for "thorough exchanges of views" on implementation and development of the Helsinki provisions and for such exchanges to take place within the relatively organised framework of meetings of representatives, such meetings to be governed by the same rules of procedure as those applied at Helsinki and at Geneva in 1973-1975. By making such concrete and punctual provision for such meetings, and fixing their date and seat, the participating States have made unambiguously clear the importance of their function. In particular, the *thoroughness* with which the exchange of views should be conducted – certainly an unusual qualification – is emphasized by the provisions according to which the meetings envisaged should be governed, *inter alia*, by that

important procedural feature of the 1973-1975 phase of the CSCE which was the rule that debates be held, unless otherwise agreed upon unanimously, behind closed doors. Highly regrettable otherwise, the absence of the public – primarily of the press – at any one of the significant 1973-1975 meetings, was intended as an important factor of the thoroughness of the negotiations. Such a rule should be an important factor in reducing the "embarrassment" that any CSCE governments might fear to suffer from the "thorough" exchange of diplomatic views which is to take place at the "review" meetings.

But that means that the exchange is not meant to be, according to the Final Act, an exchange of diplomatic platitudes. As well as implementation, the verification thereof was clearly envisaged as a serious operation and as a vital factor in the continuation of the détente process. Far from representing a threat to détente the thoroughness of the exchange of views on implementation was meant as a contribution to the continuation of that process.

Considering the general purpose of verification assigned to the "exchange of views" and to the "meetings" in question, one need not spend many words to reject any notion that the discussion of any participating State or States' achievements and failures in the respect of human rights and self-determination would be made *a priori* unlawful by the principle of non-intervention and the corresponding duty of the other participating States. In the face of the provisions on verification we are now considering – and of those on co-operation considered earlier – such preoccupation would be groundless.

In so far would the actions or attitudes of CSCE States in the course of a verification meeting or exchange become unlawful, as such actions or attitudes qualified as unlawful under the definition of intervention considered in the preceding chapter : and it is easy to see that none of the definitions of non-intervention considered in the four sections of that chapter – including those which appear to be less rigorous and concise than the Helsinki formulation – could reasonably be used in good faith to raise obstacles to the verification of implementation as a matter of principle.

67. Considering, however, that the binding force of the Final Act is controversial (*supra*, para. 5) and considering that the participants in the CSCE are all subject to the general rules of international law while the majority of them are both Members of the United Nations and participants in one or more other international instruments in the field of human rights, one should not overlook, in studying the problem of compatibility with the principle of non-intervention, the means of

implementation which may thus become available, regardless of the Final Act or by the virtue of its *renvoi*, implied or explicit, to the other instruments briefly considered earlier (*supra*, paras. 26 et seq.), to the United Nations Charter (para. 26*ter*) and to the general rules of international law and relations (para. 27).

(a) To begin with the means of implementation which may be available – as between two or more CSCE States happening to be "in humanitarian argument" with each other – under *ad hoc* instruments, none of the procedures contemplated in such instruments could possibly be bound to be incompatible by its nature with the principle of non-intervention. Whether the applicable procedure belongs to one or the other of the three main types of measures briefly singled out *supra*, under paragraph 26, in so far will it be open – to a CSCE State or to an individual or group within the CSCE area – as the relevant intrument is in force between the States concerned and as such implicitly or explicitly referred to *ad abundantiam* in paragraph 8 of Principle VII of the Helsinki Declaration or in other clauses of the Final Act. The *ad hoc* procedure in question, in other words, will be open by virtue of an acceptance by the State or States the human rights performance of which is the object of complaint. It follows that, whatever the measure (presumably not great) in which the plea of "domestic jurisdiction" might be resorted to by the "accused" State before the competent body, there can be no ground on which the State which is the author of the complaint (or whose nationals or residents put in the complaint) could reasonably be *charged* – let alone *found* – to act (by the complaint alone) in violation of the principle of non-intervention in the affairs of the "accused" State. It would be absurd, in our view, for the "accused" State to contend, either that the existence of the Final Act purports the substitution of the Final Act's procedures for the human rights implementation measures provided for under existing agreements (namely that such measure : ought to be set aside as between CSCE States by virtue of the Final Act's provisions on "follow up") or that Principle VI of the Helsinki Declaration is such as to condemn as unlawful the use of *ad hoc* implementation procedures in the field of human rights which were not so condemned prior to the signature of that Act.

(b) Similar considerations apply to the initiatives which any CSCE State might take, or participate in, within the framework of the United Nations Charter. None of the titles under which – as shown in paragraph 26*ter* – a CSCE State could place before a United Nations body a human rights claim against another CSCE State or take an

initiative of any nature with regard to the promotion of the international protection of human rights, could be affected in any measure, *per se*, by the principle of non-intervention, or, in particular, by the presence of a definition of that principle in the Helsinki Declaration. To take just the extreme case, it would be difficult indeed to see a violation of the principle of non-intervention (either as embodied in Article 2.4 of the Charter itself or in Principle VI of the Helsinki Declaration) in the submission by a CSCE State of a "humanitarian" dispute with another CSCE State (or between two "third" CSCE States) to the Security Council or to the General Assembly on the strength of Article 35 of the Charter. Of course, Article 2.7 will have to be kept in mind during consideration of the dispute or situation by the Security Council or the General Assembly, in order to determine whether and to what extent the United Nations action suggested by the complainant CSCE State, or otherwise contemplated, would be lawful under that article in its role of limit to the competence of United Nations organs : a question that falls beyond our present task. As everybody knows, there are on this matter two main trends of thought. Some commentators believe that in the area of human rights United Nations organs can only adopt, except in case of "gross" violations such as *apartheid, genocide, et similia,* recommendations addressed to the generality of the member States. Other commentators believe, as we are inclined to do, that the matter of human rights is sufficiently internationalized for Article 2.7 not to prevent the adoption by United Nations organs of resolutions either to point out violations and condemn their authors or to invite given States to comply with their obligations concerning human rights. Although we are inclined to think that the latter opinion is juridically preferable, we need not prejudge that issue here. For the purpose of assessing the impact of the principle of non-intervention, namely State-*versus*-State intervention, upon the human rights obligations incumbent upon the States participating in the CSCE, it is sufficient to find that any use of United Nations *fora* in order to denounce non-compliance or to seek compliance does not contravene any prohibition deriving from that principle.

It goes without saying that this applies *a fortiori* to any initiative which one or more CSCE States were to take in United Nations bodies in order to pursue the proposed creation of a United Nations High Commissioner for human rights.

Easily overlooked by commentators, this elementary finding is doubly relevant to the *querelle* to the illustration of which we were

invited to participate by this Academy. If on the one hand it demonstrates directly that a CSCE State would not be barred by the principle of non-intervention from bringing human rights violations (by other CSCE States) before United Nations bodies, *a fortiori* it proves how absurd it would be to claim that the principle would be infringed by a CSCE State if it brought up such violations in bilateral or multilateral contacts or at a closed-door gathering – a gathering *of CSCE States alone* – such as the Belgrade Meeting.

68. With regard to the means of implementation available under general international law (*supra*, para. 27) the matter becomes more delicate. The question is affected on the one hand by the positive fact that peaceful and conciliatory procedures are available under the Charter or other instruments, and on the other hand by the negative factor represented by (otherwise vital) prohibitions with regard to coercive measures.

A point that can surely be made, however, is that none of the non-coercive means of diplomacy possibly resorted to in order to obtain compliance by CSCE States with their humanitarian obligations could be labelled *per se* as incompatible with the principle of non-intervention by a State in the affairs of another. For example, diplomatic claims for compliance, complaints of alleged non-compliance, etc. – are *per se* perfectly compatible with the duty not to intervene as defined.

A difficult issue, of course, is whether, to what extent and under what conditions a CSCE State may be at liberty to resort to more effective or supposedly more effective means of securing compliance without violating the duty not to intervene in the affairs of other States. While some of these means could be easy to classify among the means of coercion condemned under the principle of non-intervention as defined in the preceding chapter, others would be less easy to deal with. The most important example is those forms of economic or political pressure which, while in part surely condemned as forms of unlawful intervention, surely escape in another part condemnation [158]. Such measures as severance of diplomatic relations, withdrawal of diplomatic envoys, refusal of recognition of a new government or situation, trade economic or financial embargos or boycott, and the like, may well result in being, in the light of the degree and the circumstances of their application, not unlawful.

Considering that no such measures have been threatened or applied so far as between any CSCE States in connection with respect for human rights, we need not go into the delicate question of determining

the exact line of demarcation between lawful and unlawful economic or political measures, more than we have done earlier in general terms (*supra*, paras. 34 et seq., esp. 36).

Were one to do so, one would have to extend the analysis from the area within which the concept of non-intervention is (in our opinion) quite clear, to that "grey belt" where the drawing of the line of demarcation between lawful and unlawful conduct would at least require a longer discourse. Such a discourse would have to include, *inter alia*, the question whether resort to lawful political or economic measures on the part of a United Nations member CSCE State – as most CSCE States are – would have to be *preceded* by resort to settlement procedures under Chapter VI or other provisions of the United Nations Charter.

Considering that for the present purposes it would not be indispensable further to analyse resort to lawful forms of non-military pressure, we can confine ourselves to a minimum. Such a minimum is that the lawful ways and means to secure compliance with international humanitarian obligations *surely include* within limits and under certain conditions, resort to forms of political or economic pressure. *A fortiori* one could not label as an unlawful act of intervention the resort to the strictly diplomatic and friendly means resorted to up till now for that purpose by some of the States participating in the CSCE.

CHAPTER V

CONCLUDING REMARKS

69. There is thus nothing in the principle of non-intervention to justify the position taken in view of Belgrade by some of the CSCE States with regard to the negative impact of that principle upon the substantive or procedural obligations resulting from the Helsinki Act, or recalled or confirmed therein, in the field of human rights.

To maintain that the prohibition of intervention – as defined in the American hemisphere, or in the United Nations, or in the Helsinki Final Act – could represent in any measure an obstacle to the perfectly valid existence of *substantive* international obligations concerning human rights and fundamental freedoms – or self-determination – is preposterous. Considering in particular the extent and depth acquired during the last decades by treaty rules concerning human rights, and considering the content of the humanitarian provisions of the Final Act as a whole (Basket Three clauses included), the mere formulation of such a proposition is equivalent to questioning the validity of any international obligation in any area of inter-State relations or human endeavour.

As explained earlier, there is hardly an international rule compliance with which does not presuppose, involve or require, some internal activity of the obligated State vis-à-vis its organs or subjects. The impact of international law upon the "internal" life of States being thus a *normal* occurrence, the proposed theory appears to be an attempt at the very existence of international law.

A fortiori is would be preposterous for any State to invoke the principle of non-intervention – as this principle has repeatedly been invoked – in order to justify as a matter of *law* its refusal to discuss or accept *de lege ferenda* proposals concerning the international protection of human rights. However advanced may be the substantive or procedural content of any such proposals, there is nothing in the principle of non-intervention to put an obstacle to their discussion and possibly to their acceptance by a State in full respect for its own sovereignty and independence.

As regards *procedural* obligations, to invoke by way of *exceptio* the duty of other States not to intervene is justified in principle as a *cautionary* measure. For centuries acts have been committed by

governments in the name of humanity which amounted to attempts against the independence or the very existence or integrity of other States. In a world characterized by the deepest ideological and political differences with regard to the manner in which peoples should be governed, a reminder of the duty not to intervene undoubtedly plays a useful role. The alarm is quite unjustified, however, if one considers the nature of the procedural steps taken or suggested so far by certain governments in the pre-Belgrade phase. So far – and since the signature of the Final Act in the summer of 1975 – these steps have not gone beyond taking note of complaints, the issuing of appeals for respect in cases where lack of respect was feared, the expression of disapproval for reported cases of lack of respect, insistence upon the right of each CSCE State to seek and obtain compliance, and inclusion of such compliance among the objects of verification at the Belgrade Meeting. Actions such as these are not only perfectly lawful, but they resemble the actions commonly taken by United Nations Members, within and without the organization, in the field of respect for human rights. They are actually identical, for example, with the actions taken by States toward each other – "Western" and "Eastern", "Northern" and "Southern" – in the United Nations Commission of Human Rights. Indeed, in no way could such actions be condemned under any one of the known definitions of non-intervention.

Under the Final Act in particular the actions in question could not reasonably be condemned as unlawful conduct in any measure whatsoever. Of the three categories of actions contemplated in paragraphs 2 to 4 of Principle VI of the Helsinki Declaration, one must obviously leave out the first, namely intervention by the use or threat of armed force, the two remaining categories being the forms of unlawful coercion by political or economic pressure (para. 3) and subversion or so-called "indirect aggression" (para. 4). As regards coercion by political or economic pressure, we have noted earlier that it is not unconditionally condemned. Just as economic pressure is condemned only in certain extreme cases – as when it amounts to strangulation (every State being otherwise free, in principle, with regard to its economic and financial relations with other States) – political pressure is far from being condemned unconditionally as the threat or use of force.

Public or diplomatic disapproval, as well as public or diplomatic protests or appeals and public or diplomatic insistence upon the duty to comply, *are* either forms of political pressure or equivalents thereof. Yet, if used as they have been used so far, in order to promote respect

for the Helsinki provisions on human rights, they remain perfectly lawful forms of pressure from the viewpoint of the means as well as the ends. Within limits that need not be further specified here, even economic pressure – so far not resorted to, that we know of, as between CSCE States – could be, notwithstanding the third paragraph of the Helsinki Principle VI, perfectly lawful.

As for the inclusion of human rights in the Belgrade agenda, and thus among the matters, and the principal matters, to be covered in the Belgrade multilateral review of implementation, its lawfulness is more than equally certain. It is implicit in the Final Act chapter on "follow up". From the point of view of the Belgrade *agenda* the legal situation is at least as clear as the legal situation obtaining in the debates before the Human Rights Commission of the United Nations.

70. By opposing untenable legal arguments to the implementation of the "procedural" undertakings set forth in the parts of the Final Act concerning bilateral and multilateral co-operation in ensuring respect for human rights and fundamental freedoms (together with self-determination) and by denying the other participating States the right to take notice, and protest against, any alleged violations of the humanitarian provision solemnly accepted at Helsinki, the CSCE governments which have recourse to the principle of non-intervention in order to escape any dialogue on the subject are likely to be found to be themselves, *prima facie*, not only in violation of the letter and spirit of the Final Act, but also in violation of other international instruments concerning the respect and promotion of human rights and fundamental freedoms. Leaving aside the question, which obviously lies outside the scope of the present chapters, whether any of the governments which are so conducting themselves with regard to "procedure" are complying or not, and in what measure, with the substantive humanitarian obligations deriving from the Final Act or from any other "soft-law" or "hard-law" instrument concerning the matter, the governments in question are likely to have incurred, or incur, in the violation of the following moral or legal obligations.

Firstly, they may incur in a violation of the general rule of international law under which any State is entitled at least peacefully to claim respect for its rights, including the right to see that other States honour their obligations regarding human rights, particularly their obligation to co-operate in this field, according, for example, to Articles 55 and 56 of the United Nations Charter. Secondly they incur in a violation of the known provisions of the Helsinki Final Act concerning co-operation in the implementation of the Final Act

including eventually, were their negative attitude to persist in Belgrade, their obligations concerning the verification of the implementation of the Final Act. Finally the States in question would seem not to honour their general commitments – set forth in the tenth principle of the Helsinki Declaration – to "fulfill in good faith their obligations under international law" (para. 1), "to conform" . . . "in exercising their sovereign rights" . . . "with their legal obligations under international law" and to "pay due regard to and implement the provisions of the Final Act of the Conference on Security and Co-operation in Europe". In particular, the States in question would fail to comply with the determination, expressed in the final clauses of the declaration,

> "fully to respect and apply these principles, as set forth in the present declaration, in all aspects, to their mutual relations and co-operation in order to ensure to each participating State the benefits resulting from the respect and application of these principles by all" [159].

It would be difficult not to note the awkwardness of the invocation of the principle of non-intervention, as a defence against such mild attempts at securing compliance with human rights obligations, on the part of States which understand and apply that same principle in their relations in the manner and for the purposes discussed earlier in the paragraphs devoted to Professor Tunkin's explanation of the so-called "Brezhnev doctrine" (paras. 54 to 56).

It is also necessary to note, perhaps that there is really no need to invoke – in order to prove the untenability of the non-intervention *exceptio* either against the substantive or against the procedural humanitarian rights and obligations deriving from the Final Act or recalled therein – that obvious rule of interpretation which the Final Act sets forth *ad abundantiam* when it declares "All the principles set forth above" to be of "primary significance" and that "accordingly they will be *equally* and unreservedly applied, each of them being interpreted taking into account the others". Were there really a contrast or incompatibility between procedural or substantive humanitarian rights and duties on the one side and the duty not to intervene on the other side, that rule would have a certain function to perform in guiding the interpreter in the search for the proper balance, so to speak, between the conflicting rules (interpreting each principle, "taking into account the others") in such a manner as they could coexist and operate harmoniously. Such a conflict or contrast,

however, does not exist. Coexistence and harmony between the two sets of moral or legal situations or imperatives is *in rebus ipsis*, no particular interpretative effort being necessary.

71. The matter could be left at this tentative appraisal of the legal/moral merits of the CSCE *querelle* if the Final Act were not an instrument of a problematical nature – and if international law itself were not a very special "legal system".

Had we been dealing with a question of interpretation or co-ordination of contrasting, or seemingly contrasting, pieces of a statute or of a labour contract in the municipal law of a modern State, the discussion of the legal merits of the *querelle* would suffice. One could only feel it necessary to add, in such instance, the expression of one's wish, as a prospective citizen of a free Europe and as an actual citizen of one of the States whose delegation has been among the most active in the negotiation of the humanitarian clauses of the Helsinki Final Act, that the available institutional machineries of the legal system manage to operate with all the necessary efficiency for the human rights and fundamental freedoms of all citizens or residents of the Euro-Atlantic area to be as perfectly ensured and effectively enjoyed as the Final Act indicates. Considering, however, the peculiar nature of the Final Act – described by commentators and politicians as a *political* rather than a legal document – and considering the particular nature of international "society" and international law, the expression of such a wish would be simply out of place. "Inorganic" as it is, international law must rely for implementation on the activity *of States themselves*, namely upon the action of the State or States which in each instance have a *title* to *demand* compliance with international obligations. And the Final Act being perhaps not an ordinary legal instrument, it might be even more dependent for implementation upon the manner in which it is used by States as a normative – legal, political or moral – instrument even more than the rules of treaties or international custom.

As regards human rights in particular, the fully legal instruments on which one can count as between the CSCE States belonging not to the relatively small and homogeneous Western European circle of the participants in the 1950 Convention on Human Rights, are essentially the United Nations Charter and the United Nations Covenants of 1966. Since the Charter envisages no procedural devices formally and conclusively accessible to the individuals or groups themselves, while the Civil and Political Covenant would be "actionable" by private parties only, as between States accepting the separate *ad hoc* protocol,

the channels through which compliance can be claimed are, precisely, the "other" participating *States themselves*. The implementation of the humanitarian clauses of the Final Act will therefore depend almost exclusively, in so far as the CSCE States of different political-ideological and socio-economic "faiths" are concerned, on the degree to which each State or group of States will prove willing to endeavour *at inter-governmental level*, by the *peaceful means* left or made available by international law or by the Final Act, to seek and obtain full respect of human rights and fundamental freedoms and full respect for the principle of self-determination.

72. A number of the Western States participating in the CSCE – among which one does not find, after the felicitous restoration of free institutions in three of these States, any country under totalitarian rule – have been rather active, since the signature of the Final Act, in registering data and complaints and trying to exert their influence on the responsible, or allegedly responsible governments. The "human rights policy" inaugurated recently by the United States President may well prove to be, if it is kept within the appropriate limits, a positive factor, also in the Euro-Atlantic area, in strengthening the protection of human rights at the international level. The measure in which that policy may be prompted by purely idealistic motives is irrelevant for the present discourse. What really matters instead is that the Western European governments are thus likely to obtain from the United States more substantial support, in the course of the Belgrade verification, than they did at the time when the humanitarian clauses of the Final Act were being negotiated in Geneva during the drafting of the Final Act.

Of course, it is not easy to induce States to accept a dialogue on such a topic as the human rights of their subjects : and this is particularly true in the case of governments which are inclined – as a government is inevitably more likely to be inclined to do in any country where only one political party is allowed, which practically identifies with the government – to see in the effective exercise of certain freedoms a threat to the very survival of the régime. Furthermore, the shortcomings in the area of fundamental freedoms which are typical of such régimes represent a serious obstacle to the deployment and use of the very remedies that should be applied in order to eliminate those shortcomings or reduce them. The safeguard of the effective enjoyment of human rights and freedoms – something different from the solemn proclamation of such rights and freedoms in a constitutional charter – depends essentially in any country, in the

"West" or in the "East", upon the effectiveness and freedom of action of the opposition parties, of information, of public opinion, of pressure groups. Inadmissibility of lawful, legitimate, opposition parties and the limitation of the freedom of association, combined with shortcomings in the field of free access and dissemination of information makes the functioning of the safeguard problematic to say the least. In turn, this puts a most serious obstacle to international – intergovernmental or interindividual – dialogue about human rights. One can hardly go beyond registration and denunciation of violations. The denunciation does not reach beyond the public opinion of the very same free countries from which it comes : and in the absence of freedom of information in the country where the alleged violations would have occurred, a serious verification of the degree of compliance is almost impossible.

On the contrary, the Western countries of the CSCE – because it is only the Euro-Atlantic West that comes here directly into the picture and not any other part of the world – everything, in comparison, is done "in the open", and rightly so. Governmental structures and actions are "open", as all such structures and actions ought to be, to all conceivable legal and factual review, control, cristicism and attack by the press, public opinion, the electorate, trade unions, parliament and political parties, including of course – as they should be – those parties which aim at the modification or even the *radical* alteration of the country's political, economic and social system. Human rights violations by the rulers are thus comparatively easy to trace. Freely sought and reported by the mass media, the news of violations are at the disposal of the opposition, of public opinion of independent media and independent courts of justice.

An invaluable asset for the country and for the world, this advantage represents, however, in a sense, a complication of the dialogue about human rights with countries characterized by radically different political, economic and social systems : because the yield of the monitoring of human rights violations is relatively so rich and varied in the Western countries, and so scarce elsewhere, that the comparison of the respective human rights records of the two groups of States becomes distorted – when it is not deliberately distorted by biased commentators – to the detriment of the governments which are characterized, precisely, by a higher degree of freedom and a greater respect for human rights [160]. One is thus very far – in the CSCE area – from the situation obtaining, for example, among the countries participating in the Rome Convention on human rights, where the

degree of affinity is sufficient for a considerable number of these governments to find it relatively easy to accept not only – as a matter of course – the free flow of information (on human rights implementation) in all directions, but also the judgment of a commission and a court on claims of violation of human rights of which a contracting State may be responsible according to interested individuals or groups. Between the "East" and the "West" of the CSCE even a documented impartial comparative *study* of the human rights record of any two or more participating States seems to be extremely difficult, if not impossible. This favours distortions of the truth to the detriment of *both sides*: and really meaningful international co-operation in the field seems bound to remain on paper, even if one of the sides abandoned its claim that any gesture of public or diplomatic concern over human rights on the part of the other would constitute an act of unlawful intervention.

Difficult as the task may be, it is indispensable that the effort be pursued if the humanitarian provisions of the Final Act – and not only those of the Final Act – are to survive in the relations between the two groups of States which are the most typical and significant from the standpoint of the fundamental ideological confrontation of our time, and thus the most influential, positively or negatively, in the field of human rights. The Belgrade "review" Conference will be a very important test of the degree to which the various CSCE participants realise the importance of this.

By including respect for human rights among the objectives of the CSCE the 35 participants in the Final Act have taken upon themselves a great responsibility towards their peoples, as well as towards all the other peoples of the earth. They have all recognized – thus confirming the choice made by the "Fathers" of the United Nations Charter – that peace and freedom are not divisible, and that respect for human rights and fundamental freedoms – and self-determination – *is* and *can be* the object of international obligation and of co-operation among States. The fact that by this they did not introduce any real novelty does not reduce the importance that such a recognition assumes in that particular area of international relations which is the CSCE.

It follows that if now the CSCE States were to set the matter of human rights aside on the basis of the untenable argument that the international protection of human rights is radically incompatible with another vital principle such as non-intervention, they would do much more damage to the cause of that protection than they would have done if, from the outset, they had renounced altogether the idea of

including human rights in the Final Act. Had they chosen the latter course, they would have left the existing instruments of international protection of human rights *intact*. After choosing to include in the Final Act humanitarian clauses which refer explicitly, *inter alia*, to the existing instruments in order to confirm and elaborate upon them, they could not set the implementation of such clauses aside for an alleged contrast with non-intervention, without seriously impairing the credibility of those instruments together with the credibility of the whole Final Act. Not just the CSCE participants, but any other State or group of States would feel encouraged to consider those instruments as deprived of any legal or moral impact.

The Western countries in particular, who bear the greatest responsibility for the inclusion of important humanitarian provisions in the Final Act should be most careful before letting those provisions wither away – as "soft-law" provisions are particularly apt to do – for lack of adequate implementation. By so doing after the solemn proclamations of 1975 they might well be understood to mean, either that those rights and freedoms are no more worthy of intergovernmental attention, or that they need no more attention because they are respected everywhere. In either case the Western countries would wantonly abandon at one and the same time the most essential portion of what they secured at Helsinki as a matter of *quid pro quo* for substantial concessions in other areas, and the most salient feature of their contribution to civilization.

NOTES

1. *Inter alios* : Higgins, R., *The Development of International Law Through the Political Organs of the United Nations*, 1963, pp. 58-129 ; Ermacora, F., "Human Rights and Domestic Jurisdiction, Article 2.7 of the Charter", *Hague Rec.*, 124 (1968-II), pp. 375-451 ; Trindade, A. A. C., "The Domestic Jurisdiction of States in the Practice of the UN and Regional Organisations", *ICLQ*, 25 (1976), pp. 715-765 ; Watson, J. S., "Autointerpretation, Competence, and the Continuing Validity of Article 2 (7) of the UN Charter", *AJIL*, 71 (1977), pp. 60-83.

2. An excellent description of that phase is in the book by Ferraris, L. V. (ed.), *Testimonianze di un negoziato*, SIOI, Cedam, Padua 1977.

3. Sergio Segre, a member of the Italian Parliament and of the WEU's Assembly. The emphasis is added.

4. *Ibid.* The emphasis is added.

5. Polish Institute of International Affairs, Conference on Security and Co-operation in Europe : a Polish View, Warsaw, 1976.

6. Part of the cited book's chapter on the Helsinki Declaration of Principles, by Janusz Symonides, pp. 67f.

7. Cited volume, at pp. 67-68. The emphasis is added.

8. We speak of "obligations" for the reasons explained *infra*, para. 5 *(a)*.

9. We leave out, for the moment, the question of the legal force of the Helsinki Final Act (*infra*, para. 5 *(a)*).

10. The relationship between human rights and non-intervention in the Helsinki Final Act must have played an important role in the labours of the WEU's Assembly in the course of 1977 if the original document of the Spring (Document 732 of 9 May 1977) has undergone such striking amendments as those one finds in the subsequent document on the matter made available in the Autumn (Document A/UEO/GA (77) 10 of 21 October 1977). Indeed, while the *Exposé des motifs* including the quoted passages on the alleged contrast between Principles VI and VII remained unchanged, there were added a "Complément à l'exposé des motifs" and a new "Projet de recommandation" the latter to replace the "projet de recommandation" which was contained in the May document. This had to be done, as explained in the "Complément à l'exposé des motifs" because in the course of the debate on the first document the draft recommendation

> "a fait l'objet d'un si grand nombre d'amendements que la présidente de la Commission . . . et votre rapporteur ont été amenés à demander le renvoi du rapport en commission. Compte tenu de tous les aspects du débat et des différents amendements présentés, votre rapporteur présente maintenant *un nouveau projet de recommandation*. En même temps, il lui semble nécessaire de compléter l'exposé des motifs présenté en juin 1977 pour le mettre à jour en tenant compte de l'évolution de la situation depuis cette date. Cette mise à jour couvre en substance la période allant jusqu'à la première décade d'octobre, date à laquelle s'est terminé à Belgrade le débat général et où ont commencé les travaux à huis clos des cinq groupes *ad hoc*" (emphasis added).

Coming to the recommendation, the original May draft's essential part read :

> "Recommande au Conseil : 1. De poursuivre l'examen de la préparation et du déroulement de la rencontre de Belgrade parallèlement aux autres organes intergouvernementaux de consultation ; 2. De rechercher, par priorité, la poursuite d'un processus de détente destiné à déboucher sur des progrès dans le domaine de l'entente et de la coopération entre les Etats européens ; 3. *De respecter, en tout état de cause, et de promouvoir le respect du principe défini à Helsinki de la non-intervention dans les affaires intérieures de tous les Etats* ;

4. De préparer avec soin les initiatives nécessaires à l'adaptation des politiques de défense et des stratégies adoptées par les pays membres à la situation nouvelle ; 5. De veiller à l'application, par les pays membres, de l'ensemble des principes élaborés à Helsinki et de demander aux pays de l'Europe de l'Est de mener une politique analogue" (emphasis added).

The corresponding part of the October draft of the same recommendation read as follows :

"Recommande au Conseil : 1. De poursuivre l'examen du déroulement de la rencontre de Belgrade parallèlement aux gouvernements ainsi qu'aux organisations européennes et atlantiques compétentes ; 2. De rechercher, par priorité, la poursuite d'un processus de détente destiné à déboucher sur des progrès dans le domaine de l'entente et de la coopération entre tous les Etats signataires et *sur l'affirmation des droits de l'homme et des libertés fondamentales* ; 3. De veiller à l'application, par les pays membres, des clauses de l'Acte final d'Helsinki et de demander aux pays de l'Europe de l'Est de mener des politiques analogues" (emphasis added).

Human rights non-interventions were apparently considered to be so incompatible that the ones could not coexist with the other in the context of the same recommendation.

11. *Inter alios* : Russell, H. S., "The Helsinki Declaration ; Brodlingnag or Lilliput", *AJIL*, 70 (1976), pp. 242 ff. ; Prevost, J. F., "Observations sur la nature juridique de l'Acte final de la Conférence sur la sécurité et la coopération en Europe", *AF*, XXI (1975), pp. 129 ff. ; and Ghebali, V. Y., "L'Acte final de la Conférence sur la sécurité et la coopération en Europe et les Nations Unies", *ibid.*, pp. 73 ff. ; Andreani, "La Conférence sur la sécurité et la coopération en Europe", in *Régionalisme et universalisme dans le droit international contemporain*, colloque de la Société française de droit international (Bordeaux, 1976), Paris, 1977, pp. 114 f.

12. These proposals were as follows : *USSR* (19 September 1973) : "*respect for human rights and fundamental freedoms* in accordance with which the participating States will respect human rights and fundamental freedoms, including freedom of religious belief". *Yugoslavia* (28 September 1973) : "Respect for human rights and fundamental freedoms including the freedom of thought, conscience, religion or belief" : "The participating States reaffirm the universal significance of their obligation to respect human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief, as important contributing factors to the strengthening of security and promoting of co-operation in Europe and the world as a whole". "They will make both individual and joint efforts to ensure the consistent observance and furtherance of human rights and fundamental freedoms, and co-operate towards the elimination of racial, national and other forms of discrimination wherever they may appear". "They will respect the interests of national, ethnic and linguistic minorities and their right to a free development, so that the latter may help further friendship and co-operation between the countries and peoples concerned." *France* (19 October 1973) : "7. The participating States consider that, as the Charter of the United Nations indicates, respect for human rights and fundamental freedoms for all and without discrimination is also one of the bases of international co-operation and of the development of friendly relations among the Nations. They accordingly proclaim their determination to respect and promote those rights and freedoms, especially freedom of thought, conscience, religion and belief." *United Kingdom* (3 October 1973) : "Participating States recall that it is one of the purposes of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion ; and that all members have pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of this purpose." "They reaffirm their belief that such action can make an important contribution to the creation of the conditions of stability and well-being which are necessary for the development of peaceful and friendly relations among them." "Human rights and fundamental

freedoms for all, including freedom of thought, conscience, religion or belief, should be observed in accordance with the Charter of the United Nations, and the provisions of other international conventions and instruments by which participating States are bound or which they have accepted as setting out a common standard of achievement." "Participating States will be guided by this principle in all aspects of their mutual relations and co-operation, and will seek jointly and separately to further all efforts made in this field, and in particular those of the United Nations." "To this end, they will encourage the dissemination of and access to information concerning human rights and fundamental freedoms ; and the participation of governmental and non-governmental bodies and individuals in efforts made to promote them at the United Nations and elsewhere." *Holy See* (9 October 1973) : "The participating States, *deeply convinced* that freedom of thought, conscience, religion or belief, both individual and collective is related to the spiritual life of every human being and is thus closely associated with human dignity" ; "*recognizing* that the full enjoyment of this freedom in all places, at all times and in all circumstances, is the prerogative, not to be surrendered, both of persons and communities directly concerned and of those in other countries also, who share the same religions or beliefs or who regard this freedom as an essential element of the rights of man" ; "*recognizing* that the enjoyment of this freedom, as a concept recognized by their peoples and secured by numerous national and international legal instruments, can contribute greatly to the strengthening of security, stability and peace and to the promotion of understanding, good relations, friendships and co-operation among these peoples" ; "*undertake*, individually and jointly, to ensure in full measure continued respect for and promotion of freedom of thought, conscience, religion or belief, both nationally and in the relations between their peoples."

13. See Alessi, M., in Ferraris, L. V. (ed.), *Testimonianze di un negoziato*, cited, at p. 276.

14. Freedom of association is contemplated, together with freedom of trade union in Article 22 of the Covenant on Civil and Political Rights : *but* with a substantial escape clause.

15. Namely, in the title of the principle and in the first paragraph.

16. Partly corresponding to some of the articles (2, 9, 10, 14, etc.) of the Covenant on Civil and Political Rights.

17. Alessi in Ferraris, *Testimonianze*, cited at p. 279, also describes the resistance which a number of delegations put up against the United Kingdom proposal. Particularly valuable, in addition to the United Kingdom representative (Laver)'s tenacity was the ingenious contribution of the Maltese Ambassador Gauci.

18. It will be amply stressed further on, however, that this does not mean that the human rights provisions of the Helsinki document are any less relevant – and any less "guaranteed" than the vast majority of international humanitarian rules (*infra*, paras. 21 et seq., 26 et seq., and 65 et seq.).

19. For a resumé of such clauses : Capotorti, F., *Patti internazionali sui diritti dell'uomo, Studio introduttivo*, SIOI, Padua, 1967, pp. 32-35.

On some vital problems of interpretation partly connected therewith, Schwelb, E., "The Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights", *René Cassin Liber*, I, 1969, pp. 301 ff. ; and Valticos, N., "Universalité des droits de l'homme et diversité des conditions nationales", *ibidem*, pp. 383 ff., esp. 392 ff.

20. *Supra*, under paragraph 6 (footnote).

21. According to Senator Calamandrei, F., "I diritti umani e la normativa internazionale", in *Affari Esteri*, 1977 (November) at p. 578, the human rights contemplated in the seventh principle of the Declaration "vengono richiamati in termini assai generici e sommari, se non riduttivi, a confronto con l'area garantista tracciata da altri preesistenti strumenti internazionali". Of course, most pre-existing international instruments (from the United Nations Declaration of 1948 to the European Convention and the United Nations Covenants) are more articulate, while Principle VII (*plus* Principle VIII) sets forth a number of *general* guiding lines in the

matter. As such, however – and as shown in the text – both Principles (VII and VIII) are far from "generici e sommari" and anything but "riduttivi". On the contrary. Considering actually the fact that they are integrated by the detailed clauses of the Third Basket and, above all, the fact that the obligations deriving from all existing instruments are unquestionably embodied, by obvious implication or explicit reference, into the undertakings made by the participating States in the Final Act (*infra*, paras. 24 et seq.), the humanitarian provisions in question have taken a place of very first importance among the most remarkable "humanitarian" documents produced so far at international level. Just as he underestimates the qualitative-quantitative content of Principle VII (and perhaps VIII), the distinguished Senator unduly diminishes the normative value – and the impact – of that principle when he makes so much of the fact that the Final Act is not a treaty, but rather a "declaration of intent", in order to stress the non-binding character of the provisions in question (pp. 578-579). For the reasons indicated earlier (*supra*, para. 5 *(a)*) we deem it superfluous to discuss, in the present context, the question of the legal nature of the Final Act. We confine ourselves to noting that the opinion that this document is not an international agreement of legally binding value calls for further exploration. But whatever the correct legal answer may be, there will always remain : (i) the fact that the moral and political importance of the document so solemnly and authoritatively signed and proclaimed by the rulers of the 35 powers is so high, and the continuation of the détente process (tied to its implementation) so vital, that to argue whether it is a legal document is more than a bit formalistic ; (ii) the even more decisive fact that the document enunciates, *inter alia*, repeated mutual undertakings of the participating States to comply with their international obligations. In addition to the general principle of fulfilment in good faith of *any* international obligations "set forth as Principle X, the Final Act commits in particular the participating States to comply with the obligations deriving from existing instruments on human rights, notably from the Universal Declaration, from the United Nations Covenants and first of all from the United Nations Charter. There follows that even if the question of the legal nature of the Final Act were to be solved in the sense that it is just a political document, *respect for promotion of human rights* proclaimed therein is binding as a matter of law by virtue of existing legal instruments ; and it is binding as a matter of *policy* by virtue of the recognition that that respect and promotion by the CSCE States is an essential *factor* (and not just a consequence) of détente.

22. For the concept of "soft law" see *infra*, under paragraph 24 (footnote).

23. According to the last paragraph of the General Preamble to the Third Basket (under the quoted general title of "Co-operation in humanitarian and other fields") the co-operation envisaged (in the whole Basket) "shall take place in full respect for the principles guiding relations among participating States as set forth in the relevant document".

24. Notably, in the last sentence of the first paragraph.

25. Last sentence of first paragraph.

26. Second paragraph.

27. See, for example, the fourth paragraph of the preamble to Human Contacts.

28. See, for example, the sixth paragraph of the Human Contacts preamble.

29. It should also be noted that the escape clauses such as the "mutually acceptable conditions" and the references to future agreements do not affect the various texts without qualification. For example, the conclusive paragraph of the Human Contacts preamble recites (following mention, *inter alia*, of "mutually acceptable conditions" and future "agreements or arrangements") that the participating States "Express their intention now to proceed to the implementation of the following". The "following" are a series of measures of mostly immediate application in areas such as contacts and regular meetings on the basis of family ties, reunification of families, marriage between citizens of different States, travel, etc.

30. "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and

principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."

The main formulations of the whole principle proposed at the beginning of the second phase of the CSCE (Geneva, 1973-1975) were as follows: *USSR* (19 September 1973): "*Equal rights and self-determination of peoples*, in accordance with which all peoples possess the right to establish the social régime and to choose the form of government which they consider expedient and necessary to secure the economic, social and cultural development of their country." *Yugoslavia* (28 September 1973): "*Equal rights and self-determination of peoples*: the participating States reaffirm the universal significance of the principle of equal rights and self-determination of peoples for the promotion of friendly relations and co-operation between States in Europe and the world as a whole and for the eradication of any form of subjugation or of subordination contrary to the will of the peoples concerned". "They will observe the right of every people freely to determine its political status and to pursue, independently and without external interference, its political, economic, social and cultural development. They will refrain from any forcible or other action denying the equal rights or right of self-determination of any people". *France* (19 October 1973): "8. The participating States recall that, according to the Charter of the United Nations, the development of friendly relations among nations is based on respect for the principle of equal rights and self-determination of peoples. By virtue of this principle, all peoples have the right to determine their internal and external political status in full freedom and without external interference and to pursue their economic, social and cultural development; and all States have the duty to respect this right. The participating States consider that respect for these principles must guide their mutual relations just as it must characterize relations among all States." *Netherlands* (3 October 1973): "Every participating State shall conduct its relations with every other participating State on the basis of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations." "The participating States recognize the inalienable right of every people, freely and with all due respect for human rights and fundamental freedoms, to choose, develop, adapt or change its political, economic, social or cultural system, without interference of any kind on the part of any State or group of States."

31. The seventh and eighth paragraphs of the formulation on self-determination in that declaration recite: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

32. *Supra*, footnote to paragraph 14.

33. See especially Alessi, cited *Testimonianze*, pp. 280 ff.

34. On the preference of a number of delegations for self-determination of States, Alessi, cited *Testimonianze*, at pp. 281 f.

35. Alessi, *Testimonianze*, at p. 282, rightly describes the debate over this word as "paradossale".

36. Articles 1.2. and 55 of the Charter.

37. *Normative Role*, pp. 565 f.

38. Cassese, "The Helsinki Declaration and Self-determination", in *Human Rights, International Law and the Helsinki Accord* (Buergenthal, ed.), ASIL, 1977, pp. 88 ff.

39. This text is quoted *supra*, paragraph 14 (in a footnote).

40. It is perhaps worth recalling that the safeguard clause in question originated mainly from the Italian delegation to the United Nations Special Committee on Friendly Relations and was negotiated (especially with the USSR Delegation) by a small working group composed, if we remember correctly, of Canada, Egypt, Italy,

Syria, Yugoslavia and the USSR. The purpose of the safeguard clause was surely to protect not the integrity of any power's colonial dependencies, but the territorial integrity of the metropolis itself and only the metropolis. Thence the idea that the safeguard should protect not *any* State, but only *those States* which, by ensuring a *representative* government to their whole population, could be deemed to conform with the principle of self-determination.

41. *Resto del Carlino* (Bologna), 1 February 1973, pp. 1 and 15.

42. According to a distinguished Western diplomat who took an active part in the conference, the inclusion of self-determination among the principles of the Decalogue was being opposed in reality by that delegate for other reasons. First, the principle of self-determination was looked upon by his government as a dangerous element from the point of view of the stability of régimes. Secondly, self-determination appeared to be in contrast with the so-called doctrine of the "limited sovereignty" of certain Eastern European (and other) countries (*infra*, paras. 54 et seq.). Thirdly, as well as the proclamation concerning human rights – and even more so – an emphasis on self-determination was bound to bring to the forefront in the CSCE, elements and factors other than the strictly intergovernmental matters of stability, territorial integrity and inviolability of frontiers, which seemed to be for certain governments the sole interest in the conference. In addition, the inclusion of self-determination among the principles would imply – together, again, with human rights in general – the unequivocal rejection by the conference of that static concept of détente which purported the exclusion as far as possible, from the very mandate of the CSCE, of any progressive development in such areas as human contacts, cultural exchange, flow of information and other human concerns. This was to be made abundantly clear during the 28-odd months of the preparatory and drafting phases of the conference. See, Alessi, M., in Ferraris (ed.), *Testimonianze*, cited, pp. 280 ff.

43. *Supra*, para. 15.

44. *The Normative Role*, etc., at p. 571 ; and *infra*, para. 59.

45. *The Normative Role*, pp. 563 and 571.

46. *Final Act, Follow-up to the Conference*, official edition, at p. 133.

47. *Final Act*, cited edition, at p. 81.

48. *Final Act*, cited edition, at p. 80.

49. In the general preamble to the whole Final Act the main objectives of the CSCE are indicated as "peace, security, *justice* and *co-operation*" (official edition, at p. 75, emphasis added). References to co-operation are also present in the general preamble to the First Basket under the title "Questions relating to Security in Europe", especially in the fourth paragraph (Official edition, at p. 77), and, within the same Basket, in the preamble to the Declaration of Guiding Principles, especially in the first and third paragraphs (at pp. 77, 78).

50. The text continues : "as well as in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of co-operation in Europe, and the development of the process of détente in the future" (cited edition, at p. 133).

51. On this questionable distinction (used here for convenience) see the volume edited by Kiss on The Hague Academy *Colloquium on the Protection of the Environment and International Law*, Sijthoff, Leiden, 1975, esp. at pp. 540-544 and 623-627.

52. See, for example, Drost, P. N., *Human Rights as Legal Rights*, Leiden, 1951, pp. 28-31.

53. See, for example (if we understand his position correctly), Rechetov, Y., "International Responsibility for Violations of Human Rights", in Cassese (ed.), UN Law, *Fundamental Rights*, pp. 238-239.

54. Lauterpacht, *International Law and Human Rights*, London, 1950, pp. 145 ff. By the absence of a machinery of compulsion, we mean (in Lauterpacht's words) the absence of "direct executive authority" in United Nations organs in the field of human rights.

55. Report of the ILC on the work of its thirtieth session (8 May-28 July 1978), para. 94 (draft articles on State responsibility), Art. 19.

56. Case concerning the *Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970*, paras. 33-34 (at p. 32) and para. 91 (at p. 47).

57. Para. 33 (at p. 32).

58. Para. 34 (same page).

59. Para. 35 compared to the preceding ones, always at p. 3.

60. See especially para. 90 of the Judgment (at p. 47).

61. The Court does not go deeply enough, in our opinion, when it touches upon these implications of an *erga omnes* obligation in para. 90 (p. 47) of the cited Judgment : "With regard to human rights, to which reference has . . . 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 the problem has had to be sought" : and the Court recalls "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*". Is an international "right" or "legal interest" of a State (and the correlative "obligation") conceivable which does not confer upon that State *any* "capacity to protect the victims of infringements" or *any* capacity to put in some kind of claim for non-compliance ?

62. Verdross and Simma, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, 1976, at pp. 599-600 ; and Frowein, J. A., *The Interrelationship*, etc., at p. 72.

63. On the Universal Declaration see especially Arangio-Ruiz, Vincenzo, "La Dichiarazione Universale dei Diritti dell'Uomo", *in La Comunità internazionale*, Rome, 1965 ; and Capograssi, G., *La Dichiarazione Universale dei Diritti dell'Uomo e il suo significato*, SIOI, Rome, 1957, pp. 9-19.

On the international impact of the declaration see especially Verdross and Simma, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, 1976, at pp. 599-600 ; and Frowein, J. A., *The Interrelationship*, etc., at p. 72.

64. Frowein, cited work, pp. 74 ff.

65. Frowein, cited work, pp. 76 f., mentions, *inter alia*, Article 19 of the Covenant on Civil and Political Rights on freedom of expression and freedom to seek information in connection with Chapter 2 of the Third Basket on the improvement of the flow of information. Indeed, the presence of that chapter in the Final Act "makes it clear that the right to seek information under Article 19 of the Covenant cannot be restricted so as to completely exclude all foreign newspapers".

66. See especially Carey, J., *UN Protection*, etc. ; and Sohn, L., and Buergenthal, T., *International Protection of Human Rights*, 1973.

67. Compare the various sets of articles cited in the preceding paragraph sub. *(a)*.

68. With the known distinction between general recommendations (addressed to all States and none in particular), on one side, and individual recommendations.

69. Schwelb, E., "Civil and Political Rights : the International Measures of Implementation", *AJIL*, 62 (1968), pp. 827 ff., at pp. 847-848.

70. Schwelb, E., cited work, at p. 848. The passage quoted by that distinguished author is from the *Austria-Italy* case in *Yearbook of the European Convention on H.R.*, Vol. 4, at p. 140.

71. Cited official text, at p. 82.

72. See, *inter alios*, Alvarez, *Le droit international américain*, 1910 ; Yepes, J. M., "Contribution de l'Amérique latine au développement du droit international public et privé", *Hague Rec.*, 32 (1930-II), pp. 745 ff. ; but mainly in "Les problèmes fondamentaux du droit des gens en Amérique", *Hague Rec.*, 47 (1934-I), pp. 51-90 ; Thomas, A., *Non-Intervention*, Dallas, 1956 ; Bemis, S. F., *The Latin American Policy of the United States, an Historical Interpretation*, New York, 1943, esp. pp. 226-294 ; Fenwick, C. G., "Intervention : Individual and Collective", *AJIL*, 39 (1945), pp. 645-663.

73. *The Normative Role*, etc., pp. 547 ff.

74. See, *inter alios*, Yepes, J. M., "Les problèmes", etc., at p. 69. On the underlying causes see Bemis, *The Latin American Policy of the United States*, passim.

75. Precedents are reported, *inter alios*, by Bustamante, A. S., *Droit international public*, I (1934), pp. 337 ff. ; and by Thomas, A., *Non-Intervention*, Dallas, 1956, pp. 3 ff.

76. Bemis, quoted work, pp. 242 ff., esp. 246.

77. According to Yepes, the French version would have read "Aucun Etat ne pourra intervenir dans les affaires d'un autre" (quoted *Hague Rec.*, 1934, at p. 77).

78. According to Yepes, quoted 1934 Course, pp. 77-78 ; *Haitians and Mexicans* had proposed : "Aucun Etat ne pourra à l'avenir, ni directement ni indirectement, pour quelque motif que ce soit, occuper, même temporairement, une portion quelconque du territoire d'un autre Etat. Le consentement donné par celui-ci ne légitimera pas l'occupation, et l'occupant sera responsable de tous les faits découlant de son occupation, tant par rapport à l'Etat occupé que par rapport aux Etats tiers." *Paraguay* proposed : "Sera considérée comme violatrice du droit international toute intervention d'un Etat dans le territoire d'un autre, sans déclaration de guerre préalable et avec l'intention de décider des questions d'ordre interne ou externe par la force, la pression matérielle ou la coercition morale." *Argentina* proposed : "Un Etat ne peut intervenir ni dans les affaires internes ni dans les affaires externes d'un autre."

The same author explains (at p. 79) the shortening of the formulation at Rio in 1927 by the fact that : "Les jurisconsultes de Rio estimèrent que les propositions du Mexique, de Haïti et du Paraguay pouvaient avoir des répercussions sur des cas pendants alors dans la politique internationale américaine et décidèrent d'en différer l'étude pour des circonstances plus propices. C'est pour cela qu'on se borna à approuver l'interdiction pure et simple de la seule intervention dans les affaires internes telle que l'avait proposée la délégation de Costa Rica. Cette approbation eut lieu – il faut le rappeler pour en saisir la portée – à l'unanimité, y compris la voix de la délégation des Etats-Unis."

79. Bemis, cited work, pp. 249 ff. (and 241).

80. It should be noted that at the time of the Havana Conference the United States was involved in intervention in Central America.

81. According to Bemis, cited work, p. 272, the inclusion of "external" in addition to "internal" affairs was an Argentine thesis, partly directed against intervention in the Chaco dispute and war (in implementation of the Declaration of 3 August 1932) between Bolivia and Paraguay. We wonder, however, whether the addition had not been made sometime before.

82. Yepes, cited 1934 course.

83. Bemis, cited work, pp. 273-274. On the reservation, the whole text of which can be read in Hyde, *International Law*, etc., Vol. 1, pp. 276-277 (footnote 4) ; see also Fenwick, "Has the Spectre of Intervention Been Laid in Latin America ? ", *AJIL*, 50 (1956), at p. 637.

84. Bemis, cited work, p. 270.

85. United Nations, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (Oct. 1949), at p. 1039.

86. Bemis, cited work, at pp. 285-286.

87. "In adhering to this treaty the United States does not thereby waive any rights it may have under other treaties or under international law."

88. Bemis, cited work, at p. 276.

89. Bemis, cited work, Chapter XVI (pp. 276 ff.).

90. Bemis, cited work, p. 289.

91. Bemis, *ibidem*, at pp. 290-291.

92. Bemis, cited work, pp. 290-291.

93. Except for a greater frequency of the word "intervention" as a technical term, we have not found a real difference between "intervention" and "interference".

The terms "intervention" and "interference" seem to be used indifferently, for

example, by Wheaton, *Elements of International Law*, 2nd ed., 1864, pp. 117 ff. ; and 5th ed., 1916, pp. 90 ff.

94. It is worth adding that among the various alternative formulas proposed at the Rio session by the assembled jurists all but one (that of Argentina ?) contained an express reference to the coercive or dictatorial element that was present in the 1925 draft.

95. Namely, "for any reason whatever".

96. *The Normative Role*, etc., pp. 558 f.

97. Although it looks certainly obscure enough to discourage the interpreter (*The Normative Role*, etc., pp. 556 ff.), the expression "attempted threats" is perhaps, on second thoughts, manageable. The word "attempted" was presumably added in order to signify that the condemned action – namely, a wanton threat of military force – would be unlawful regardless of whether it were successful.

98. A not minor, albeit indirect, confirmation of our reading of the word interference (in the phrase now under scrutiny) as always implying coercion on the part of the intervenor, comes from the draft of the principle of non-intervention proposed by Yugoslavia at the first session of the United Nations Committee on the Principles of International Law concerning Friendly Relations and Co-operation among States (1964). The Yugoslav proposed formulation read : "No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State." "Accordingly, States shall refrain from any form of interference or attempted threat against the independence or right to sovereign equality of any other State and in particular its right to select its political, economic and social system and to pursue the development thereof." "States shall therefore especially refrain from : *(a)* using or encouraging the use of coercive measures of a political or economic character to force the sovereign will of another State either in the field of its internal or external relations, in order to obtain advantages of any kind ; *(b)* attempting to impose a political or social system on another State ; *(c)* interfering in civil strife in another State ; *(d)* organizing, assisting, fomenting, inviting, or tolerating subversive or terrorist activities against another State ; *(e)* interfering with or hindering in any form or manner the free disposition of the natural wealth and resources of another State" (1964 Report of the Special Committee, para. 204).

It would be difficult to see, either in the definition or in the specifications and examples, contained in this text, any form of intervention consisting in a non-coercive action.

A similar position was to be taken by Yugoslavia in the proposal to the CSCE of 28 September 1973 (*infra*, para. 45).

99. *Inter-American Conference on Problems of War and Peace, Mexico City, February 21-March 8, 1945, Report Submitted to the Governing Body of the Pan-American Union by the Director General*, Pan-American Union, Washington, 1945, at p. 39.

100. Another instance was, in 1944, the "Hudson Committee" draft on the International Law of the Future : Postulates, Principles and Proposals, in United Nations General Assembly, *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States*, doc. A/CN.4/2, of 15 December 1948, at p. 161. Non-intervention was there defined in terms of refraining "from intervention in the *internal* affairs of any other States". The inter-American Juridical Committee draft, however, submitted in 1942 to the member governments of the Pan-American Union and included in the same cited *Preparatory Study*, at pp. 144-145, maintained the prevailing definition according to which "no State may intervene in the *internal or external* affairs of another".

For a number of instances of preference for the "*internal* affairs" formula in the United Nations period (Section 3 of the present chapter), see *infra*, para. 44.

101. This is not contradicted, in our view, by the long list of forms of intervention contained in the 1959 "Draft instrument on violations of the principle of non-intervention" prepared by the Inter-American Juridical Committee on the request of

the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS (Pan-American Union, doc. CIS-SI, Washington, DC, C, 1959, pp. 1 f. and 16 ff.).

102. Alvarez, *Le Droit international américain*, 1910, pp. 91 ff., 147 ff.

103. Bemis, *The Latin American Policy*, etc., pp. 48 ff., esp. 123-225.

104. Yepes, *Les problèmes fondamentaux*, etc., pp. 54-69.

105. Thomas, *Non-Intervention*, pp. 15-54.

106. Winfield, "The History of Intervention in International Law", *BYBIL*, 1922-1923, at p. 130.

107. On the legal implications of protest, see Anzilotti, *Cours de droit international* (French translation by Gidel), 1929, at p. 349.

108. On some of these instances, Wright, Q., "Is Discussion Intervention ?", *AJIL*, 50 (1956), at p. 106.

109. To put it with Oppenheim (*International Law*, I (Peace), 6th ed. by Lauterpacht, at p. 273), "intervention must neither be confused with good offices nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference". Oppenheim also stresses, *inter alia*, the lawfulness of diplomatic protection (pp. 276 and 626 ff.).

110. In the case of permanent international instruments envisaging the possibility of unilateral recourse (regional bodies or United Nations organs), a participant State is even at liberty to choose, whenever the instrument does not provide to the contrary, between a proposal to resort to the international body by mutual agreement and a unilateral initiative.

111. Everybody knows that this is a very common aspect of the contemporary ideological struggle.

112. Bemis, S. F., *The Latin American Policy*, etc., at pp. 234, 237, 250.

113. This conclusion is implicitly supported by the list of forms of violations of the principle of non-intervention drafted in 1959 by the Inter-American Juridical Committee (on a request from the Fifth Meeting of Consultation of Foreign Ministers of the OAS) for presentation to the Eleventh Inter-American Conference (mimeographed edition of United Nations, General Assembly, Eighteenth Session, doc. A/C.6/L.537 of 30 October 1963, pp. 175-176, under Section C.4).

114. United Nations, *ILC Yearbook* for 1949, at pp. 90 and 101 f.

115. United Nations, *ILC Yearbook*, 1949, at p. 101 (emphasis added). See also Alfaro's statement as summed up at p. 90 of that same Yearbook.

116. See Yepes, *Les problèmes fondamentaux*, etc., at pp. 71-72. See also, of the same Latin American author, *La contribution*, etc., at pp. 747-748.

117. The statement in the text is a development of the remarks set forth, with reference to the Friendly Relations Declaration, in *The Normative Role*, etc., pp. 528-530 and 558-559. It is further explained, in a measure, by developments *supra*, paras. 34 and 36.

The condemnation of economic or political measures of coercion does not extend, in our opinion, to those "innocent" measures which, while not of such a nature as to amount to an act of aggression (see, *inter alia*, Articles 2.3. *(g)*, 4, 5.1 and 6 of the Definition of Aggression in resolution 3314 (XXIX) of the General Assembly) were resorted to by a State in order to secure compliance by another State with an international obligation (towards the intervenor).

118. Russell, R., *A History of the United Nations Charter*, at p. 900.

119. *The Normative Role*, at pp. 551-554.

120. *ILC Yearbook* for 1949, pp. 61 ff. and 90 ff.

121. Other Assembly enactments touching upon the matter are recalled *infra*, para. 44 (ii).

122. See paras. 44 and 49.

123. *The Normative Role*, pp. 503-518 and 525-527.

124. Considering that this principle is referred to twice in such terms in resolution 1815, one can hardly doubt that this title was chosen intentionally. Under the same title the principle was indicated in the United Nations Secretariat's documents

prepared under the Assembly's instructions contained in paragraph 4 *(a)* and *(b)* of resolution 1966 (XVIII).

125. See, for example, United Nations document A/AC. 119/L.1 of 24 June 1964, paras. 200-201 and 187-194. The title under which the latter set of paragraphs are presented is "The question of what matters is essentially within the domestic jurisdiction of a State".

126. Only "internal" affairs are mentioned in the draft Declaration of Principles of Peaceful Coexistence prepared by the Soviet branch of the International Law Association in 1962 and presented at the 50th Conference of the ILA ("No State has the right to interfere in the internal affairs of any other State"); and an explicit combination of the condemnation of intervention of a State with the concept of "matters within the domestic jurisdiction of any other State" was contained in the comment submitted by the Government of Poland between the seventeenth and eighteenth sessions of the General Assembly. That comment concluded with the suggestion that the principle of non-intervention be laid down, mainly, in the terms: "States shall have the duty not to intervene in matters which are within the domestic jurisdiction of any other State in accordance with the Charter." Solely in terms of internal affairs referred to non-intervention in the draft resolution submitted to the seventeenth session of the General Assembly (A/C.6/L.509/Rev. 1) by a number of non-aligned countries. The relevant part of the draft read: "shall refrain from intervention or interference in any form in the internal affairs of other States" (this sentence being a part of the principle of sovereign-equality).

127. GA resolution 380 (V), on peace through deeds, condemns "intervention of a State in the internal affairs of another for the purpose of changing its legally established government by the threat or use of force". Resolution 1236 (XII), on peaceful and neighbourly relations among States, proclaims "non-intervention in one another's internal affairs". Resolution 1237 (ES-III), on questions considered by the Security Council at its 838th meeting on 7 August 1958, recommends "strict non-interference in each other's *internal* affairs".

128. We leave aside, of course, the Covenant, the peaceful-settlement instruments subsequent to the Covenant (such as declarations of acceptance of the jurisdiction of the World Court, Article V of the American Treaty on Pacific Settlement of 30 April 1948 and Article 27 of the European Convention on Peaceful Settlement of Disputes) and the constituent instruments of Specialized Agencies or regional organizations (e.g., Article 1 of the Constitution of UNESCO and Article III.2 of the Organization of African Unity). We refer, again, only to instruments covering the action *of a State* towards another and which mention "internal affairs", "internal matters" or "form of government" without paying any attention to those "external affairs" which were to become omnipresent in the inter-American formulations and an integral part of the *texts* of United Nations resolutions 2131 and 2625. Among such instruments are, *inter alia*, the USSR-United States exchange of communications of 16 November 1933, the non-aggression treaty between France and the USSR of 29 November of the same year: both concerned essentially with subversion; Article IV of the Treaty of Friendship of 12 December 1943 between Czechoslovakia and the USSR (non-intervention "in the internal affairs"); the Agreement between India and China on Tibet of 29 April 1954 ("mutual non-interference in each other's internal affairs"); the Baghdad Pact of 24 February 1955 ("any interference whatsoever in each other's internal affairs"); the Bandung Conference Declaration on World Peace and Co-operation of 24 April 1955 ("abstention from intervention or interference in the internal affairs of other countries"); Article 8 of the Warsaw Treaty of Friendship, Co-operation and Mutual Assistance of 14 May 1955 ("respect for each other's independence and sovereignty and . . . non-intervention in each other's domestic affairs"); the Vienna Convention on Diplomatic Relations of 18 April 1961, Article 41, paragraph 1, and the Vienna Convention on Consular Relations of 1963, Article 55, paragraph 1 ("They also have a duty (in addition to the duty 'to respect the laws and regulations of the receiving State') not to interfere in the internal affairs of the State"); the Belgrade Declaration of Non-Aligned Countries of 6 September 1961

("provided attempts at domination and interference in the internal development of other peoples and nations are ruled out").

129. We shall see in particular (*infra*, para. 46) that the reference to "domestic jurisdiction" coexists, in that formulation, with the usual Inter-American reference to both "internal and external affairs".

130. The three main proposals were those of the USSR of 9 September 1973 ("*Non-intervention in internal affairs* in accordance with which no participating State will intervene in the internal affairs of other States, and each participating State will respect the political, economic and cultural foundations of other States"); of Yugoslavia, 28 September 1973 ("*Non-intervention in internal affairs*: The participating States will refrain from intervening, individually or collectively, directly or indirectly, by any means or under any pretext, in the internal or external affairs of any other State." "They will, in particular, refrain from any form of military intervention or from resorting to political, economic or other measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights to their own interests or to secure from it advantages of any kind." "They will also refrain from other forms of interference, such as assisting, initiating or tolerating subversive and terrorist activities, interfering in internal strife or conducting hostile propaganda"); and of France, 19 October 1973 ("6. Each of the participating States will abstain from any intervention or threat of intervention, direct or indirect, in matters falling within the national competence of any other participating State whatever their mutual relations may be. Each of them will refrain in particular from any act of military, political, economic or other coercion designed to infringe the exercise by another State of its sovereignty").

131. *Infra*, paras. 54 et seq.

132. *PCIJ*, Recueil des Avis consultatifs, *Series B, No. 4*, at pp. 23-24.

133. "The reserved domain" is the domain of "State activities where the jurisdiction of the State is not bound by international law".

134. Except for general remarks in the *Normative Role*, etc., pp. 704-705, and more in *L'Etat dans le sens du droit des gens*, etc., pp. 367-372, our interpretation of Article 2 (7), of the Hague Court's opinion and of other pronouncements on the concept of domestic jurisdiction is still to be developed in a forthcoming monograph.

135. See, *inter alios*, Thomas, cited work, pp. 91 ff. One need not even recall the general principle according to which any wrongful act may be "made legitimate by consent" (Ross, A., *A Textbook of International Law*, 1947, at p. 243). The problem of consent to intervention would obviously require a less inadequate development than the few remarks in the text: but see also *infra*, paras. 53 and 55.

135a. Compare UN, GA, doc. A/AC.119/L.1 of 24 June 1964, para. 203. The remark was made with reference to the case of civil war, the insurgents not being aided from outside. For the view that consent justifies intervention, see the 1964 session report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (United Nations, General Assembly, doc. A/5746 of 16 November 1964, para. 248). On the relationship between self-determination and non-intervention, see the same report, paras. 257-260.

136. *Theory of International Law*, translation by Butler, Harvard University, 1974, pp. 440 ff.

137. Cited work, at p. 440.

138. Cited work, same page.

139. See, *inter alios*, Fisher, E., "Quelques problèmes juridiques découlant de l'affaire tchécoslovaque", *AF*, 1968, pp. 15-42; and Pinto, R., "La legalité de l'intervention des forces armées de la Communauté des Etats socialistes en Tchécoslovaquie", *René Cassin Liber*, III, 1971, esp. pp. 117-119.

140. *The Normative Role*, etc., *Hague Rec.*, 1972-III, pp. 578 ff., esp. 588, 589, 590.

141. For the latter condition to be met, the government in power must not only be a representative government (according to the well-known provision of the relevant

portion of the Friendly Relations Declaration ; that government must not request or accept foreign intervention in the specific case against the will of the people of the State.

142. According, for example, to the cited report on European Security adopted by the Assembly of the Western European Union : "N'étant pas un traité mais une déclaration d'intentions, l'Acte ne prévoit pas de sanctions à l'endroit des parties contractantes défaillantes mais n'en constitue pas moins un précédent dans le domaine du droit international en se plaçant au centre, tant des questions concernant les relations entre les Etats que des questions relatives à leur vie intérieure. Il devient, de ce fait, difficile de trouver et de définir une philosophie appropriée des comportements" (p. 5). The concept is even clearer in the Italian translation published by the author of the report (Segre, S., *Da Helsinki a Belgrado*, Editori Riuniti, Rome, 1977, 18-19).

The idea that the Final Act did something unprecedented appears also in the cited passage of the Polish Institute's volume (*supra*, para. 3), and in an article by Calamandrei, F., "I diritti umani e la normativa internazionale", in *Affari esteri*, 1977 (November), at p. 578.

143. This sentence is drawn from Lauterpacht's *International Law and Human Rights*, London, 1950, at p. 3.

144. A different position from the one we take in the text is expressed by a considerable number of scholars. A systematic exposé touching more or less explicitly upon all the three points mentioned above is that of Michel Virally, "Droits de l'homme et théorie générale du droit international", in *René Cassin Liber*, IV, pp. 323-330. In a similar sense he expresses himself – with regard to sovereignty and individual personality – while very lucidly pointing out differences between the internal and the international aspects of the protection of human rights – Weil, P., "Droits de l'homme et droit administratif français", *ibid.*, at p. 257. Considering sovereignty to be affected, also Milojevic, "Les droits de l'homme et la compétence nationale des Etats", *ibid.*, pp. 330 ff. Rather prudent, in the same volume, Charles Rousseau, "Droits de l'homme et droit des gens", pp. 315-322.

The view that limitations of sovereignty are involved in, and indispensable for, the international protection of human rights is taken strongly by Sir Hersch Lauterpacht, cited *International Law and Human Rights*, esp. pp. 67-69, 304 ff.

145. His vehement *critique* of the "object" theory of the international condition of the individual – such theory purporting "to see in the articles of the Charter bearing upon human rights an artificial innovation altogether divorced from previous practice and out of keeping with the natural framework of international law" (p. 3) – seems to be considered indispensable to remove "an obstacle of some importance in the way of giving full scope to a crucial purpose of the Charter" by Lauterpacht, *International Law and Human Rights*, cited above, pp. 3 ff., 45 ff. and *passim*. On the same line of thought, possibly more decidedly, Drost, P. N., *Human Rights as Legal Rights*, 1951, pp. 21 ff.

146. Dupuy, René-Jean, "Conclusion" in *René Cassin Liber*, IV, at p. 394.

147. As shown in the following paragraph, this state of affairs is not altered either by the acceptance by States of international or "supranational" individual claims procedures.

148. See the preceding footnote.

149. See the following paragraph.

150. It is indeed correct to say – *à la limite* – that "An international community truly concerned with the preservation of freedom of speech, conscience and assembly, for example, must of necessity be concerned also with the sociology of a nation's internal order. It must probe deeply and earnestly into the ways and means of changing specific situations, by helping the State towards the highest excellence of which it is capable" (Moskowitz, "Towards an Integrated Approach to International Human Rights", in *René Cassin Liber*, IV, at p. 64). Of course, "probing deeply" into a State's "internal order" would presuppose the integration of the State into a federal structure and the establishment of "probing" (federal) organs. But an influence in the

right direction can be exerted by international normative instruments and institutional devices even without really "probing" *directly* into the State's internal order.

151. René-Jean Dupuy, cited remark.

152. See, *inter alios*, Verdross, "Idées directrices de l'Organisation des Nations Unies", *Hague Rec.*, 83 (1953), p. 23 ; and Milojevic, M., "Les droits de l'homme et la compétence nationale des Etats", *René Cassin Liber*, IV (1972), pp. 331 ss., esp. 332-334.

153. Robertson, A. M., *Human Rights in Europe*, Manchester Univ. Press., 1963, at pp. 1-2 : "An international order – that author continues – which can effectively secure human rights is thereby taking the biggest single step towards the prevention of war" (at p. 2).

154. The "novelties" in the field of human rights and self-determination are not any more unprecedented than the splitting by the Final Act of the principle of the prohibition of force (Article 2.4 of the United Nations Charter) into *three* "distinct" principles : refraining from force (Principle II of the Declaration), inviolability of frontiers (Principle III) and respect of territorial integrity (Principle IV).

155. Cited official text, at p. 82.

156. In addition to the cited WEU document, see Calamandrei, F., "I diritti umani e la normativa internazionale", in *Affari esteri*, 1977 (Nov.), pp. 579, esp. 584 f.

157. It is conceivable for instance that more or less tacit agreements of such *negative* "humanitarian" content were in existence in the second half of the thirties, between the Nazi and the Fascist dictatorships with regard to their respective nationals as well as with regard to any foreigners to whom they chose to extend the benefits of their régimes. The intervention of the two dictators in the Spanish Civil War certainly implied the infringement and the ultimate abolition of the rights and freedoms of the Spaniards, notably of the right of that unfortunate people to self-determination. In the measure in which an undertaking to maintain a totalitarian régime negatively affects the condition of the "population" – to use the term chosen by the Polish Institute's publication quoted *supra*, under paragraph 3 – the undertaking among the "Socialist" States of Eastern Europe to defend a "Socialisme réel" as apparently understood and applied at present by the USSR may well contain, hélas, not minor negative implications with regard to human rights, fundamental freedoms and self-determination.

158. For an example of possibly lawful measures (within limits) of economic pressure, see in particular Shihata, I. F. I., "Destination Embargo of Arab Oil : Its Legality under International Law", *AJIL*, 1974 (68), pp. 591-627.

159. It is worth quoting also the further final clauses of the Declaration contained in the last three paragraphs thereof :

"The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, 'Fulfilment in good faith of obligations under international law', note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements."

"The participating States express the conviction that respect for these principles will encourage the development of normal and friendly relations and the progress of co-operation among them in all fields. They also express the conviction that respect for these principles will encourage the development of political contacts among them which in turn would contribute to better mutual understanding of their positions and views."

"The participating States declare their intention to conduct their relations with all other States in the spirit of the principles contained in the present Declaration."

160. An example of distorted comment is to be found in the cited report on European Security adopted by the Assembly of the Western European Union (*supra*, para. 3), where the author states : "Il paraît évident au rapporteur que des violations de ces droits (de l'homme) sont commises à l'Est comme à l'Ouest" (cited report, p. 5), adding that he finds "significative", in this respect, "la remarque faite par le Président

Carter, dans sa conférence de presse du 23 février" to the effect that also the United States were "coupables à certains égards" of violations of human rights (cited report, same page).

If the distinguished Rapporteur merely meant that also in countries of the Western group in the CSCE (in a wide sense) one registers more or less frequent violations of human rights, his opinion could be shared. In that sense it would also have been correct for him to find the cited part of Carter's press conference "significant". However, the tenor of the Rapporteur's discourse is such as to lend itself easily to be read in the sense that between the CSCE countries there are not really relevant differences with regard to respect for human rights (*plus* fundamental freedoms, *plus* self-determination, *internal* and external) : while everybody knows that between the countries participating in the CSCE there is a *world* of difference from the point of view in question. To put it mildly, there is the difference existing between the pluralism and liberalism in force in the "west", and to which heretically declare themselves to be pledged the "eurocommunists", on the one side, and the centralized, one-party and intolerant régimes from which the heretics are so keen to distinguish themselves, on the other side. To put it bluntly, there is the difference between the degree to which fundamental freedoms are enjoyed, for example, in Great Britain or Italy, and the degree to which those freedoms are conculcated in certain countries belonging not to Western Europe. The members of the Assembly of the Western European Union must pay, indeed, very little attention to the contents of the reports they adopt if they accepted a half-truth that resembles so much a lie.

BIBLIOGRAPHY

Ago, R., "Le délit international", *Hague Rec.*, 69 (1939), pp. 415-554.

–, "La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale", *Archivio di dirritto pubblico*, 1938, pp. 178-249.

–, "La colpa nell'illecito internazionale", *Scritti giuridici in onore di Santi Romano*, Padua, Vol. 3, 1940, pp. 177-206 (tirage à part, 1939).

Alessi, M., "La seconda fase della CSCE a Ginevra (settembre 1973-luglio 1975) : la Dichiarazione dei principi", in Ferraris, L. V. (ed.), *Testimonianze di un negoziato*, SIOI, Padua, 1977, pp. 239-320.

Alvarez, A., *Le droit international américain*, 1910.

Andreani, "La Conférence sur la sécurité et la coopération en Europe", in *Régionalisme et universalisme dans le droit international contemporain*, Société française de droit international, Bordeaux-Paris, Pedone, 1977, pp. 114 f.

Anzilotti, *Cours de droit international* (French trans. by G. Gidel, Paris, 1929).

Arangio-Ruiz, G., "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Hague Rec.*, 137 (1972-III), pp. 421 ff.

–, *L'Etat dans le sens du droit des gens de la notion du droit international*, Bologna, Cooperativa libraria universitaria, Piazza Verdi 2/A, 1975.

–, *The UN Declaration of Friendly Relations and the System of the Sources of International Law*, with an Appendix on the Concept of International Law and the Theory of International Organization, Leiden, 1979 (in proof).

Arangio-Ruiz, Vincenzo, "La Dichiarazione universale dei diritti dell'uomo", in *La comunità internazionale*, 1965.

Azorine, V., "Coopération internationale dans le domaine des droits de l'homme", *La vie internationale* (Moscow), September 1979, pp. 65-72.

Bastid, S., "Observations as to the Consequences on the International Plane of Failure to Respect Human Rights", in Buergenthal (ed.), *Human Rights*, etc., p. 41.

Bemis, S. F., *The Latin American Policy of the United States, an Historical Interpretation*, New York, 1943.

Van Boven, T. C., "United Nations and Human Rights : a Critical Appraisal", in Cassese (ed.), *UN Law*, etc., pp. 119-135 *(read during proof stage)*.

Bowett, D. W., "Self-Determination and Political Rights in the Developing Countries", *ASIL Proceedings*, 1966, pp. 129 ff.

Buergenthal, Th. (ed.), *Human Rights, International Law and the Helsinki Accord*, ASIL, 1977.

–, "International Human Rights Law and the Helsinki Final Act", in Buergenthal (ed.), *Human Rights*, etc., pp. 3-10.

Calamandrei, F., "I diritti umani e la normativa internazionale", *Affari esteri*, 1977, pp. 577 ff.

Capotorti, F., *Patti internazionali sui diritti dell'uomo. Studio introduttivo*, SIOI, Padua, 1967.

Carey, J., *UN Protection of Civil and Political Rights*, Syracuse Univ. Press, 1970.

Cassese, A., "The Helsinki Declaration and Self-Determination" in Buergenthal (ed.), *International Law and the Helsinki Accord*, ASIL, 1977, pp. 83 ff.

–, (ed.), *UN Law/Fundamental Rights – Two Topics in International Law*, Alphen aan der Rijn *(read during proof stage)*.

–, "Progressive Transnational Promotion of Human Rights", in Ramcharan, B. G. (ed.), *Human Rights : Thirty Years after the Universal Declaration*, Nijhoff, The Hague, 1979, pp. 249-262.

–, "Political Self-Determination, Old Concepts and New Developments in Cassese" (ed.), *UN Law*, pp. 137-165 *(read during proof stage)*.

Cohen and Jacqué, "Obligations Assumed by the Helsinki Signatories", in Buergenthal (ed.), *Human Rights*, etc., 43-70.
Drost, P. N., *Human Rights as Legal Rights*, Leiden, 1951.
Dupuy, R.-J., "Conclusions", in *René Cassin Liber*, IV, 1972, pp. 391-398.
Falk, R., "The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights", in Cassese, A. (ed.), *UN Law*, etc. pp. 225-235 *(read in proof stage)*.
Fenwick, C. G., "Has the Spectre of Intervention Been Laid in Latin America ?", *AJIL*, 50 (1956), pp. 636-639.
–, "Intervention : Individual and Collective", *AJIL*, 39 (1945), pp. 645-663.
Ferraris, L. V. (ed.), *Testimonianze di un negoziato*, Rome, SIOI, 1977.
Fisher, "Quelques problèmes juridiques découlant de l'affaire tchécoslovaque", *AF*, 1968, pp. 15-42.
Frowein, J. A., "The Interrelationship between the Helsinki Final Act, the International Covenants", etc., in Buergenthal (ed.), *Human Rights*, etc., pp. 71-82.
Ghebali, V. Y., "L'Acte final de la Conférence sur la sécurité et la coopération en Europe et les Nations Unies", *AF*, XXI (1975), pp. 73 ff.
Gros Espiell, H., "Self-Determination and *Jus Cogens*", in Cassese, A. (ed.), *UN Law*, pp. 167-173 *(read during proof stage)*.
Henkin, L., "Human Rights and 'Domestic Jurisdiction' ", in Buergenthal (ed.), *Human Rights*, etc., pp. 21-40.
Lauterpacht, H., *Collected Papers*, Vol. 2, 1975, pp. 526 ff., esp. 530.
–, *International Law and Human Rights*, London, 1950.
Leary, V., "The Implementation of the Helsinki Final Act", etc., in Buergenthal (ed.), *Human Rights*, etc., pp. 111-160.
Milojevic, M., "Les droits de l'homme et la compétence nationale des Etats", *René Cassin Liber*, IV, pp. 331 ff.
Mitrovic, T., "Non-Intervention in the Internal Affairs of States", in Sahovic, M. (ed.), *Principles*, etc., pp. 219-275.
Pinto, "La légalité de l'intervention des forces armées de la Communauté des Etats socialistes en Tchécoslovaquie", *René Cassin Liber*, III, 1971.
Polish Institute of International Affairs, *Conference on Security and Co-operation in Europe : a Polish View*, Warsaw, 1976.
Prévost, J. F., "Observations sur la nature juridique de l'Acte final de la Conférence sur la sécurité et la coopération en Europe", *AF*, XXI (1975), pp. 129 ff.
Rechetov, Y., "International Responsibility for Violations of Human Rights", in Cassese, A. (ed.), *UN Law*, etc., pp. 237-248 *(read in proof stage)*.
Rigaux, F., "The Algiers Declaration of the Rights of Peoples", in Cassese, *UN Law*, pp. 211-223 *(read in proof stage)*.
Rigo Sureda, A., *The Evolution of the Right of Self-Determination, A Study of UN Practice*, Leiden, 1973.
Robertson, A. M., *Human Rights in Europe*, 1963.
Rousseau, Ch., "Droits de l'homme et droit des gens", *René Cassin Liber*, IV, pp. 315-322.
Russell, H. S., "The Helsinki Declaration : Brobdingnag or Lilliput", *AJIL*, 70 (1976), pp. 242 ff.
Russell, R., *A History of the UN Charter*, Washington, 1958.
Sahovic, M. (ed.), *Principles of International Law Concerning Friendly Relations and Co-operation*, Oceana, 1972.
Schwelb, E., "Civil and Political Rights : the International Measures of Implementation", *AJIL*, 62 (1968), pp. 827-868.
–, "The Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights", *René Cassin Liber*, I, 1969, pp. 301 ff.
–, "Entry into Force of the International Covenant on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights", *AJIL*, 70 (1976), pp. 511-519.
Segre, S., *Da Helsinki a Belgrado*, Editori riuniti, Rome, 1977.

Shihata, I. F. I., "Destination Embargo of Arab Oil : Its Legality under International Law", *AJIL*, 68 (1974), pp. 591-627.
Thomas, A., *Non-Intervention*, Dallas, 1956.
Tunkin, G., *Theory of International Law*, transl. by Butler, Harvard Univ. Press, 1974.
–, "International Law and the International System", *Hague Recueil*, 147 (1975-IV).
Union de l'Europe occidentale, Assemblée, Commission des affaires générales (vingt-troisième session ordinaire (première partie)), *L'application de l'Acte final de la CSCE*, rapport présenté au nom de la Commission des affaires générales par M. Segre, rapporteur, doc. 732 du 9 mai 1977 (avec projet de recommandation, exposé des motifs et annexe).
Union de l'Europe occidentale, Assemblée, Commission des affaires générales (vingt-troisième session de l'Assemblée), *L'application de l'Acte final de la CSCE*, projet de rapport présenté par M. Segre, rapporteur, Doc. A/UEO/GA (77) 10, du 21 octobre 1977 (avec nouveau projet de recommandation et complément à l'exposé des motifs).
Valticos, N., "Universalité des droits de l'homme et diversité des conditions nationales", *René Cassin Liber*, I, pp. 383 ff.
Verdross, A., "Idées directrices de l'Organisation des Nations Unies", *Hague Rec.*, 83 (1953).
Virally, M., "Droits de l'homme et théorie générale du droit international", *René Cassin Liber*, IV, pp. 223-330.
Weil, P., "Droits de l'homme et droit administratif français", *René Cassin Liber*, IV.
Wheaton, *Elements of International Law*, 2nd ed., 1864, 5th ed., 1916.
Winfield, "The History of Intervention in International Law", *BYBIL*, 1922-1923.
Wright, Q., "Is Discussion Intervention ?", *AJIL*, 50 (1956), pp. 102-110.
Western European Union, Assembly, see Union de l'Europe occidentale, Assemblée.
Yepes, J. M., "Les problèmes fondamentaux du droit des gens en Amérique", *Hague Rec.*, 47 (1934-I), pp. 51-90.
–, "Contribution de l'Amérique latine au développement du droit international public et privé", *Hague Rec.*, 32 (1930-II), pp. 745 ff.