Leiden Journal of International Law, 20 (2007), pp. 753–765
 Printed in the United Kingdom doi:10.1017/S0922156507004426

'Human-Rightism' and the Development of General International Law

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Abstract

International human rights law norms and 'human-rightist' imperatives are increasingly 'mainstreamed' into general international law. The writer makes two modest assertions: that the success of this trend (i) makes it now possible to speak of general international law 'sources' of human rights obligations; and (ii) undermines claims of the 'specialness' of the human rights legal framework, which are a source of perplexity for the general international lawyer increasingly used to taking human rights law (as *lex generalis*) into account when interpreting and applying general international law.

Key words

general international law; 'human-rightism'; human rights; *lex specialis*; sources of international law

A defining characteristic of the post-war era has been the unprecedented level to which the plight of the individual has come to be regulated by international law. While primarily anchored in the Universal Declaration of Human Rights, the human rights legal framework has since grown into a veritable 'system' spanning a number of major treaties encompassing several themes and numerous issues, which are, in turn, the subject of evolving interpretation through several treaty-based mechanisms. But there is another story to be told: that of the significant influence of human rights norms and imperatives over the further development of general international law.

This paper seeks to situate international human rights law within the broader umbrella of international law, by demonstrating how human rights norms are increasingly being 'mainstreamed', either through their explicit inclusion in international agreements, or through the more indirect, while no less significant, influence of human rights considerations ('human-rightism') in the elaboration of general international law, to the extent that it is increasingly possible to speak of general international law 'sources' of human rights obligations, even if derivative in nature. As such, any survey of the extent of the 'field' of human rights necessarily requires a consideration of developments in other areas of international law, including general international law. The paper makes the modest assertion that the very success of

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human rights law in infiltrating contemporary general international law undermines claims of the 'specialness' of the human rights legal framework, claims which are a source of some perplexity for the general international lawyer increasingly used to taking human rights considerations into account when interpreting and applying general international law.

Consideration of the limitations of space impose a certain economy in the selection of examples to illustrate these basic propositions; those examples chosen were selected not only for their persuasiveness, but also – in line with the theme of this compilation – as issues which have been of particular interest to John Dugard throughout his career. While well known for his human rights work earlier in his career, in South Africa and more recently, as the Special Rapporteur of the Commission on Human Rights (later the Human Rights Council), on the situation of human rights in the Palestinian territories occupied by Israel since 1967, John Dugard's interests extended to a range of other areas of general international law arising also from his work as a member of the International Law Commission. His membership of the Commission coincided with the completion of its work on the Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001, as well as that on Diplomatic Protection, concluded in 2006, for which he served as the Commission's Special Rapporteur. Indeed, the apparent seamlessness with which he moved from human rights law to other areas of international law serves to illustrate a key theme of this paper: that whether a field of law is *lex specialis* or not is a matter, to a certain extent, of perspective; and from the perspective of the general international lawyer, international human rights law is not *lex specialis*, but *lex generalis* – it is part and parcel of general international law, and a key component thereof.

1. The incorporation of human rights norms and considerations into general international law

Despite being a relative latecomer, human rights law has quickly become entrenched in international law, to the extent that it is possible today to speak of international law as no longer being limited to the regulation of relations between sovereign states; but also extending to the treatment of individuals within states. As a 'cross-cutting' theme, human rights considerations are also increasingly a common feature of modern international law-making and application. At times, this is simply a matter of the approach taken (which is the subject of this section), but increasingly this phenomenon is manifested more explicitly through the inclusion of human rights provisions in international agreements, to the extent that it is increasingly possible to speak of general sources of international human rights law (discussed in the next section, below).

1.1. Namibia redux: from bilateralism to communitarian ideals and the protection of the individual

Arguably, the period 1965–70 was one of the most significant in the history of the development of modern international law. It commenced with the International

https://doi.org/10.1017/S0922156507004426 Published online by Cambridge University Press

Court of Justice (ICJ)'s much criticized (not least by John Dugard[1]) *Namibia* Judgment of 1966,[2] in which it declined to recognize the standing of Ethiopia and Liberia in their claim against South Africa in response to its application of the discriminatory apartheid policies to the inhabitants of the mandate territory of South West Africa/Namibia. By the end of the decade the international community had recognized as a matter of positive international law the concept of peremptory norms of international law (*jus cogens*);[3] and the International Court had seemingly distanced itself from its earlier decision by recognizing, in one of the most significant *obiter* statements in its history, the concept of obligations owed to the international community as a whole (*erga omnes*) in the *Barcelona Traction* case.[4] Human rights norms feature prominently in the lists of suggested examples of both concepts.[5]

While it is not being suggested that this was the definitive turning point – signalling a move away from the traditional, bilateral, conception of international law to a more communitarian approach[6] – the significance of the shifts in the tectonic plates of international law which occurred at the time cannot be minimized. The trajectory of international law was nudged in the direction of greater emphasis on interests above and beyond those of the state. While initially such broader interests were conceived of as relating primarily to the collective – that of the international community as a whole, as encapsulated in notions of *jus cogens*, *ordre public*, obligations *erga omnes* and the common heritage of mankind, and so on – it was the increasing focus on the protection of the rights of individuals (a development which also received a significant boost during the second half of the 1960s, with

1. J. Dugard (ed.), *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973), at 333–42 and 368–72. No doubt John Dugard drew particular personal satisfaction from his involvement in the adoption by the International Law Commission of Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in 2001 *Yearbook of the International Law Commission*, Vol. II (Part 2), para. 77, on the invocation of responsibility by a state other than an injured state, and from the reference in n. 766 in the commentary to that provision referring to the 'much-criticized decision of the International Court in [the 1966 *South West Africa* case] *from which article 48 is a deliberate departure*' (emphasis added).
2. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6.
3. See 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.
4. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3, para. 33 ('In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.'). See too *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, para. 29 ('In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable'); and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep., at 595, para. 31.
5. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3, para. 34 ('Such [*erga omnes*] obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.* Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character' (emphasis added)). See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Draft Article 26 (5), and Commentary to Part 2, Chapter III, para. 7, and the cases cited therein; C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 117–57; A. Orakhelashvili, *Peremptory Norms in International Law* (2006).
6. See B. Simma, 'From Bilateralism to Community Interest in International Law', in *Recueil des Cours*, 1994, Vol. 250 (VI), at 217.

https://doi.org/10.1017/S0922156507004426 Published online by Cambridge University Press

the adoption of the two Human Rights Covenants[7]) which has had a more lasting impact – at least thus far.

This is not to say that the protection of broader interests is without its place today; as recently as 2001, the concept of serious breaches of obligations arising under peremptory norms of general international law was referred to by the International Law Commission in its Articles on Responsibility of States for Internationally Wrongful Acts.[8] Similarly, the existence of *jus cogens* norms was recently (in 2006) acknowledged by the International Court of Justice.[9] However, the track record of broader communitarian notions such as *jus cogens* and *erga omnes* obligations, since their formulation in the 1960s, has largely been one of missed opportunities,[10] of a potential by and large still to be realized.

However, less attention has been given to the more subtle gentrification of international law through the successful infusion of 'human-rightist' tendencies into the corpus of general international law. Furthermore, taking the argument one step further, on balance, it has been *qua* human rights norms, and not as peremptory norms or obligations owed *erga omnes*, that such notions have infiltrated general international law. While examples of this trend abound, this paper will refer to the work of the International Law Commission during John Dugard's tenure, as well as to recent developments in several other areas of particular interest to him.

1.2. Examples of 'human-rightism' in modern international law

The increasing influence of human rights norms and 'human-rightist' tendencies in contemporary international law has not gone unnoticed.[11] The tag 'human-rightism' is deliberately imprecise: it serves broadly as an analogue for patterns of argumentation which place particular value on the protection of the individual through the conceptual vehicle of human rights protection but not necessarily limited thereto – that is, there are other mechanisms recognized by international law for the protection of individuals.[12] As such it amounts to a specific legal technique which

7. 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, and 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.
8. Draft Articles on Responsibility of States for Internationally Wrongful Acts, in 2001 *Yearbook of the International Law Commission*, Vol. II (Part 2), para. 76, Article 40.
9. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep., para. 64. See too *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep., paras. 147 and 161.
10. See the examples of decisions in which the International Court of Justice could have invoked norms of *jus cogens*, but did not, cited by Judge (ad hoc) Dugard, in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. (Judge ad hoc Dugard, Separate Opinion, para. 11). To that list might be added the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep., para. 147, where the International Court expressly did not find it necessary to rely on the *jus cogens* nature of the obligations under the Genocide convention, even though the prohibition of genocide features in most suggested lists of peremptory norms (as discussed below).
11. A. Pellet, '"Droits-de-l'hommisme" et Droit International', in Gilberto Amado Memorial Lecture Series, 18 July 2000, available at http://untreaty.un.org/ilc/sessions/52/french/amado.pdf (last visited 10 July 2007).
12. Such as consular protection under the 1963 Vienna Convention on Consular Relations, 596 UNTS 261, as discussed below; the protection afforded by states of nationality to their nationals under the rules

seeks to accommodate human rights norms, or considerations of the protection of individuals more broadly, either expressly through the inclusion in legal texts of positive rules or more subtly through the reinterpretation or reorientation of existing international law norms to accord with overarching human rights protection imperatives.

For example, the Draft Articles on Nationality of Natural Persons in relation to the Succession of States, adopted by the International Law Commission in 1999,[13] are squarely presented as a human rights text ('emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected'),[14] anchored in the right to a nationality (Art. 1) and the commensurate presumption against statelessness (Art. 5).[15]

The influence of considerations of the protection of individuals is more diffuse in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, since the focus is predominantly on secondary rules of international law. Nonetheless, echoes are to be found in several of the communitarian provisions of the draft articles, even if, as maintained above, some of the provisions themselves remain largely within the realm of progressive development of international law. One example is Article 26 on the limitation of the invocation of a circumstance precluding wrongfulness which is 'not in conformity with an obligation arising under a peremptory norm of general international law'. The commentary to that provision notes that '[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.[16] A similar reference is made in Article 40, dealing with serious breaches of obligations arising under a peremptory norm of international law. Likewise, Article 48 envisages the invocation of responsibility for an internationally wrongful act by a state other than an injured state, *inter alia*, where the obligation breached 'is owed to the international community as a whole' (i.e. an *erga omnes* obligation).[17] Furthermore, obligations for the protection of fundamental human rights and those of a humanitarian character prohibiting reprisals are identified as not being susceptible to countermeasures.[18]

The Commission commenced its work on state responsibility in the early 1950s. Had it completed its draft articles then, it is quite likely that it might not have included references to obligations aimed at the protection of individuals. That a quintessentially 'general' international law text adopted in 2001 treats such matters

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of diplomatic protection, see Draft Articles on Diplomatic Protection, Report of the International Law Commission, in Official Records of the General Assembly on the Work of its Sixty-first Session, Supplement No. 10, A/61/10, para. 49, also discussed below; and the protection exercised by the state of nationality of a ship over its crew members (regardless of their nationality), see ibid., Draft Article 18 and Commentary thereto.

13. See Draft Articles on Nationality of Natural Persons in relation to the Succession of States, *Yearbook of the International Law Commission*, 1999, Vol. II (Part 2), para. 47.
14. Preambular para. 6.
15. See the discussion below on Article 1 of the Draft Articles on Nationality of Natural Persons in relation to the Succession of States.
16. Commentary to Draft Article 26, 2001 *Yearbook of the International Law Commission*, Vol. II (Part 2), para. 5.
17. Article 48(1)(b). See Commentary to Draft Article 48, ibid., paras. 8–10.
18. Article 50(1)(b) and (c).

as being essentially fundamental is testament both to the influence of international human rights law and to the distance that general international law has travelled.

In the draft articles on diplomatic protection,[19] the Commission ostensibly sought to 'modernize' what was a traditional mechanism of international law for the protection of state interests arising out of the treatment of its nationals abroad, by reconceptualizing it more squarely as one aimed at the protection of human rights.[20] This was done in a number of ways: by mitigating the traditional rule that, in exercising diplomatic protection, the state was asserting its own right and not that of the individual (i.e. the fiction that, for purposes of international law, it was the state that was injured and not the individual);[21] by deliberately extending the scope of the draft articles to cover refugees and stateless persons even though they do not have the nationality of the protecting state;[22] by recognizing the practice of permitting the existence of dual and multiple nationalities;[23] by mitigating the continuous nationality requirement in situations of hardship, for example, arising out of a change of nationality in the context of marriage, adoption, or succession of states;[24] and by recommending that states adopt the practice of consulting, as well as sharing any compensation received with, the injured individual.[25]

A brief survey of the recent jurisprudence of the International Court of Justice provides further affirmation of such trends in general international law. In the consular protection cases, the Court established the existence under international law of individual rights (possibly) other than human rights,[26] which could be invoked by the national state of a detained person. In the *Wall* Advisory Opinion, the Court took a strong position in favour of the protection of individuals by confirming the applicability of human rights obligations during armed conflict.[27] Furthermore, the first positive recognition of the existence of norms of *jus cogens* – even if by way of holding that peremptory norms did not displace the consent basis of its jurisdiction – by the Court in its 2006 judgment in the *Case Concerning Armed Activities on the*

19. Report of the International Law Commission, in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, A/61/10, para. 49.
20. Ibid., para. 50, Commentary to Draft Article 1(4) ('Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad').
21. Article 1. See A. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection', (2007) 18(1) EJIL 18, at 37.
22. Article 8.
23. Articles 6 and 7.
24. Article 5(2), and Commentary thereto, para. 8.
25. Article 19.
26. *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, [2001] ICJ Rep., at 466, para. 77, where it held that the 1963 Vienna Convention on Consular Protection 'creates individual rights', without passing on whether such a right constituted a human right (which it did not consider necessary to do). See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] ICJ Rep., at 12, para. 124. At the same time, it should be borne in mind that the remedy in the Vienna Convention has its analogue in the due process rights afforded by Article 14 of the International Covenant on Civil and Political Rights, and that both cases were pursued before the Court against the background of the imposition of the death penalty, the abolition of which is the subject of the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1642 UNTS 414.
27. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep., at 136, para. 106 ('The Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights').

Territory of the Congo,[28] which was hailed by Judge (ad hoc) Dugard,[29] confirms the trend in general international law towards greater recognition of the existence of fundamental interests, which include the protection of individuals. Those interests were at issue in stark terms in the *Genocide* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*),[30] where the Court found a violation of the Convention on the Prevention and Punishment of the Crime of Genocide,[31] in particular the obligation to prevent genocide, in relation to the Srebrenica massacre in 1995. Issues relating to some of the other findings of the Court in that case aside, this decision represents a major milestone both in the history of the Court and for international law generally.

Certainly, the ascertainment of the existence of a 'trend' is one undertaken on balance. A recent prominent counter-example was the decision of the International Court in the *Arrest Warrant* case.[32] Nonetheless, the outcome of that case is pertinent to this analysis for a different reason: it is fair to say that there was a time when the grant of immunity from criminal jurisdiction to a government official of another state would have been regarded as somewhat perfunctory. However, the fact that the Court's decision to decide in favour of established doctrine (issues of whether such doctrine was properly applied aside), by upholding the immunity of a foreign minister in the context of allegations of the commission of war crimes and crimes against humanity, has not been without controversy, which relates to the juxtaposition in the case between the classical institution of the grant of immunity and the assertion of the purported exercise of universal jurisdiction. The latter notion served as the conceptual vehicle resorted to in the case for the application of 'international criminal law' – a branch of international law of more recent vintage whose core purpose relates to the protection of individuals. The fact that the decision came down on the side of immunity, as opposed to that of more fundamental interests pertaining to the protection of individuals, can also be analysed as an attempt to keep such 'human-rightist' tendencies at bay.[33] One cannot help but wonder for how long such a position can be maintained.

Indeed, the emergence of international criminal law, primarily, but not exclusively, through the establishment of the various international criminal tribunals,

28. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep., para. 64 (that a norm having the character of peremptory norm of general international law (*jus cogens*) 'is assuredly the case with regard to the prohibition of genocide'). See too *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep., paras. 147 and 161.
29. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. (Judge ad hoc Dugard, Separate Opinion, para. 3) ('The Court has responded boldly by acknowledging the existence of norms of *jus cogens*').
30. *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep.
31. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.
32. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratric Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 1, at 3.
33. Judge (ad hoc) van den Wyngaert, in her dissenting opinion, expressed the view that there was a fundamental problem in the Court's general approach in that it disregarded 'the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes'. Ibid., at 137, para. 27.

as well as through the adoption of the Rome Statute of the International Criminal Court,[34] adopted in 1998 (again a matter of keen interest for John Dugard), more than fifty years after the Nuremberg trials, is a key milestone in the 'shift' in international law being discussed here.[35]

The last example, still in the category of issues of particular interest to John Dugard, relates to the demise of the political offence exception to the obligation to extradite in the context of the legal regulation of acts of international terrorism,[36] and the commensurate emergence of the human rights exception based on the principle of non-discrimination. The International Convention for the Suppression of Terrorist Bombings provides in Article 12[37] that

> Nothing in the Convention shall be interpreted as imposing an obligation to extradite . . . if the requested State has substantial grounds for believing that the request for extradition for offences set forth in article 2 . . . has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

The fact that this provision was included as a counterpoint to the limitation on the resort to the political offence exception for extradition also serves to illustrate a further dimension of the 'human-rightist' trend, namely that human rights considerations are increasingly a feature of the basic 'compromise' underpinning new general international law instruments.

2. General international law as a 'source' of international human rights law

While the 'human-rightist' trend is relatively well established in contemporary general international law, what is perhaps less appreciated is the fact that, in some areas, this has manifested itself in a manner that makes it increasingly possible to speak of general international law 'sources' of human rights obligations. Traditionally, the main sources of international human rights law are considered to be the various human rights treaties developed after the adoption of the Universal Declaration, as

34. 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.
35. The Preamble to the Rome Statute recalls the 'millions of children, women and men [who during the twentieth century had] been victims of unimaginable atrocities that deeply shock the conscience of humanity' and affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished'. Preambular paras. 2 and 4.
36. The Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, adopted by the United Nations General Assembly in Resolution 51/210 of 17 December 1996, reflects the basic political compromise which led to the subsequent conclusion of several anti-terrorism treaties. In para. 6 of the Supplementary Declaration, 'States are encouraged, when concluding or applying extradition agreements, not to regard as political offences excluded from the scope of those agreement offences connected with terrorism . . . whatever the motives which may be invoked to justify them'. This provision subsequently found its way into several anti-terrorism treaties. See the 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, Art. 11; the 1999 International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109 (1999), Art. 14; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc. A/RES/59/290 (2005), Art. 15.
37. The same provision appears in the International Convention for the Suppression of the Financing of Terrorism, Art. 15, and the International Convention for the Suppression of Acts of Nuclear Terrorism, Art. 16.

bolstered by a number of non-binding texts, primarily (but not exclusively) adopted by the United Nations, as well as, more recently, the doctrine developed by a variety of treaty and other bodies.

Yet, as it becomes more common that international instruments which would not usually be categorized as human rights treaties (either because of their subject matter, or because they are developed outside the established human rights machinery) contain human rights provisions, it is not inconceivable that those texts may themselves establish international obligations for states parties to guarantee human rights protection in a particular context. In some cases the obligations established might be explicit, while in others the obligations are more diffuse, grounded in a general *renvoi* to existing obligations under international human rights law.

An example of the former is to be found in the 1999 Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, which, if eventually converted into a binding text,[38] would in Article 1 establish the right to a nationality in the context of the succession of States as follows:

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

The commentary to the draft article confirms that the provision 'applies to [the particular situation of succession of states] the general principle contained in article 15 of the Universal Declaration of Human Rights, which was the first international instrument embodying the "right of everyone to a nationality"'.[39]

A more generalized provision establishing human rights obligations is to be found in Article 14 of the International Convention for the Suppression of Terrorist Bombings,[40] which provides:

> Any person who is taken into custody or regarding whom any other measures are taken or proceedings carried out pursuant to this Convention shall be guaranteed fair treatment, *including enjoyment of all rights and guarantees* in conformity with the law of the State in the territory of which that person is present *and applicable provisions of international law, including international law of human rights* [emphasis added].

Three things are apparent from the provision: (i) the drafters anticipated the possibility of the existence of rules of general international law,[41] other than in international human rights law, which would also be relevant for the protection of individuals – which accords with the basic assertion of this paper; (ii) there was a conscious decision to supplement national protections with those established

38. The fate of the Draft Articles on the Nationality of Natural Persons in relation to the Succession of States is still under consideration by the United Nations General Assembly, which, in Resolution 59/34 of 2 December 2004, decided to revert to the matter at its sixty-third session in 2008.
39. 1999 *Yearbook of the International Law Commission*, Vol. II (Part 2), para. 48, Commentary to Draft Article 1, para. 1.
40. The same provision is to be found in the Financing of Terrorism treaty (Art. 17) and the Nuclear Terrorism treaty (Art. 12), as both treaties were based on the 'boilerplate' of the Terrorist Bombings convention.
41. An example can be found in the Terrorist Bombings treaty itself: Art. 7(3) (Article 9(3) of the Financing of Terrorism treaty and Article 10(3) of the Nuclear Terrorism treaty) establishes a mechanism similar to the consular notification procedure in Art. 36(1)(b) of the Vienna Convention on Consular Relations.

under international law, including human rights law;[42] and (iii) the obligations are not explicit but are to be 'read into' the treaty – a sort of derivative international law.[43] Accordingly, in a way different from the earlier example of the right of nationality in the context of succession of states, the provision only establishes the obligation, not its content.

Such a provision is not without complexity. Which are the human rights protections and guarantees in question? Would economic and social rights be included? Furthermore, the reference is to the 'international law of human rights', not necessarily to the human rights treaties themselves. It is not clear, therefore, that it would include any derogation provisions. For example, in the context of terrorism and the detention of suspects, Article 14 of the International Covenant on Civil and Political Rights, which establishes a number of procedural guarantees, would be particularly relevant. However, under certain circumstances involving a public emergency, which conceivably may arise out of a terrorist act, a state party may derogate from its obligations under that article.[44] Should such possibility of derogation also be read into the Terrorist Bombings treaty?

In the absence of specific rules of international law governing such types of derivative provisions, the treaty has to be read as self-standing. In other words, regardless of the *renvoi* to other law, it is the treaty itself that establishes the obligation to offer protections and guarantees. The significance of this is quickly apparent: taking only the example of the International Covenant on Civil and Political Rights (which, as already mentioned, is possibly the most relevant human rights instrument in the context of anti-terrorism activities undertaken by states), at the time of writing the following 21 states were *not* parties to the International Covenant but *were* parties[45] to either the Terrorist Bombings, the Financing of Terrorism, or the Nuclear Terrorism treaties (or to two or all three treaties): Antigua and Barbuda, Bahamas, Bhutan, Brunei Darussalam, Comoros, Cook Islands, Cuba, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Pakistan, Palau, Papua New Guinea, Saint Kitts and Nevis, Samoa, Singapore, Tonga, United Arab Emirates, and Vanuatu.[46]

To the extent, therefore, that one reads the word 'applicable' in the provision (and its counterparts in the other two treaties) as referring to substantive rules *relevant* to the context of terrorism (as opposed to referring to those specific treaty provisions applicable to the state in question),[47] the anti-terrorism agreements serve, for the

42. Contrast Art. 16(13) of the United Nations Convention against Transnational Organized Crime, 2000, adopted by United Nations General Assembly Resolution 55/25 of 15 November 2000, which, in the context of extradition, limits the enjoyment of rights and guarantees only to those provided by domestic law.
43. The relationship between the human rights treaties, and other applicable international law conventions, could thus be described as that contemplated in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties, i.e. as 'relevant rules of international law applicable in the relations between the parties'.
44. International Covenant on Civil and Political Rights, Article 4, para. 1.
45. Saudi Arabia, also not a party to the International Covenant on Civil and Political Rights, is a signatory to the Financing of Terrorism and Nuclear Terrorism treaties. Likewise, Kiribati, Malaysia, Qatar, and Singapore are signatories to the latter treaty.
46. Information obtained from the United Nations Treaty Collection database, accessed online at http://untreaty.un.org, on 13 July 2007.
47. During the negotiation of the Terrorist Bombings treaty, the reference to 'international law' was added to what became Article 14 following a proposal by Greece and Portugal (A/AC.252/1997/WP.7, reproduced in

states mentioned above, as a principal source of the international obligation to extend the rights and guarantees existing under international human rights law to individuals apprehended in the context of anti-terrorism measures falling within the scope of the anti-terrorism treaties. This is regardless of the fact that they are not parties to the specific human rights treaty in question.

3. INTERNATIONAL HUMAN RIGHTS LAW AS THE *LEX GENERALIS*

As mentioned earlier, the proposition that international human rights law is *lex specialis* is a strange one for the general international lawyer: it does not necessarily displace any general rule. In addition, it is not merely that claims of the 'specialness' of the human rights system reveal an abbreviated conception of international law as it exists today, but also that such claims are undermined by the very success international human rights law has had in infiltrating and influencing the development of modern general international law, to the extent that it would be unrecognizable to international lawyers from an earlier era. This does not mean that specific special rules cannot be devised, within the context of human rights, deviating from rules under general international law.[48] Yet, to the extent that one is not dealing with such special rules, international human rights law is to all intents and purposes the *lex generalis*. This was the approach taken by the International Court in the *Nuclear Weapons* Advisory Opinion. Indeed, it went one step further and recognized the possibility that in certain circumstances (pertaining to armed conflict), human rights rules, as the applicable *lex generalis*, could themselves be set aside by other special rules (namely rules of international humanitarian law) in specific situations.[49]

At the same time, it is not clear whether the *lex generalis*/*specialis* characterization is of assistance, for example, in understanding the relationship between Article 14 in the Terrorist Bombings treaty, referred to above, and the international human rights law it refers to. If the provision is understood as incorporating the relevant human rights protections in the International Covenant but not the corresponding derogation provision, it could potentially amount to the granting of broader rights, thereby constituting a *lex specialis* (or even *lex posterior*) albeit in the context of

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document A/52/37, at 30–1), which read, '[a]ny person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings, *in accordance with international law*, as well as enjoyment of all the rights and guarantees provided by the law of the State in the territory of which that person is present' (emphasis in original). This suggests that the drafters intended the reference to 'international law' to apply more generally, and was not merely a reference to those treaties to which the state in question was a party.

48. An example of this would be the proposition of the existence of special rules relating to reservations to human rights treaties. See General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, adopted by the Human Rights Committee on 4 November 1994, reproduced in document CCPR/C/21/Rev.1/Add.6. However, see A. Pellet, Tenth Report on Reservations to Treaties, UN Doc. A/CN.4/558/Add.1, paras. 100–101; A. Pellet, Eleventh Report on Reservations to Treaties, UN Doc. A/CN.4/574, paras. 53–55, citing extracts from a working paper on reservations to human rights treaties, UN Doc. E/CN.4/Sub.2/2004/42, in which it is maintained that '[n]othing in the Vienna Convention [on the Law of Treaties] suggests that a special regime applies to human rights treaties or to a particular type of treaty which type includes human rights treaties', para. 6.

49. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep., at 226, para. 25.

anti-terrorism measures. Yet there is no indication that such was the intention of the drafters, but rather that what was envisaged was the conclusion of an anti-terrorism treaty which took account of the existence of human rights guarantees and protections. Even the International Court has seemingly softened the resort to the strict general/special dichotomy in the *Wall* opinion. The better approach, short of an express reference to the contrary, may be, therefore, to view individual protections and guarantees established in general international law as essentially complementary to (as opposed to displacing) those in human rights law – they share a common objective in the protection of individuals.

4. Conclusion

This paper has sought to draw attention to the growing influence of human rights, and what have been somewhat loosely described as 'human-rightist', considerations in contemporary general international law. It has made two modest assertions: (i) that this trend has become so widespread that it is increasingly possible to speak of general international law sources of human rights obligations; and (ii) that the very success of this phenomenon undermines claims that international human rights law exists as a 'self-contained' regime in relation to the general law (and in fact confirms the opposite, namely that human rights law is part and parcel of the general law).

This is not merely a question of intellectual curiosity; there is a risk of the particularization of international human rights law itself. By limiting their focus to the traditional human rights treaty framework, human rights lawyers are, in effect, abstaining from playing a role in the development and interpretation of human rights norms in other contexts. However, as such norms are increasingly included in instruments developed in other areas of international law, there is a risk that the latter would be considered *lex specialis* (or *lex posterior*), leading to the displacement of existing human rights norms in particular contexts (regardless of the position maintained above by this writer that a more holistic approach might be appropriate). The same could be said in the opposite direction; without the benefit of the input of human rights expertise and jurisprudence, such as that developed in the various treaty bodies, practitioners involved in the development of general international law norms are liable to employ a somewhat superficial conception of existing human rights norms, typically based on the literal reading of treaty texts.

Part of the difficulty relates to the formalism of the categorization of the 'branches' of international law in a seemingly self-contained manner with little need for outside reference. Many human rights treatises, for example, do not include consideration of relevant developments in other areas of international law.[50] Yet human rights is a 'cross-cutting' theme *par excellence*, and does not easily fit into the conception of international law as a series of vertical silos of law. The interaction between

50. Notable recent exceptions include D. Shelton, *Remedies in International Human Rights Law* (2005), at 50–103 (covering reparations as an aspect of the 'general' law of state responsibility); C. Tomuschat, *Human Rights: Between Idealism and Realism* (2003), at 191–8 (discussion on the existence of obligations *erga omnes* under general international law as developed by the International Court).

human rights and international trade law, or the rules regulating the environment, or measures to prevent terrorism, should be of equal interest to human rights lawyers as it is to trade, environmental, and general international lawyers. In other words, a thorough appreciation of the extent of the existing international human rights system requires an understanding of related developments in other areas of international law, including under general international law.[51]

For general international lawyers, not only is a background in human rights law increasingly indispensable, but it has also to be admitted that the emergence of international human rights law has had a beneficial impact on international law overall. It has contributed to the success of the modern treaty law system (by the end of the twentieth century, in contrast to a century before, a large swathe of international law had come to be regulated by treaties), and, equally important, has also injected a level of vitality into general international law itself by shifting it away from its state-centric moorings towards a greater emphasis on the protection of individuals.

51. There is a related point to be made: it may be that those who find their claims as to the existence of a customary international human rights law thwarted by a thicket of comprehensive human rights treaties are looking in the wrong place, i.e. that it is in general international law that there may exist evidence of customary human rights norms.