Distribution: limited

SHS-89/CONF.602/5
Paris, 10 October 1989
Original: English/French

UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL ORGANIZATION

International Experts Meeting
on further study of the concept
of the rights of peoples

Unesco, Paris
27-30 November 1989

RELATIONS BETWEEN RIGHTS OF PEOPLES AND HUMAN RIGHTS

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I. INTRODUCTION

1. Unesco commissioned the International League for the Rights and the Liberation of Peoples to write a juridical study on the relationship between the rights of peoples and human rights, the latter as defined in the Universal Declaration of Human Rights, as well as in the two International Covenants on Human Rights and, more particularly, on the relationship between the rights of peoples and cultural rights, the latter as defined in the three universal international instruments mentioned above.

2. In an endeavour to answer the questions thus formulated, this study will be limited to what is regarded as law in this field. Although it will not be possible to avoid completely all the historical, philosophical, political and moral considerations that are frequently linked with this issue, they will be reduced to the minimum necessary for a proper understanding of the law, as will all doctrinal controversies. Given this basis, this study can be no more than a survey, and, sometimes, even a rudimentary one. The approach has been positivist, and the study will, without any doubt, deserve all the censure it will incur: some readers will find it full of certitudes, whilst others will criticize it for its uncertainty; all will undoubtedly be right.

3. It was thought appropriate to give first the definition of the two concepts whose relationship we are to study: (I) the concept of human rights, and (II) that of the rights of peoples. The scope of our study thus determined, it is now for us to analyse more accurately the relationship between the two concepts before giving closer scrutiny to their relationship as far as cultural rights are concerned.

II. HUMAN RIGHTS

(a) The texts

4. It is easier to know what is understood by human rights than, as will be seen, by the rights of peoples. Indeed, a large corpus of doctrinal texts dealing with the former is extant, together with a large number of international instruments in the field of law. The following three universal international instruments, already mentioned in the introduction, will be the subject of our study:

> the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10 December 1948;
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> the International Covenant on Economic, Social and Cultural Rights, adopted by the Untied Nations General Assembly on 16 December 1966;
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> the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966.

5. These texts form the major part, but not the sum total, of international law concerning human rights. The very existence of an international law concerning human rights has sometimes been questioned; it has been alleged, among other things, that the Declaration states in its Preamble, that it is "a common Universal standard of achievement for all people and all nations". According to some authors, it would therefore be no more than a morally compelling document lacking executory power. Yet, as has already been pointed out by Rene Cassin, one of the fathers of the Universal Declaration, article 56 of the United Nations Charter, according to which all States pledge themselves to act both jointly and singly with a view to carrying out the aims stated in article 55 (one being the "universal respect for, and observance of, human rights and

fundamental freedoms") confers to the Universal Declaration a juridical value that goes much further than a mere recommendation.[1]

(b) The individual as subject of international law

6. Can we consider that, by becoming rules of international law, the dispositions of the Universal Declaration have put an end to the old doctrinal controversy as to whether the individual may or may not be considered as a subject of international law? The individual, in traditional international law is not to be considered as a subject of the law of nations ***(droit des gens);*** the latter is thought to govern only the relationships between States. The individual as subject of domestic law can only fall within the scope of the rules of international law through the State to which he belongs, and its domestic law. Such a conception was already criticized by several authors before the Second World War; it now appears to be obsolete. Too many sentences in the Universal Declaration, as well as in the International Covenants, begin with such words as: "Everyone is entitled..." or "Everyone has the right..." for anybody to deny that it is the individual as such who is granted those rights by these international instruments. Although the International Covenants, which are part of multilateral conventional law, contain numerous pledges by the signatory countries to enforce the respect of human rights, it is nevertheless the individual who is entitled to them.

7. The fact that some texts, such as the Optional Protocol to the International Covenant on Civil and Political Rights or the European Convention on Human Rights, allow for complaints lodged by individuals who claim they have fallen victim to a violation of human rights, argue that, contrary to what was held by the tenets of traditional conception, individuals are, or at least become, subjects of international law.

(c) The distinction between human rights

8. This is not the place to list the various rights initiated by the Universal Declaration and the International Covenants, or their classification into various categories. However, two distinctions between human rights have to be made:

one is between civil and political rights on the one hand, and economic, social and cultural rights on the other;

the second is between fundamental rights and other rights.

9. Civil and political rights are rights which emerged directly from the French Declaration of the Rights of Man and of the Citizen of 1789; they centre on the individual. Economic, social and cultural rights are rights which can only be enjoyed collectively. They are sometimes called human rights of the second generation. While the International Covenants on Human Rights were being elaborated, the question was raised whether it was necessary to have one or two covenants and this gave rise to long and painstaking discussions. According to those who were in favour of a single covenant, it was impossible to distinguish between the various human rights. Without economic, social and cultural rights, civil and political rights would only be an empty concept. Conversely, the former could not be guaranteed without civil and political rights. Partisans of two distinct covenants won the day by contending that civil and political rights had to be made applicable immediately, while respect of economic, social and cultural rights needed to be organized step by step.

10. Consequently, while all the human rights proclaimed in the two International Covenants are part and parcel of international law, the nature of the pledges taken by the States Parties is not the same. A States pledges itself to "...respect and to ensure to all

1 See also VAN BOVEN, "Survey of the positive international law of human rights" in *The International Dimensions of Human Rights*, Paris, Unesco, 1982.

individuals within its territory [...] the rights recognized" in the International Covenant on Civil and Political Rights (article 2, paragraph 1), whereas each of the States Parties to the International Covenant on Economic, Social and Cultural Rights "...undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present International Covenant by all appropriate means, including particularly the adoption of legislative measures", (article 2, paragraph 1) of the International Covenant on Social, Economic and Cultural Rights.

11. The distinction between human rights and fundamental freedoms as a matter of doctrine caused much ink to flow. If one wishes to confine oneself to law, one only has to consider article 4, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "In time of public emergency which threatens the life of the nation", the States Parties "... may take measures derogating from their obligations under the present Covenant..." provided that "... such measures [...] do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Yet, in article 4, paragraph 2, we find that "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision". The States Parties to the International Covenant which take advantage of the derogation are to inform the other Parties, through the Secretary-General of the United Nations, what articles they are infringing, as well as their reasons for so doing.

12. The provisions in the International Covenant on Civil and Political Rights from which a State cannot depart, even in the case of exceptional danger threatening the existence of the nation, are:

> the right to life: the death penalty in countries where it has not been abolished can only be pronounced ... pursuant to a final judgement rendered by a competent court" (article 6, paragraph 1);
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> the ban on torture, or on cruel inhuman or degrading treatment or punishment (article 7);
>
> slavery or holding in servitude (article 8);
>
> the ban on imprisoning people merely on the ground of inability to fulfil a contractual obligation (article 11);
>
> the fact that penal laws cannot be retroactive, and that no one may be condemned for acts which were not considered a crime or an offence at the time they were committed (article 15);
>
> the right to recognition as a person before the law (article 16);
>
> the right to enjoy freedom of thought, conscience and religion (article 18, paragraph 1).

13. This bare minimum which is stated in article 4 of the International Covenant on Civil and Political Rights is covered by the provisions that a state has to respect under any circumstance whatsoever, according to article 3 of the four Geneva Conventions of 1949 which applies to armed conflicts of a non-international character. Whether in the case of exceptional danger threatening the existence of a nation or during civil war, there exists therefore a minimum number of human rights which must be respected. In both cases, the State concerned is bound by international law.

(d) The lack of strength of international means of implementation

14. Although human rights are stated and defined exactly in the three international texts of a universal character to which we have referred to above, as being rights whose beneficiary is the individual, we cannot fail to remark the lack of strength, not to say the complete absence, of the means of implementing them in order to ensure "effective and universal respect" for them, in accordance with article 55 of the Untied Nations Charter. The States, pursuant to both International Covenants, are only obliged to send reports. Thus the International Covenant on Economic, Social and Cultural Rights provides that: "The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein" (article 16, paragraph 1). The International Covenant on Civil and Political Rights states: "The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights (article 40, paragraph 1). As to the possibility of the Human Rights Committee, instituted by article 41 of the International Covenant on Civil and Political Rights, to hear communications from one of the Parties about another State Party, it is subject to the two-fold condition that the State reading the communication, as well as the State concerned, both recognize the authority of the Committee. The number of States having actually recognized this authority is very low. This provision does not seem to this day to have been followed to any effect.

15. As a conclusion to this brief survey of the international law of human rights, let us say that it recognizes individuals as subjects in their own right, that these rights are expressed and described in the Universal Declaration and laid down in the two International Covenants. States are compelled to enforce respect for these rights: immediately for some rights and progressively for others, but nothing or very little has been set up on an international level to ensure that this respect is exercized, at least in the three universal instruments to which this study refers.

III. THE RIGHTS OF PEOPLES

(a) Formulating the problem

16. We have reached the conclusion that there is an international law of human rights, even if the means for enforcing it are dramatically lacking. It is much more difficult to reach an agreement on the rights of peoples. Some specialists go as far as questioning the very existence of such rights, reckoning that the "rights of peoples to self-determination", or the "right of self-determination", which is most frequently referred to, is a political principle rather than a juridical norm. To support such a contention, they argue that determining the concept of "people" and giving it a thorough definition is in itself difficult, that the content of the rights of peoples is far from clear, and, finally and above all, the rights of peoples is inconceivable outside a State structure. It is true that, as soon as the problem of an international law concerning the rights of peoples is considered, at least four questions are posed which no jurist can dismiss:

What is a "people"?
Can a "people be a subject of international law?
What is the content of the rights of peoples?
Who represents the "people in the exercise of its rights?

(b) What is a "people"?

17. The question of what was to be understood by the word "people" was raised *a propos* the rights of peoples. The debate on this point is similar to that which went on

throughout the nineteenth century about the concept of "nation". It is true that the words "people" and "nation" have often been confused and have only been tentatively defined by doctrinal thinking. At that time, specialists contrasted the objective concept of nation, considering that it was founded on a certain number of objective elements such as territory, language, religion, race or culture with the subjective and wilful concept whereby a nation was mainly defined in terms of psychological elements (what Ernest Renan called the "will to live collectively").

18. The same differentiation was made when the question of defining the word "people" was under examination by the organs of the Untied Nations. Many varied opinions were put forward. However it was obvious that "there is no text or recognized definition from which to determine what is "a people" possessing the right..." of peoples to self-determination granted by the United Nations Charter. Another author refers to "the fact that no juridical definition of "people" will ever be found"[3]

19. The most subtle analysis has been made by Charles Chaumont.[4] For him, the lack of a proper definition of "people" does not deprive it of a juridical existence. The various conditions to which specialists usually refer, in order to try and define the concept of people, borrow their significance only from the people's historical movement towards self-determination which becomes manifest in the struggle which not only reveals the existence of such conditions but also, and this is the main point, testifies that a people exists. This is the lesson that we can draw from the experience of national liberation movements today. Combat has a definite probationary value. Peoples must continuously fight for their existence as such, even if, in the case of traditional nations, "the need for a proof is not constantly felt with great acuity". Such a concept has sometimes been summarized by saying that a people cannot be defined but that it defines itself, which is far from being a paradox, for it is true to say that a people can be better understood through its development than through its actual existence.

(c) Peoples as subjects of international law

20. Since a people can testify to its own existence, one has to admit that its right of self-determination entitles it to be a subject of international law. This was inconceivable in traditional law, which only dealt with the relationships between States. However, should anyone question the fact that peoples have become subjects of international law is to deny that the provisions of article 55 of the United Nations Charter which states that "equal rights and self-determination of peoples" have any significance. It also takes away all significance from article 1, common to both International Covenants, which begins: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

21. The International Court of Justice has twice had the opportunity to assert that the rights of peoples to self-determination was, or at least had become, a norm for the rights of peoples. In their advice of 21 June 1971 on the Namibian Case, the Court declared that it had taken into account the development of international law from the United Nations Charter onwards, an important step of which had been making the Declaration on the Granting of Independence to Colonial Countries and Peoples "... applicable to all peoples". Its conclusion was that: "... in the domain to which the present proceedings relate, the last fifty years [...] have brought important developments. These developments leave little, doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as

2 Aurdliu Cristescu, *The right to self-determination,* United Nations, New York, 1981, p. 39.

3 E. Jouve, *Le droit des peuples,* Collection "Que sais-je?", Presses universitaires de France, Paris, 1986, p.7.

4 Charles Chaumont, "Le droit des peuples a temoigner d'eux-memes", in *Annuaires du Tiers-Monde,* Vol.II, 1975-1976, pp. 15 et seq.

elsewhere, the ***corpus juris gentium*** has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore".[5] In their advice on the Western Sahara of 16 October 1976, the International Court of Justice asserted that "...the free and authentic expression of the will of the population of this territory remains applicable to the case of Western Sahara".[6]

22. It may be useful to highlight another international instrument in which the rights of peoples is considered to be a principle of the law of nations (*"droits des gens").* Namely, Protocol I added in 1977 to the Geneva Conventions of 1949, in which international armed conflicts are assimilated to armed conflicts in which peoples fight against colonial domination and foreign occupation as well as against racist regimes within the exercizing of the right of nations to self-determination, as established in the United Nations Charter and mentioned in the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the United Nations Charter.

(d) The content of the rights of peoples

23. An agreement has therefore now been reached in considering the right of peoples to self-determination as a norm of international law. In various United Nations or Unesco documents, and also in other international instruments or in doctrinal thinking, one can see the emergence of other rights granted to people such as the right to development, the right of peoples to freely dispose of their natural wealth and resources, the right to culture, to the protection of the environment and even the right to peace.

24. Can we consider that such rights granted to peoples are norms of international law? It is impossible to answer this question without taking into account the process of elaboration of international law. It is commonly agreed nowadays that international law is in constant development. United Nations resolutions contribute to this on-going development. They have a juridical value inasmuch as they materialize either an agreeemnt or a customary rule which is being created. A moral and political principle may become a norm of law through repeated insertion into texts issued by the United Nations, the Commission on Human Rights, Unesco or other international organizations. It has been written that asserting the right to development in United Nations resolutions "had the effect of fundamentally reshaping the international policy of development and raising it from the moral to the juridical level, making it no longer a giving of alms but an obligation".[7]

(e) Who represents the people in the exercise of its rights?

25. In order to answer this question, one has to distinguish between what is commonly called external and internal self-determination. When a people under the yoke of colonial or foreign occupation fights for its freedom, it acquires, *de facto,* in the course of the fight, a certain number of leaders who quite often manage to secure recognition from the whole or part of the international community. Liberation movements or exiled governments have frequently been recognized not only by individual States but even by the United Nations Organization.

26. For the latter, the right of self-determination means the right to get rid of all types of colonial or foreign domination or of all racist regimes. In all these cases, it is the right

5 Quoted in Cristescu, op. cit., p. 17. See also "L'avis consultant du 21 juin 1971 dans 1'Affaire de la Namibie" by Brigitte Bollecker, in *Annuaire francais de droit international,* CNRS, Paris, 1971, p. 281 et seq.

6 Maurice Flory, "L'avis de la Cour Internationale de justice sur le Sahara occidental, 16 octobre 1975", in *Annuaire francais de droit international,* CNRS, Paris, 1975, p. 253 et seq.

7 Rene-Jean Dupuy, Theme et variation sur le droit au developpement" in *Le droit des peuples a disposer d'eux-memes,* Miscellany in honour of Charles Chaumont, Pedone, Paris, 1984, p. 263.

for a people not yet organized into a State to choose its own status and bring about its external self-determination.

27. Although it is true that, due to the conditions of international life, self-determination leads to the creation of a distinct State, it cannot be claimed that the people and the State are one and the same thing, or that the State is in all circumstances a representative of the people. In contemporary international law, the idea of an everlasting link between the people and the State has been discarded. The right of peoples to self-determination is not only the right to free themselves from all foreign domination, be it colonial or racist; it is also the right to decide their fate freely and permanently, in other words the right to internal self-determination. A people cannot be said to be free when fundamental rights and liberties are limited and political rights denied.

28. This is the link between human rights and the rights of peoples. The right of self-determination acquires its full meaning only when it allows peoples to free themselves from all types of colonial domination, foreign occupation or racist regimes, and to take their destinies into their own hands by securing for themselves a democratic government which represents all citizens without distinction as to race, sex, belief or colour, and can ensure full respect of human rights and fundamental freedoms for all.

IV. THE RELATIONSHIPS BETWEEN RIGHTS OF PEOPLES AND HUMAN RIGHTS

29. It is not possible to disregard the fact that human rights and the rights of peoples to self-determination share the same origin and history. Is it because of this common history that some authors consider that the rights of peoples are, or are also, human rights, and call them the human rights of the third generation? Do the rights of peoples have to be observed as a prerequisite for human rights to be respected? Or are the two concepts consistently complementary?

(a) Common origin and history

30. The first text in which both human rights and the rights of peoples were simultaneously proclaimed was the Declaration of Independence of the United States of America, which begins:

> "When in the course of Human Events it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the laws of Nature and Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, Liberty and the pursuit of Happiness".

31. The right of a people to free itself from the bonds that bind it to another country together with the inalienable rights of man are stated in a few lines of this text.

32. The concept of human rights was formulated mainly during the French Revolution at a time when the principle of the right of peoples to self-determination, later to be called the "principle of nationalities" was also laid down. Although the 1789 Declaration of the Rights of Man and of the Citizen bears no mention of the concept of people, the various constitutions of the revolutionary era mention it explicitly. The same texts then proclaim human rights and the rights of peoples to freedom and equality.

33. Conversely, both concepts, i.e. human rights and the principle of nationalities, came to be considered as harmful by the Holy Alliance and were banned from Europe with its restored absolute monarchy. People could not claim rights from monarchs. Citizens had no rights beyond those which they were granted by monarchs. Thereafter, in all countries of Europe or of European origin, there were to be struggles both for human rights and for the rights of peoples to self-determination.

34. The agitation of 1848, which has been call "The Springtime of the Peoples", bears testimony of popular unrest in the demand for democracy, human rights, independence and national unity.

35. In the name of such principles, Latin American countries were to break away from their Spanish or Portuguese colonizers, whilst other peoples were to rid themselves of Ottoman domination, and the Austro-Hungarian Empire, known as a "mosaic of peoples", was broken up.

36. As the the Empire of the Czars, which was known as the "jail of the peoples", it became, according to the Fundamental Law of 31 January 1924, a Union of Soviet Socialist Republics in which each republic was "... guaranteed the right to freely leave the Union", while "... open access is given to all the existing Soviet Republics, or all republics likely to be created in the future, thus taking "... another final step towards the union of workers of all countries into a world-wide Soviet Socialist Republic.

37. Subsequent constitutions were to maintain the right to leave the Union, but no longer made any reference to "guarantees" or to a "world-wide Soviet Socialist Republic".

38. Nazi Germany, for its part, was to declare itself completely against the ideology of human rights and of the rights of peoples and, tragically, to carry out its opposition through massacres, mass deportation and the enslaving of a great majority of the European nations.

39. At the end of the Second World War after the victory of the Allied Forces, the United Nations Charter became the first international instrument of a universal character to acknowledge human rights formally as well as the rights of peoples to self-determination. In article 55 are asserted "equal rights and self-determination of peoples" on the one hand, and "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" on the other.

40. This brief reminder of the common history of the two concepts we are studying might give the wrong impression if we forget that, despite the universal significance attached by them to these principles, the European States or the States of European origin, such as the United States of America, have unflinchingly tolerated slavery, colonialism and even genocide, not to mention all forms of racial discrimination. Latin American countries, although they have freed themselves form colonialism, have nevertheless continued relations of a colonial nature with Indian populations, with the despoliation and slavery that this entails.

41. Slavery was not abolished before the second half of the nineteenth century, and in the United States of America a civil war was even necessary to get rid of it. The nineteenth century, the century of human rights and the principle of nationalities, was the golden age of colonization. Millions of human beings were enslaved by those very countries which had enshrined in their constitutions the important principles of the 1789 Declaration.

(b) The distinction between human rights and the rights of peoples

42. Whether because of this common history or of the inclusion of the rights of nations into article 1 of the two International Covenants on Human Rights, it has been thought legitimate to say that the right of self-determination had to be considered as a "human right". Such an opinion, as we shall see, was discarded quite easily.

43. Yet the "new" rights of peoples, such as, for example, the right to development or the right to freely dispose of their natural wealth and resources, have come to be seen as human rights and are referred to as "human rights of the third generation". We shall question such a description further on.

44. Both of the two International Covenants on Human Rights has a first article with identical wording. They read as follows:

> "1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

45. Was it necessary, because of the inclusion of the rights of peoples to self-determination in the two International Covenants, to consider the right of self-determination as, strictly speaking, a "human right"? Most specialists think that it was not. They rightly present the idea that the protection conferred by human rights is only for individuals as such; whereas the right of self-determination is exercised by the people collectively.

46. In the course of the United Nations debates about article 1 of the two International Covenants, some people thought it possible to question such an obvious fact. They claimed that, since some human rights - such as the freedom of association or the rights of trade unions - can only be exercised collectively, the same should apply to the right of self-determination.

47. The response to this observation was that, whereas it is the individual entitled to the right who freely decides to become a member of an association or a trade union, the fact of belonging to a people is not determined, except under exceptional circumstances, by individual choice.

48. As regards the "new" rights which are granted to a people, such as the right to development, the right of peoples to freely dispose of their natural wealth and resources, their right to culture, to the protection of the environment, and even their right to peace, some doctrinal thinkers went so far as to consider them as human rights or even call them "human rights of the third generation".

49. First of all it seems difficult to consider that the right of peoples to self-determination is a human right of the third generation since, as we have seen, it shares

8 See K. J. Partsch, "Fundamental principles of human rights: self-determination, equality and non-discrimination" in *The International Dimensions of Human Rights,* Unesco, Paris, 1982, p. 72.

the same historical origins as human rights. One would therefore have to admit that the only right of peoples is the right of self-determination and that the other rights mentioned above are, in fact, only human rights which have recently appeared.

50. It is true that, in some texts, the right to development is given a two-fold dimension, both as a human right and as a right of peoples. Thus the Declaration on Social Progress and Development proclaimed by the United Nations General Assembly on 11 December 1969 reads in its article 1: "All peoples and all human beings [...] shall have the right to live in dignity and freedom and to enjoy the fruits of social progress...". Again the Unesco Declaration on Race and Racial Prejudice of 1978 mentions the "right to total development for every being or human group".

51. But, in fact, the two rights are distinct. The right of the individual to utter and complete fulfillment cannot be mistaken for the right of the whole nation to social and economic development. The same distinction applies, as we shall see, to cultural rights: it is one thing for an individual to have free access to culture and another for a people to see its culture respected.

52. Can it be said that a single right may have two beneficiaries? We think that neither human rights nor the rights of peoples can gain from such an amalgam. Although the aim of the right to development is the fulfillment of the individual, we must bear in mind that human beings do not exist in the abstract, out of time and space, but are real men and women, living among a people. Identifying human rights with the rights of peoples, resorting to a rather strange vocabulary ("human rights of the third generation") to refer to rights that concern the people, can only lead to confusion and obscure the debate on the relationships between the two concepts which should be seen as distinct though complementary.

53. As regards the "right to peace", which is, in some cases, considered to be a human right of the third generation and, in others, a right of peoples, let it be said here that resorting to war has been declared illegal in a great number of texts, from the Paris Treaty of 27 April 1928, known as the Briand-Kellog Pact, to the United Nations Charter. But resorting to war is not only unlawful, it is also criminal. Article 6 of the Nuremburg Statute gives a definition of the concept of "crime against peace" for which perpetrators incur penal responsibility. The Nuremburg verdict put it into practice and it was consecrated by the United Nations General Assembly Resolution of 11 December 1946: article 5 of this resolution on the definition of aggression stipulates: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility". Enunciating a right to peace for man and for peoples adds nothing to such peremptory denunciations of the recourse to war, which are the essential, constraining norms of international law. Any warlike aggression is an international crime against humanity as a whole.

(c) The rights of peoples as a preliminary to human rights

54. We have already noted that the inclusion of the rights of peoples to free determination in the two International Covenants, in other words into juridical instruments mainly concerned with enunciating individual rights, did not involve its becoming a "human right". How can we then account for such an inclusion? Was it a methodological blunder, as some specialists have contended, since the rights of peoples to self-determination have no place in the International Covenants on Human Rights? We do not think so. As a matter of fact, the authors of the International Covenants, by including the right of self-determination into the first part of each of the two International Covenants, consisting of one article, have wished to indicate through this initial provision that human rights do not exist when a people is enslaved.

55. The United Nations resolutions habitually describe the right to self-determination as the right to become free from all colonial domination, either foreign or racist, such

domination being incongruous with the guarantee that human rights be respected. Such respect presupposes the liberation of the people which, given the conditions of contemporary international life, is achieved through the creation of an independent state. In this creation, the people exercises its self-determination within the framework of international life, human rights then being the responsibility of the new independent sovereign state.

56. Such a point of view is correct although defective. It is true that gaining freedom from colonial, racist or foreign domination is the necessary condition for the exercise of human rights, but it is not sufficient. The right of a people to self-determination is not only the right to shake off colonial domination, foreign occupation or a racist regime, it is also the right for this people to take its destiny into its hands freely and permanently. A people is not free or master of its fate if it is submitted to an authoritarian and repressive regime. The right of a people to self-determination does not lose its purport after that people has torn free of foreign domination. Like human rights, it is a permanent right.

57. The United Nations proclaim as a general principle that everybody has a right to self-determination, but apply this only to peoples who are under foreign or colonial domination. The sovereignty of the colonial or occupying power is not considered to be a hindrance for such international support as is due to a people fighting for its freedom. Here, self-determination takes the form of a choice within the framework of international relationships (external self-determination). It is true that the United Nations apply the principle of self-determination to the case of peoples submitted to a racist regime. So the hindrance of sovereignty ceases in the case of a State which submits a people to a racist regime. This is a step towards the recognition of a right to internal self-determination.

(d) The complementarity of human rights and the rights of peoples

58. The work accomplished by the United Nations in establishing the principle of self-determination has been of fundamental importance in the process of decolonization and in the elaboration of a real international concept of the rights of peoples. But it is the jurist's duty to go further. The rights of peoples to self-determination is defined in the International Covenants as the right to choose their political status freely. It therefore includes both internal and external self-determination. When human rights and fundamental freedoms are constantly violated, when political rights are negated, the right of peoples to self-determination is itself violated, as peoples cannot choose freely their political status.

59. As Antonio Cassese has pointed out, internal political self-determination means, on the one hand, the "right to choose a government freely through the exercise of all the liberties which make such a choice possible (freedom of thought, of reunion, of association, political freedom, etc...)" and, on the other hand, "once the government has been chosen, the right to make sure that it is always founded on the consensus of the people".

60. Even before the Second World War, Professor G. Scelle wrote: 'Tyranny, absolutism, dictatorship at once violate individual rights and ignore the rights of peoples".[10]

61. The Universal Declaration of People's Rights, a document free of all state control, proclaimed in Algiers (Algeria) on 4 July 1976 by a number of personalities during a meeting called by the International League for the Rights and Liberation of the Peoples and the Foundation of the same name, includes the following three articles on self-determination:

9 Antonio Cassese, in *Le mois en Afrique,* October-November 1981, p. 102.

10 Quoted by A Cassese, ibid.

Article 5
Every people has the imprescriptible and inalienable right of self-determination. It shall determine freely its own political status without any external interference whatsoever.

Article 6
Every people has the right to free itself from all colonial or foreign domination, whether direct or indirect, and from all racist regimes.

Article 7
Every people has the right to a democratic regime representing all the citizens, without distinction of race, sex, belief or colour and capable of assuring the effective respect of human rights and fundamental freedoms for all.[11]

62. The rights of peoples to self-determination thus acquires its full meaning since it includes both external (article 6) and internal (article 7) self-determination. Through recognizing the right for each people to a democratic regime, which represents all the citizens and ensures true respect of human rights, the Algiers Declaration gives the full meaning to the rights of peoples to self-determination proclaimed in the United Nations Charter.

63. Rather than trying to define the right to self-determination and the other rights of peoples in terms of human rights, thus paving the way for juridical confusion, it is more apposite to interpret the principle of self-determination in a way that gives it its full force. The existence of the rights or peoples is the necessary condition for the existence of human rights, but true respect of human rights and of fundamental freedoms is a necessary condition for the peoples to enjoy real self-determination. The two concepts therefore appear to be complementary.

64. So much for the question of the relationship between the people and the State. We consider that it is a datum of contemporary international law that peoples and State should be distinct. The State cannot be considered as representative of the people unless it is based on a democratic regime that ensures true respect of human rights and of fundamental liberties. If this is not the case, it becomes necessary to note a contradiction between the State and the people.

65. This is why the implementation of international self-determination on an international level is inevitably at odds with the problem of national sovereignty. In this case, the objection is a serious one, the respect of national sovereignty being an essential norm of the rights of peoples and a prerequisite of international peace. Having already pointed out that the means implemented to ensure respect of the international law of human rights are extremely frail, and having congratulated the United Nations for its efforts to promote the right to self-determination for peoples submitted to a colonial, foreign or racist domination, we must now note that States lack the juridical means to ensure the respect of the people's right to internal self-determination. Even the States that are sometimes willing to do so act selectively, according to their interests or to political choices of a partisan nature.

66. This is where international public opinion must take over from States and from official institutions. Support of public opinion is often secured through the action of non-governmental organizations, some of which manage to make themselves heard in the precincts of the United Nations. Such support becomes more effective when, to the moral and political reasons for condemning the oppressing government, it becomes possible to add juridical arguments.

11 Unofficial translation.

67. The complementarity of the two concepts is manifest. The combats of colonized peoples for their freedom have elicited support from international public opinion not only on the basis of the rights of peoples, but also through exposure of the violations of human rights which go along with colonization. The same must be true of combats against all forms of internal oppression.

(e) The difficult problem of minorities

68. We have tried to cast some light on the distinction between human rights and the rights of peoples as well as on the relationships between the two concepts and, as far as possible, to overcome certain confusions or ambiguities. The task is more difficult when it comes to minorities, for whom such confusions and ambiguities seem to have been thoroughly cultivated.

69. The only text to mention minorities in the instruments to which we refer is article 27 of the International Covenant of Civil and Political Rights:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

70. Two remarks are called for:

> the minorities in point are ethnic, religious or linguistic minorities, excluding national ones;
>
> the rights are granted not to minority groups as such but to "persons belonging to these minorities".

71. During the preliminary working sessions on article 27, a first draft mentioned national alongside ethnic, religious or linguistic minorities. The reference to national minorities was dropped in the course of the discussion. This leads us to the question of what is meant by "national minority" and in what ways it is distinct from ethnic, religious and linguistic ones. The most varied opinions have been expressed on the subject. For some, the expression "national minority" refers to a group of people being nationals or citizens of a state different from the one in which they live. Some take the expression "ethnic minorities" to include national minorities, whilst others hold the opposite opinion, thinking that national minorities include ethnic minorities. Still others have thought it advisable to drop the expression "national minorities" altogether, in order to avoid an ambiguity that arises through using an expression whose meaning fails to secure unanimous recognition.[12] One author even contended that oppressed majorities were to be considered as minorities, which implies that a numerical majority may at the same time be a juridical minority. Greater confusion would be hard to imagine.

72. Why so much perplexity? Might this not be because the expression "national minority" in fact applies to a minority "people" in a State which is not its own? To recognize the existence of a minority people is, ***ipso facto,*** to recognize its right to self-determination, since, according to article 1 of the International Covenants "every people has a right to self-determination". There is no reason, in principle, why this right should be denied to a people which has given testimony of its existence through its behaviour, or even through its combat, simply because it lives as a minority in a State which is not its own.

12 See Jules Deschenes, "Propositions pour une definition du terme "minorite", United Nations ECOSOC, E/CN.Sub.2/1985/31.

73. Assuming that such a conception is correct, the case of "national minorities" would be a matter for the rights of people since the right of self-determination is granted to every people, whereas the case of ethnic, religious or linguistic minorities is a question of human rights, since, according to article 27 of the International Covenant on Civil and Political Rights, the rights mentioned in this article are granted to "persons" who are members of these minorities.

74. More particularly, "national minorities" and ethnic minorities must not be confused. Individuals of various ethnic origins may well be found in a single people. On the other hand, although the ethnic origin may be one of the characteristics of a people, it is not a sufficient determinant.

75. Does this imply that the right of self-determination granted to a minority people will include the right to secede, thus endangering the integrity of the State? Such a risk exists, but it cannot be willed away by refusing to recognize a minority people's existence. However, in many circumstances, the objective conditions for secession will not be fulfilled: minority peoples will be hemmed in within the territory of another people or dispersed over the whole of the State territory, and so on. Sometimes also subjective conditions, i.e. the will to secede, do not exist. In all these cases, the members of the minority benefit from the rights granted to persons in ethnic, religious or linguistic minorities and, at the same time, due to the principle of non-discrimination, from equality of rights with members of the majority.

V. HUMAN AND PEOPLE'S RIGHTS TO CULTURE

76. We shall first recall the texts referring to cultural rights as human rights and those which refer to them as people's rights. We shall then endeavour to draw the distinction between the cultural rights of man and of peoples and stress their complementarity. We shall then underline the importance for cultural rights to be recognized internationally, and highlight what has been considered as an evolution towards an international cultural right".

(a) The texts

77. The following texts refer to cultural rights as human rights:

- Universal Declaration of Human Rights.

> Article 22.
> Everyone ... has the right to social security and is entitled to realization through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
> Article 27. paragraph 1.
> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

- International Covenant on Economic, Social and Cultural Rights.

> Article 3.
> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.
> Article 15, paragraph 1.
> The States Parties to the present Covenant recognize the right of everyone:
> (a) to take part in cultural life;

(b) to enjoy the benefits of scientific progress and its applications;
(c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author....

• **International Covenant on Civil and Political Rights:**

Article 27 of the Covenant deals with the cultural rights of members of ethnic, religious or linguistic minorities. It has already been discussed above.

78. As for the texts referring to the cultural rights of peoples, we should mention:

Article 1. paragraph 1. common to the two International Covenants:
"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

However, one must above all mention article 1 of the Declaration of the Principles of International Cultural Co-operation, unanimously adopted by the Unesco General Conference of 4 November 1966.

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

79. In order to dispel any ambiguity, we must distinguish between the cultural rights of man and of peoples, as we have done already for the relationship between human rights and the rights of peoples in general. Both rights are obviously related to culture but they have different purposes and different beneficiaries. On the one hand, each person is entitled to take part in cultural life, on the other, each people is entitled to a culture which is respected and which may develop. It is one thing for an individual to be granted access to culture, and another for each people to enjoy the safeguarding and respect of its culture by other peoples and States.

80. Not only does the beneficiary of the right vary, but its aim does as well. In the first instance, each State is compelled, according to its means, to ensure that each person takes part in cultural life. In the second instance, it is matter of safeguarding and respecting the value and dignity of every people's culture and allowing for their development. It is useless here to enter the debate over the different meanings of the word "culture", it suffices to note that the acceptation of the concept varies according to whether one refers to the culture of an individual or that of a people.

81. According to article 27 of the International Covenant on Civil and Political Rights, members of an ethnic, religious or linguistic minority are entitled to have their "own cultural life". Similarly, they can profess their own religion or use their own language. We have already mentioned these rights and underlined the fact that they are granted not to the minority group as such but to its members. Moreover, article 27 does not apply to national minorities, that is to say to minority peoples in the midst of a State (see above).

(c) Towards an international law of culture

82. The reference to cultural rights as human rights poses no problem and may be seen as being part and parcel of the law; on the contrary, the concept of a cultural right of the peoples appears to be in the course of elaboration. Article 1 of the two International

Covenants mentions the right of peoples to determine their cultural development only as an aspect of the general right of self-determination.

83. Some authors consider that an evolution - as regards cultural exchanges, for instance - not only of the attitudes of States, but also of international law itself is not inconceivable.[13] The resolutions and recommendations of the Unesco General Conference greatly help to bring about the birth of this new international law of culture, and it will conceivably be elaborated after the principles stated in article 1 of the Declaration of 4 November 1966 already mentioned.

84. Unesco, thanks to its awareness of the cultural needs of everyone in the world and also of the multifariousness of the cultures of all peoples, as well as its perception of the necessity to protect every one of them, is the ideal place for such a new international law of culture to be elaborated.

85. This law must be based on the complementarity and interdependence of the cultural rights of man and of peoples. The cultural rights of an individual cannot be fulfilled when the people of which they are members is not free. Conversely, the cultural development of each people implies free access to culture for all its members.

86. The fact that the Declaration of 4 November 1966 states that "... all cultures form part of the common heritage belonging to all mankind" will not have escaped notice. It was important that Unesco reminded everyone of the concept of a "... common heritage belonging to all mankind", which is also found in other international texts dealing with other subjects. Is a new principle of international law in the course of elaboration? Over and above individuals, peoples and States, humanity would be granted a heritage and given rights over it. Although this point goes beyond the scope of the present study, it seems useful to underline it.

VI. CONCLUSION

87. We have now surveyed, admittedly in a cursory and sometimes superficial way, what can be considered as the international law of human rights and the rights of peoples, whether complete or in the course of elaboration. We would like to make two remarks in order to avoid any misunderstanding.

88. Although we have, as far as possible, kept to the study of the law, we do not adhere to a positivist theory of law, which postulates that it is useless to try and find explanations for the juridical norm outside the norm itself. The author of this paper thinks rather that, in order to analyse a juridical norm, one must take into account the conditions of its making within the framework of given economic, social and political structures which are themselves constantly shifting.

89. Moreover, we do not ignore or underestimate the fact that the rights of peoples are sometimes manipulated for political reasons, in order to gloss over obvious breaches of human rights and of fundamental freedoms; so are human rights, in order to try to justify inacceptable breaches of the rights of peoples. This unfortunately happens all too often. We have judged that the present study is not the place to mention them, since it concerns solely the law and not its application, let alone its deviation.

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13 See Jean-Pierre Colin and Jack Lang, "La culture entre les peuples et les Etats: vers un nouveau droit international" in *Le droit des peuples d disposer d'eux-memes,* Miscellany in honour of Charles Chaumont. op. cit., pp. 179 et seq.