Part I
Human rights in the international legal system

Chapter 1

The foundation and historical development of international human rights

1.1 Concept and foundation of human rights

The notion of "human rights" is apparently simple; but it is actually quite complex. In fact, these rights have been, in the history of juridical philosophy, gradually defined with different terms (natural, innate, original, moral, fundamental rights); their historical origin is situated at different times; their legal foundation has been explained from varying perspectives by naturalism, positivism, juridical realism, institutional law theory; and the very notion of "human rights" has progressively widened.

According to some authors [1], human rights are those freedoms, immunities and benefits which, in conformity with accepted contemporary values, all human beings should be able to demand, as real rights, from the society in which they live. According to others, human rights are those that have the nature of fundamental and essential rights of the person and are therefore imprescriptible, inalienable, indispensable and universal [2]. According to others, human rights constitute an impassable minimum for every human being that the law must protect at any cost [3].

These definitions are rather similar; however, they do not seem sufficiently precise to clearly distinguish human rights from other "ordinary" rights. Therefore, the problem of the legal basis of human rights opens up, especially from the point of view of the international legal order.

From one point of view, a certain right can be considered a "human right" when it corresponds to human nature, that is, to the reason and will typical of the human species. This view has a basic naturalistic law approach and has the disadvantage of leaving a margin of subjectivity in finding a definition of "human nature" that is universally accepted in the contemporary multicultural world.

Other authors have supported the theory of the "self-evidence" of human rights. They would be so obvious and so immediate that they would not require

[1] Henkin (1995), p. 886.

[2] Zanghì (2013), p. 5.

[3] Focarelli (2008), p. 342.

a rational justification and legal basis. But even this view lends itself to different subjective interpretations by different groups of States with different traditions, religions and cultures.

The third theory, in my view the most convincing, is that human rights are based simply on consensus. In other words, human rights are those rights that are recognized as such in a given legal system on the basis of a general consensus of the subjects of that system. In the international legal order it will be the consensus of the international community to determine which rights can be defined as "international human rights". A different problem (the answer to which is more restrictive) is to ascertain which human rights are truly universal because they are well established in general international law [4].

To this third theory another concept, in my opinion, can be added; namely that human rights are, of all rights, those that best express the essential and noblest function of law: that of a legitimate instrument in the fight against force, power and abuse. In international human rights, this function is realized above all in the opposition between the person and the State [5].

1.2 Historical precedents

1.2.1 Historical development of human rights in national legal systems

If one wants to go back to ancient times, one can argue that the idea of certain human rights can be found in the Bible, in the Hammurabi Code, in the laws of Greek cities like Athens, as well as in some precepts of various religions or philosophies, such as Buddhism, Confucianism and Hinduism.

However, a more interesting development occurs many centuries later with some English national documents, such as the famous *Magna Charta Libertatum* of 1215, the *Habeas Corpus Act* of 1679 and the Bill of Rights of 1689. In modern times, some American declarations are of great importance, such as the Virginia Declaration of Rights of June 12, 1776 [6], the American Declaration of Independence of July 4, 1776 [7], and the Bill of Rights adopted in 1789

[4] See below, Sects. 1.4 and 13.1-13.3.

[5] This contrast evokes, *mutatis mutandis*, the image of the State as Leviathan. See Hobbes (1651).

[6] Art. 1: "[…] all men are by nature equally free and independent, and have certain inherent rights […]".

[7] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness …".

and ratified in 1791 [8]. Finally, French documents include the Declaration of Human and Citizen's Rights of 1789 [9]. Subsequently, many States followed the examples of the USA and France in their constitutional charters [10].

However, it should be noted that, in these instruments, beyond the universalistic language, human rights are essentially understood as citizens' rights; and that they are relevant to domestic constitutional law and not to international law. The idea that a State can assert the human rights of persons against another State, and especially against the State of nationality of the person, is in fact extraneous. In other words, human rights had no impact on international relations between States in the 18th and 19th centuries and little impact during the first half of the 20th century.

1.2.2 The role of the individual in classical international law

According to the concept of classical international law, predominant until the middle of the 20th century, individuals were not subjects of international law, their role was essentially irrelevant and they were submitted to the exclusive power of government of the State of which they were "subjects". International law formally regulated only relations between States. Also from a substantive point of view, international law dealt almost exclusively with interstate relations and therefore the way in which the State treated its subjects was a matter of "domestic jurisdiction" of that State. In reality, certain limits to the territorial sovereignty of States already existed in classical international law; but individuals derived only an indirect benefit from such limits and not true rights under international law. Let us look briefly at these limits.

1.2.3 Obligation to protect aliens and their property

Traditional international law has recognized since the early centuries of its development that States have an obligation to protect aliens who are on their territory or under their jurisdiction from offences relating to their person or property, through preventive and repressive measures that conform to certain mini-

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[8] These are ten amendments to the US Constitution of 1787.

[9] Art. 1: "Men are born and remain free and equal in rights. Social distinctions can only be based on common utility"; Art. 2: "The aim of every political association is the preservation of natural and inscribed human rights. These rights are freedom, property, security and resistance to oppression".

[10] See, for example, The Netherlands (1798), Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), the Kingdom of Sardinia (1848), Denmark (1849), Prussia (1850).

mum standards of civilization and justice. But this obligation, of a customary nature, was conceived only as operating between the territorial State and the State of nationality of the alien; the individual victim was considered only as a possible "*de facto* beneficiary" of this obligation. Therefore, when the foreign individual suffered a violation of this obligation of protection by the territorial State, only the nation-State of the individual had the right to take international action against the offending State, according to the rules on diplomatic protection and those on international responsibility of States.

In essence, the individual was an "object" and not a "subject" of international law; and he did not even have a true right to receive from his own nation-State the reparation that the latter might have been able to obtain from the offending State.

1.2.4 Humanitarian intervention

The doctrine of humanitarian intervention, already supported by some internationalists in the 17th century, recognized as legitimate the use of armed force by one or more States when it was necessary to stop the mistreatment of individuals in a foreign State, and when such mistreatment was so brutal and systematic as to offend the conscience of the community of States [11]. In fact, humanitarian intervention was used mainly in the 19th century by the European Powers to protect persecuted Christians in the territories of the Ottoman Empire. The doctrine was sometimes used in an abusive manner and as a pretext for the strongest States to occupy or invade the territory of weaker States.

However, the doctrine of humanitarian intervention highlighted the fact that there were certain limits to the freedom of States in the treatment of their subjects when it came to very serious violations of their human rights.

1.2.5 Treaties against slavery and on the protection of religious groups

In the 19th century, the strictly interstate conception of international law was largely dominant; but there was the possibility, albeit in rare and isolated cases, that a State, through a bilateral or multilateral treaty, would assume obligations to grant certain rights to individuals. In this way the treatment of individuals became the subject of an international obligation between the States Parties and went beyond the sphere of the "domestic jurisdiction" of those States [12]. This

[11] Buergenthal et al. (2004), p. 3.

[12] Buergenthal et al. (2004), p. 6.

process of "internationalization" of individual interests already had its start with the Congress of Vienna of 1815.

The Congress adopted a Declaration on the Slave Trade, which recommended its abolition to States, affirming that slavery was incompatible with the principles of humanity and international morality. Later, this objective was included in a series of bilateral treaties, in a multilateral treaty of 1842 between European and Latin-American States, in the Berlin Congo Act of 1885 and in the General Act of the 1890 Brussels Conference on the abolition of slavery. In the 20th century, as we shall see [13], the subject was taken up in the important 1926 Slavery Convention of the League of Nations and other subsequent treaties.

Similar developments occurred with regard to the protection of religious minorities. As early as the 17th century, a number of treaties contained provisions protecting religious minorities. Thus, the Congress of Vienna imposed an obligation on some States to guarantee non-discrimination of religious minorities and the freedom to practice the Catholic religion in certain territories. Later, in the Treaty of Berlin of 1878 a special legal status was granted to certain religious groups [14].

1.2.6 The birth of international humanitarian law

International humanitarian law (originally called *jus in bello*) deals with the protection of the victims of armed conflict and the prohibition of certain means and methods of warfare considered inhuman, with the aim of "humanizing" armed conflict as far as possible through legal rules. Its origin is much older than international human rights law, although at present these two legal fields tend to be closer and complementary.

The birth of modern international humanitarian law dates back to the mid-19th century, when the Swiss Henry Dunant proposed measures for the protection of war victims, which led to the creation of the International Committee of the Red Cross and the drafting of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field [15]. In the meantime, in 1863, US President Lincoln had issued the so-called "Lieber Code", which established a set of rules and instructions for military operations during the American Civil War. The next step in this development process was the St. Petersburg Declaration of 1868, which prohibited the use of certain weapons and in whose Preamble it was solemnly declared that "the only legitimate pur-

[13] See below, Sect. 16.1.

[14] Buergenthal et al. (2004), p. 7.

[15] Kälin, Künzli (2009), p. 11.

pose that States should pursue during the war is to weaken the military forces of the enemy".

Subsequent developments, of great importance, were the Hague Conventions of 1899 and those of 1907. Particularly significant is the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, whose Preamble contains the famous "Martens Clause", according to which, in the absence of a specific legal rule applicable to the case, the inhabitants and the belligerents:

> "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

It should be noted that these first norms of international humanitarian law were based on the principle of reciprocity and were structurally conceived within the framework of traditional international law of an interstate nature; and therefore did not attribute real rights to individuals under international law. However, most of these norms were, in fact, designed to protect individual interests as well, and thus represented a sign of the growing role of the individual in international law.

International humanitarian law was revised, updated and further developed in the 20th century, especially after the Second World War[16]. There is no doubt that the legal position of the individual has changed substantially in contemporary humanitarian law.

1.2.7 The League of Nations and the system of mandates

Some important developments in relation to specific human rights occurred after the First World War. US President Woodrow Wilson presented to Congress in 1918 his "Fourteen Points", an ambitious program aimed at creating a more peaceful and just international community. He called, among other things, for the realization of the principle of self-determination of peoples, albeit limited to Western States, through a redetermination of borders based on the principle of nationality and the recognition of statehood to nation-entities seeking autonomy. The principle was not accepted; but it exerted a certain influence on the League of Nations.

In reality the Covenant of the League of Nations, approved on April 28, 1919 and included in the Versailles Peace Treaty of June 28, 1919[17], did not contain any general provisions dedicated to human rights. The idea that human

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[16] See below, Sect. 2.4.1.

[17] The Treaty of Versailles was signed by 44 States and came into force on 10 January 1920.

rights, in general, should be protected at international level was not yet mature in the international community. However, the Covenant contained two provisions, Articles 22 and 23, which were intended to have an influence on the development of certain human rights.

Article 22 of the Covenant established the system of mandates of the League of Nations, which applied to the colonies and non-autonomous territories of the States that had lost the First World War and which transformed these colonies into Mandates of the League entrusted in administration to the winning Powers. The final purpose of the mandates was to achieve the self-determination of these colonies and territories over time. In the meantime, the Powers entrusted with the mandate undertook with the League to administer the territories promoting the material and moral well-being, and social progress, of the inhabitants. The Mandates Commission of the League gradually acquired more and more powers over time to control the administration of the mandates and the way in which the native populations were treated. However, the dissolution of the League of Nations put an end to this development. In its place, the United Nations established the Trusteeship System, which was entrusted with controlling powers over the remaining mandates and other non-autonomous territories.

1.2.8 Protection of workers

The Versailles Peace Treaty recognized the need to protect workers, since it stated that world peace "can only be established if it is based on social justice". Article 427 of the Treaty set out a number of more specific objectives with regard to the protection of workers [18].

Besides, Article 23 of the League of Nations Covenant dealt, inter alia, with issues relating to "fair and humane working conditions for men, women and children"; and provided for the creation of an international organization to promote this objective. In fact, the International Labour Organization (ILO) was created, which quickly managed to prepare and have adopted some important conventions, such as the 1919 Hours of Work Convention, the 1919 Maternity Protection Convention, the 1919 Night Work of Young Persons Convention, and the 1930 Forced Labour Convention.

1.2.9 The system for the protection of minorities

The League of Nations has also played an important role in the creation of an

[18] See Kälin, Künzli (2009), pp. 12-13.

international system for the protection of minorities. This matter was not regulated by the League of Nations Covenant. However, some Central and Eastern European States, which had been created after the collapse of the Ottoman Empire and the Austro-Hungarian Empire, included ethnic, linguistic and religious minority groups on their territory. These groups had historical reasons to fear that the new States would not respect their cultural autonomy. Therefore, the victorious States of the First World War succeeded in imposing unilateral treaties or declarations on these States, which contained guarantees of protection for those minorities. One may recall the peace treaties with Austria, Bulgaria, Hungary and Turkey; the special agreements with Czechoslovakia, Greece, Poland, Romania and Yugoslavia; and the unilateral declarations of Albania, Finland, Estonia, Lithuania and Latvia.

These States were obliged not to discriminate against members of protected minorities and to guarantee them protection of life and personal security, freedom of religious belief and practice, and certain linguistic rights. In order to strengthen the fulfilment of these obligations, the States in question agreed that their obligations should be placed under the guarantee of the League of Nations. The latter exercised its monitoring function by developing a system for dealing with petitions from minorities who complained of violations of their rights. Petitions were examined by a committee of three members of the League Council to which the States concerned could submit their observations; and, when appropriate, the Permanent Court of International Justice (PCIJ) was asked to give an advisory opinion on controversial legal issues.

This system of international protection of minorities was an interesting experiment at the time. However, it is also true that the treaties on the protection of minorities remained in line with traditional international law, since they only established obligations of States towards other States and the League of Nations, and did not create genuine substantive rights, at international level, either for minorities as collective bodies or for individual members of minorities. The latter only had the right to submit petitions to the League.

1.2.10 The limits of the above historical precedents

We have so far examined some historical precedents, indicating the existence of limits to the general principle of the "domestic jurisdiction" of the State in the treatment of its citizens and, at the same time, an increasing attention of international law to the interests and role of the individual.

However, three important limitations that characterized these developments must be stressed. The first is that they were very specific and sectoral in character. The second limitation is that many of the above-mentioned treaties actually pursued political or economic interests of States, rather than being motivated by humanitarian concerns. The third limitation is that the prevailing doc-

trine of positivist formation continued to interpret these treaties as formally regulating only relations between States, from which there were no real rights for individuals at the international level. This view was also endorsed by the Permanent Court of International Justice in its 1924 judgment in the *Mavrommatis* case, in which the Court formulated the notion of diplomatic protection in traditional terms, stating that:

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its rights to ensure, in the person of its subjects, respect for the rules of international law" [19].

1.3 The turning point after the Second World War: human rights theory imposes itself internationally

In the post-World War II period, under the pressure of world public opinion, the efforts for an international protection of human rights, with a general and not only a sectoral aspect, are multiplying. Individuals are considered as human beings to be protected as such, and therefore also from their own nation-State. Therefore, the issue of human rights, as a whole, becomes a central issue on the international scene.

The most important reason for this radical change is certainly the awareness on the part of the international community that the Nazi system and other totalitarian regimes had shown, before and during the war, an absolute contempt for the most essential human rights and that the protection of human rights through the constitutions of individual States was not sufficient. Instead, a new world order had to be created, based on peace and the international protection of human rights. These ideas were initially supported primarily by Western States, by virtue of their constitutional traditions; they were included in the Atlantic Charter of 1941; and they were taken up at the Dumbarton Oaks Conference in 1944, which proposed the establishment of the United Nations (UN).

Finally, the Western Powers, at the San Francisco Conference in 1945, created the United Nations, entrusting it with the promotion and protection of human rights as an important part of its mandate. The basic idea was to develop human rights principles to guide the work of the UN and its Member States, with the aim of gradually creating a comprehensive system of human rights protection in peacetime, through its progressive codification in a series of international treaties and guarantee mechanisms. This aim has been achieved

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[19] PCIJ, *Mavrommatis Palestine Concessions*, p. 12.

over time, giving rise to the so-called UN human rights protection system [20]. It is a system that tends to operate at a universal level. Over time, it has been joined by a number of human rights protection systems operating at regional level, sometimes more advanced than the UN system [21].

We can therefore speak today, in a more general and overall sense, of an "international system of protection of human rights". This international system has been progressively implemented through conventional norms and guarantee mechanisms (monitoring bodies and procedures), whose broad path of evolution I will discuss later on. For the time being, it is sufficient to note that the international movement for the protection of human rights, which has developed in a generalized manner, and no longer only in a limited and sectoral way, since the entry into force of the UN Charter, has taken the form, in legal terms, of the adoption of many acts of soft law, the conclusion of numerous treaties on a universal and regional scale [22] and also the creation of certain norms of general international law [23]. It may also be recalled that, thanks to the work of the international monitoring bodies set up by some of the above-mentioned treaties, there is now an extensive international, judicial and quasi-judicial practice in the field of human rights.

Ultimately, it can be said that the theory of human rights strongly characterized the phase of development of the international community that took place after the Second World War and that this theory led to the affirmation and progressive consolidation of a new, vast and important area of the international legal order, the so-called international law of human rights.

Moreover, it is worth pointing out that the theory of human rights has also exercised a wider role, since, by taking root deeply in the life of the international community, it has ended up producing a great influence on the general principles that regulate this community and therefore also, as we shall see [24], an impact on the international legal order as a whole. In this sense, we can speak of a process of structural change in international law.

In my view, there are basically two related reasons for this. The first is that the theory of human rights is by its very nature "subversive" or "revolutionary" [25] with respect to the traditional structure of relations between States, because it runs counter to the principle of sovereignty, which is the basic princi-

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[20] See below, Chap. 10.

[21] See below, Chaps. 11-12.

[22] These agreements contain both a detailed catalogue of human rights that States Parties are obliged to grant to all individuals under their jurisdiction and instruments of guarantee and control.

[23] These rules include customs, principles of international law and general principles of law recognized by civilized nations in domestic courts.

[24] See below, Chap. 2.

[25] Cf. Cassese (1984), p. 321; Id. (2003-2004), vol. II, pp. 83-84.

ple of traditional international law and which has long prevented States from interfering in the internal organization of other States and in the way they treat their citizens. The second reason is that this theory focuses on the individual, who is no longer considered as an object of State sovereignty, but considered in him or herself, as a human person, and tends to assume an increasingly important and central role in the life of the international community. In this sense too, the theory of human rights is "subversive", because it runs counter to the traditional conception that only States and other sovereign bodies are the subjects of the international order.

In the next chapter, I will look more deeply at the impact of the human rights theory on the structure of international law.

1.4 General aims of human rights

1.4.1 Dignity of the human person and universal values

At the beginning of this chapter I have dealt, in a nutshell, with the main theories on the notion and foundation of human rights. It is now appropriate to address the problem of the general objectives pursued by these rights in international law. In summary, it can be said that international human rights norms simultaneously pursue two general aims: a) to protect the dignity of the human person and to defend it in relation to the State; b) to become a universal value of the contemporary international legal order.

The first aim is very obvious. Under the pressure of various historical factors, which I have briefly described, the international community was convinced that it was necessary to create an *international* legal regime for the protection of the individual with regard to the State, and especially with regard to its own State. This also means that international human rights law tends to create a legal regime for the protection of *individual interests* which tend to take precedence over State interests, simply because human rights are, in principle, rights which the individual has against the State. In this sense, in my view, the *principle of the primacy of the individual* (or human person) can be considered a guiding principle of international human rights law.

The second purpose is closely linked to the first. In fact, under the impetus of the protection of the essential interests of individuals, the international norms on human rights today also aim to realize a community interest of the States, which overrides their individual and "selfish" interests. This is because it is recognized that the protection of human rights pursues high objectives of humanity, civilization and morality, and constitutes a central and universal value for the contemporary international community. Therefore, the *principle of*

the universality of human rights can be considered a second guiding principle of international human rights law.

However, this second conclusion is not taken for granted, since the very concept of universalism of human rights is controversial and has to deal with phenomena of particularism and multiculturalism that are present in the reality of the international community. The problem deserves some reflection.

1.4.2 The problem of the universalism of human rights in a multicultural world

The problem of the universalism of human rights will only be addressed from a legal point of view [26]. In common language, it is often taken for granted that human rights are universal in the twofold sense that they belong to all people and are globally recognized. But in reality the question is more complex, and can be summed up and simplified into one question: is the universalism of human rights possible in a multicultural world [27]? And in a contemporary reality that sees the rebirth of nationalism and particularism? What exactly does universalism of human rights mean in international law?

In my opinion, the universalist *vocation* of human rights is sure and cannot be called into question, if one does not want to renounce belief in the very existence of international human rights. These are, by definition, rights that *should* belong to all human beings and that all States *should* recognize. The idea that all States should guarantee fundamental rights to all human beings, and to the same extent, is clear from Article 1 of the Universal Declaration of Human Rights, according to which:

> "All human beings are born free and equal in dignity and rights [...]" [28].

Moreover, as stated above, the idea of the central and universal value of the protection of human rights has also been affirmed in the international community of States; and therefore it can be said that *the principle of universality* is a guiding principle that operates in the whole field.

However, this universalistic *vocation* of human rights must come to terms with a multicultural world in which there are different conceptions of what rights and values are truly fundamental; and with legal reality, for which only certain human rights are governed by general international law. In summary, there are two opposing trends or, if you like, *two conflicting principles*: univer-

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[26] And therefore neglecting the philosophical, historical, social, cultural aspects.

[27] See, recently, Lenzerini (2014).

[28] UDHR, Art. 1.

salism and multiculturalism/particularism. But, since, in human rights theory, multiculturalism is also recognized as a value to be defended [29], there is a need to try to reconcile the two principles in some way. This need also responds to the requirement to harmonize the utopian aspects of universalism, which would like to achieve equality in respect and enjoyment of human rights for all States and for all human beings, with the more realistic aspects of particularism, which take into account the differences concretely existing in the international community. One could say, with a synthetic expression, that it is a matter of reconciling, in some way, the values of equality with those of diversity. In other words, it is a matter of conciliating a common heritage of humanity with a plurality and diversity of values and traditions.

In my opinion, this conciliation is possible if it is recognized that, in international law, a balance (or compromise) between universalism and multiculturalism has so far been achieved: the universalist *vocation* of human rights operates as the driving force of the whole area, but it has been fully realized, *from a legal point of view*, only in part; that is, for the limited number of human rights that are regulated by general international law (principles of international law, customary law, general principles of law recognized *in foro domestico*). In other words, this vocation has been realized for those human rights which enjoy the general consent of the international community, a consent which is expressed in different ways in the various above-mentioned sources of general international law [30]. Moreover, as we shall see [31], this general consensus of the international community is also reinforced by the fact that human rights regulated by general international law almost always (but not always) end up coinciding with human rights regulated by *jus cogens*; that is, recognized as essential and peremptory values of the entire international community.

However, the legal universalism of human rights still has many limitations, because most human rights, as we shall see, are governed only by conventional international law; in other words, by norms that only bind States that have voluntarily accepted and ratified them. It is in this aspect that the principle of multiculturalism/particularism is expressed: it is clear that those human rights that are regulated only by treaties, and by treaties ratified only by a part of the existing States, cannot be considered concretely as universal, *from a legal point of view*. Those rights do not belong to all human beings and do not oblige all States. In other words, conventional international law leaves States free, even on the basis of their own culture of human rights, to accept or not to be bound by the respect of certain rights. To give an example (though not edifying), if

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[29] Cf. Lenzerini (2014); Crawford (2013), pp. 325-341. See also the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005.

[30] See below, Chaps. 3-5.

[31] See below, Sects. 13.3.4 and 13.3.5.

those treaty norms which establish the principle of equality between men and women are not accepted by the States of the Muslim world, this prevents them from becoming norms of general international law. A similar discourse could be made for other human rights that are accepted only by some States, such as, for example, the prohibition of the death penalty.

Furthermore, consider another aspect in which the relationship between universalism and multiculturalism/particularism is expressed; that is, the fact that the content of the customary norm on a given human right is not identical to that of the corresponding conventional norms on the same right. Usually, the content of the customary norm is more general, simpler and more essential, as we shall see later. For example, the right to life in customary law means, in essence, the prohibition of arbitrary deprivation of life [32]. On the other hand, in many conventional rules the right to life has more complex and detailed content, with restrictions and exceptions, as well as criteria for better defining the concept of arbitrariness. To give another example, the right of access to justice, in customary law, has a synthetic and essential content [33], while in the conventional rules it is specified in detailed provisions on fair trial and effective domestic remedies, which establish a complex legal regime, with a series of substantive and procedural guarantees. And these treaty provisions vary according to the different treaties and different human rights systems, leaving room for particularism and regionalism.

But it should be noted that conventional human rights law does not only express the trend towards multiculturalism. It can also, in the difficult balance between the two trends, reflect the universalistic vocation. In fact, in the first place, some human rights treaties have been ratified by a very large number of States [34] and therefore they are "quasi-universal". Secondly, as we shall see [35], treaty law can, under certain conditions, have a considerable impact on the progressive development of general international law (especially customary law). In the third place (and this point will be explored in more detail later [36]), the universalist principle exerts an influence on certain "special" features of human rights treaty law, since it tends to favor the widest possible participation by States in such treaties and to widen their scope of application.

In summary, in my view, the relationship between universalism and multiculturalism of human rights can be visually represented by two concentric circles: the largest represents all human rights, while the smallest, within the former, represents human rights governed by general international law, which I

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[32] See below, Sect. 14.1.

[33] See below, Sect.17.1.

[34] See, e.g., the Convention on the Rights of the Child (below, Sect. 10.4.2.7).

[35] See below, Sect. 3.1.

[36] See below, Sects. 4.2 and 4.3.