3

Evolution and Norms of the Universal Human Rights System

Chapter 3 introduces basic instruments of the human rights movement. Those instruments are at the core of the *universal* human rights system—universal in that it is based on treaties that aim at worldwide, universal membership. The chapter then examines the continuing significance for human rights of customary international law, extending the examination of that topic that Chapter 2 began. Its last section explores the effect of the human rights movement on the related conceptions of state sovereignty and domestic jurisdiction.

The core of the universal system consists of the United Nations Charter and related instruments. Three such instruments, composing the so-called International Bill of Rights, stand out in significance: the Universal Declaration of Human Rights of 1948, and two principal covenants that became effective in 1976: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). (Chapter 5 examines this second covenant.) As of September 1995, the ICCPR had 131 states parties, the ICESCR 132 parties.

Chapter 10 explores three *regional* human rights systems—regional in that they are based on treaties whose membership is restricted to states in a particular region: the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights) (30 states parties as of September 1995), the American Convention on Human Rights (25 parties), and the African Charter on Human and Peoples' Rights (49 parties).

A. FOUNDATIONS OF THE SYSTEM

COMMENT ON THE UNITED NATIONS CHARTER AND THE ORIGINS OF THE HUMAN RIGHTS MOVEMENT

The human rights movement is not simply a matter of norms—rules, standards, principles. To the contrary, those norms are imbedded in institutions, some of them state and some international. In particular, it is impossible to grasp this movement adequately without an appreciation of its close relation to and reliance on international organizations. Both the universal and regional human rights systems have vital links to such organizations. For example, the basic instruments of the universal system were drafted within the different organs of the United Nations and adopted by its General Assembly, before (in the case of treaties) being submitted to states for ratification.

Moreover, the United Nations Charter itself first gave formal and authoritative expression to the human rights movement that began at the end of World War II. Since its birth in 1945, the UN has served as a vital institutional spur to the development of the movement. The purpose of the present comments is to call attention to aspects of the UN and its Charter that bear on the following examination of basic rights instruments. You should become familiar now with the provisions (in the Documents Annex) of the Charter and the ICCPR that are referred to below. Other Charter provisions figure in later chapters.

Charter Provisions

Consider first the Charter's radical transformation of the branch of the laws of war concerning *jus ad bellum* (p. 101, *supra*). Recall that for several centuries that body of law had addressed almost exclusively *jus in bello*, the rules regulating the conduct of warfare rather than the justice or legality of the waging of war. The International Military Tribunal at Nuremberg was empowered to adjudicate 'crimes against peace,' part of *jus ad bellum* and the most disputed element of that Tribunal's mandate.

The Charter builds on the precedents to which the Nuremberg Judgment (p. 102, *supra*) refers and states the UN's basic purpose of securing and maintaining peace. It does so by providing in Article 2(4) that UN members 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,' a rule qualified by Article 51's provision that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs' against a member.

The Charter has little to say directly about human rights. Its references to human rights are scattered, terse, even cryptic. The term 'human rights' appears infrequently, although in vital contexts. Note its occurrence in the fol-

lowing provisions: second paragraph of the Preamble, Article 1(3), Article 13(1)(b), Articles 55 and 56, Article 62(2) and Article 68.

Several striking characteristics of these provisions emerge. Many have a promotional or programmatic character, for they refer principally to the purposes or goals of the UN or to the competences of different UN organs: 'encouraging respect for human rights,' 'assisting in the realization of human rights,' 'promote . . . universal respect for, and observance of, human rights.' Not even a provision such as Article 56, which refers to undertakings of the member states rather than of the UN, contains clear language of obligation. It notes only that states 'pledge themselves' to action 'for the achievement' of purposes including the promotion of observance of human rights. Note also the prominence in these provisions of the notion of equal protection.

The UN and the Universal Declaration

Despite proposals to the contrary, the Charter stopped shy of incorporating a bill of rights. Instead, there were proposals for developing one through the work of a special commission that would give separate attention to the issue. That commission was contemplated by Charter Article 68, which provides that one of the UN organs, the Economic and Social Council (ECOSOC), 'shall set up commissions in economic and social fields and for the promotion of human rights . . . .' In 1946, ECOSOC established the Commission on Human Rights (sometimes referred to in this book as the UN Commission), which has evolved over the decades to become the world's single most important human rights organ. Chapter 7 examines its work. At this earlier time, the new Commission was charged primarily with submitting reports and proposals on an international bill of rights.

The UN Commission first met in its present form early in 1947, its members (representatives of the state members of the Commission) including such distinguished founders of the human rights movement as René Cassin of France, Charles Malik of the Lebanon, and Eleanor Roosevelt of the United States. Some representatives urged that the draft bill of rights under preparation should take the form of a declaration—that is, a recommendation by the General Assembly to member states (see Charter Article 13) that would exert a moral and political influence on states rather than constitute a legally binding instrument. Other representatives urged the Commission to prepare a draft convention containing a bill of rights that would, after adoption by the General Assembly, be submitted to states for their ratification.

The first path was followed. In 1948, the UN Commission adopted a draft Declaration, which in turn was adopted by the General Assembly that year as the Universal Declaration of Human Rights (UDHR), with 48 states voting in favor and eight abstaining—Saudi Arabia, South Africa, and the Soviet Union together with four East European states and a Soviet republic whose votes it controlled. (It is something of a jolt to realize today, in a decolonized

and fragmented world of 185 member states, that UN membership in 1948 stood at 56 states.)

The Universal Declaration was meant to precede more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification. After all, within the prevailing concepts of human rights at that time, the UDHR seemed to cover most of the field, including economic and social rights (see Articles 22–26) as well as civil and political rights. But during the years of drafting—years in which the Cold War took harsher and more rigid form, and in which the United States strongly qualified the nature of its commitment to the universal human rights movement—these matters became more contentious. The human rights movement was buffeted by ideological conflict and the formal differences of approach in a polarized world. One consequence was the decision in 1952 to build on the UDHR by dividing its provisions between two treaties, one on civil and political rights, the other on economic, social and cultural rights.

The plan to use the Universal Declaration as a springboard to treaties triumphed, but not as quickly as anticipated. The two principal treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—made their ways through the drafting and amendment processes in the Commission, the Third Committee and the General Assembly, where they were approved only in 1966. Another decade passed before the two Covenants achieved the number of ratifications necessary to enter into force.

During the 28 years between 1948 and 1976, specialized human rights treaties such as the Genocide Convention entered into force. But not until the two principal Covenants became effective did treaties achieve as broad coverage of human rights topics as the Universal Declaration. It was partly for this reason that the UDHR became so broadly known and frequently invoked. During these intervening years, it was the only broad-based human rights instrument available. To this day, it retains its symbolism, rhetorical force and significance in the human rights movement. It is the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement. It remains the single most invoked human rights instrument.

Other UN Organs Related to Human Rights

Together with the UN Commission, other UN organs have played major roles in developing universal human rights. Their full significance becomes apparent through readings in this chapter and through the topics of later chapters. A brief description follows.

Chapter IV of the Charter sets forth the composition and powers of the General Assembly. Those powers are described in Articles 10–14 in terms such as 'initiate studies,' 'recommend,' 'promote,' 'encourage' and 'discuss.'

Particularly relevant are Articles 10 and 13. Article 10 authorizes the General Assembly to 'discuss any questions or any matters within the scope of the present Charter [and] . . . make recommendations to the Members of the United Nations . . . on any such questions or matters.' Article 13 authorizes the General Assembly to 'make recommendations' for the purpose of, *inter alia*, 'assisting in the realization of human rights.'

Contrast the stronger and more closely defined powers of the Security Council under Chapter VII. Those powers range from making recommendations to states parties about ending a dispute, to the power to take military action 'to maintain or restore international peace and security' (Article 42) after the Council 'determines the existence of any threat to the peace, breach of the peace, or act of aggression' (Article 39). Under Article 25, member states 'agree to accept and carry out' the Security Council's decisions on these and other matters. No such formal obligation of states attaches to recommendations or resolutions of the General Assembly.

Two of the six Main Committees of the General Assembly—committees of the whole, for all UN members are entitled to be represented on them—have also participated in the drafting or other processes affecting human rights. The Social, Humanitarian and Cultural Committee (Third Committee) and the Legal Committee (Sixth Committee) have reviewed drafts of proposed declarations or conventions and often added their comments to the document submitted to the plenary General Assembly for its ultimate approval.

Historical Sequence and Typology of Instruments

That part of the universal human rights movement consisting of intergovernmental instruments—that is, excluding for present purposes both national laws and non-governmental institutions forming part of the movement—can be imagined as a four-tiered normative edifice, the tiers described generally in the order of their chronological appearance.

(1) We have seen that the UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject. But what it does say has been accorded great significance. Through interpretation and extrapolation, the sparse text has constituted a point of departure for inventive development of the entire movement.

(2) The Universal Declaration of Human Rights, viewed by some as a further elaboration of the brief references to human rights in the Charter, occupies in some ways the primary position of constitution of the entire movement.

(3) The two principal covenants, which alone among the universal treaties have broad coverage of human rights topics, develop in more detail the basic categories of rights—civil and political; and economic, social and cultural—that figure in the Universal Declaration, and include additional rights as well. These covenants together with the UDHR form what is generally referred to as the International Bill of Rights.

(4) A host of multilateral human rights treaties (usually termed 'conventions,' for there are only the two basic 'covenants'), as well as resolutions or declarations with a more limited or focused subject than the comprehensive International Bill of Rights, have grown out of the United Nations (drafting by UN organs, approval by the General Assembly) and (in the case of treaties) have been ratified by large numbers of states. They develop further the content of rights that are more tersely described in the two covenants or, in some cases, that escape mention in them. This fourth tier consists of a network of treaties, most but not all of which became effective after the two Covenants, including: the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 1948 (116 states parties as of September 1995), the International Convention on the Elimination of all Forms of Racial Discrimination, 1965 (143 parties), the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (144 parties), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (90 parties), and the Convention on the Rights of the Child, 1989 (176 parties). Later chapters examine several of these treaty regimes.

NOTE

Consider the following observations in Louis Henkin, *International Law: Politics, Values and Functions*, 216 Collected Courses of the Hague Academy of International Law (Vol. IV, 1989), at 215.

> The United Nations Charter, a vehicle of radical political-legal change in several respects, did not claim authority for the new human rights commitment it projected other than in the present consent of States. Unlike the international standard of justice for foreign nationals, which derived from the age of natural law and clearly reflected common acceptance of some natural rights, the Charter is a 'positivist' instrument. It does not invoke natural rights or any other philosophical basis for human rights. (The principal Powers could not have agreed on any such basis.) The Charter Preamble links human rights with human dignity but treats that value as self-evident, without need for justification. Nor does the Charter define either term or give other guidance as to the human rights that human dignity requires. In fact, to help justify the radical penetration of the State monolith, the Charter in effect justifies human rights as a State value by linking it to peace and security.
>
> Perhaps because we now wish to, we tend to exaggerate what the Charter did for human rights. The Charter made the promotion of human rights a purpose of the United Nations; perhaps without full appreciation of the extent of the penetration of Statehood that was involved, it thereby recognized and established that relations between a State and its own inhabitants were a matter of international concern. But the Charter did not erode State autonomy and the requirement of State consent to new human rights law. . . .

. . . Surely, the Charter did not provide, clearly and explicitly, that every State party to the Charter assumes legal obligations not to violate the human rights, or some human rights, of persons subject to its jurisdiction.

In 1945, the principal Powers were not prepared to derogate from the established character of the international system by establishing law and legal obligation that would penetrate Statehood in that radical way; clearly, they themselves were not ready to submit to such law. Small Powers and non-governmental organizations indeed proposed the addition to the Charter of an international bill of rights, but it was not done. . . .

. . .

QUESTIONS

Compare the Charter's human rights provisions with those of the UDHR. How many of the concrete rights declared in the UDHR appear in the Charter? Note how frequently one such right, equality of worth and treatment, appears in the Charter. Why would you imagine that it alone was given such prominence?

COMMENT ON RELATIONSHIPS BETWEEN THE UNIVERSAL DECLARATION AND THE ICCPR

You should now read the Universal Declaration and the substantive part (Articles 1–27) of the International Covenant on Civil and Political Rights. The comparisons below between the UDHR and the ICCPR assume a familiarity with these provisions.

(1) Under international law, approval by the General Assembly of a declaration like the UDHR has different consequences from a treaty that has become effective through the required number of ratifications. Of course the declaration will have solemn effects as the formal act of a deliberative body of global importance. Its subject matter, like that of the UDHR, may be of the greatest significance. But when approved or adopted, it is hortatory and aspirational, recommendatory rather than, in a formal sense, binding.

The Covenant, on the other hand, binds the states parties in accordance with its terms, subject to such formal matters as reservations (see p. 34, *supra*). Of course this statement of international law doctrine and its premise, *pacta sunt servanda*, do not end discussion. Disputes over interpretation may likely arise; some states will disagree with others as to what even basic provisions of the Covenant mean and require. What indeed is the 'commitment'? In absence of a consensus, which state party or which international institution can provide an authoritative answer, decision, interpretation? Even if there is a widespread consensus about meaning, we must confront the question of whether states will honor this 'binding' commitment and, if not, whether the UN or some member states will apply pressure against violators sufficient to persuade them to

comply. Does or should the probability of enforcement against violators have any bearing on the legally binding character of an international agreement? Such are the questions underlying much of the discussion in Part C of this book.

We must take account of these and other qualifications to the apparently clear contrast between 'binding' and 'hortatory' instruments. In the case of the UDHR, the years have further blurred that contrast as arguments have developed for viewing all or part of the Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter. See Section B of this chapter.

(2) A resolution of the General Assembly with the formal status of a recommendation can hardly create an international institution or an organ particular to the resolution. A treaty can. The Covenant creates an ongoing institution, a treaty organ: the Human Rights Committee. That organ gives institutional support to the Covenant's norms, for the Covenant imposes on states parties formal obligations (such as the submission of periodic reports) to the Committee. This Committee (referred to in this book as the ICCPR Committee), examined in Chapter 9, *infra*, is charged with the performance of the tasks defined both in the Covenant and in its Optional Protocol effective in 1976 (79 states parties as of January 1995).

(3) Both the UDHR and ICCPR are terse about their derivations or foundations in moral and political thought. Such statements as are made that have the character of justifications appear in the preambles. But clearly these instruments differ radically from, say, a tax treaty that expresses a compromise and temporary convergence of interests among the states parties. They speak to matters deep, lasting, purportedly universal. What then are the intuitions that shape them, their sources in intellectual history?

(4) Many rights declared in the Covenant closely resemble the provisions of the Universal Declaration, although they are stated in considerably greater detail. Compare, for example, the requirements for criminal trials in Articles 10 and 11 of the Universal Declaration with the analogous provisions in Articles 14 and 15 of the Covenant.

(5) Group or collective rights are either asserted or hinted at in the Covenant, most directly in Articles 1 and 27. They are absent from the Universal Declaration, which contains no equivalent to the powerful, historically influential first article in the Covenant, 'All peoples have the right of self-determination.' (Note that the International Covenant on Economic, Social and Cultural Rights contains an identical Article 1.)

(6) In both instruments the idea of 'rights' dominates. Article 29(1) of the Declaration does state that everyone 'has duties to the community in which alone the free and full development of his personality is possible.' The Covenant has no article referring to individuals' *duties*, though its Preamble has such a clause.

(7) Article 17 of the Declaration on the 'right to own property' and protection against arbitrary deprivation thereof does not figure among the rights declared in the Covenant.

(8) Note the structure of the ICCPR, which goes beyond the 'declaration' of rights in the UDHR to require the state to provide a remedial system in the event of violations of rights. In Article 2, states parties agree to 'ensure' to all persons within their territory the rights recognized by the Covenant, and to adopt such legislative or other measures as may be necessary to achieve that goal. Moreover, the parties agree to 'ensure' that any person whose rights are violated 'shall have an effective remedy,' and that 'the competent authorities shall enforce such remedies when granted.'

Hence the Covenant goes well beyond imposing a duty on states not to interfere in stated ways with individuals. States must develop and enforce a legal system adequate to respond to claims of violation. At its very start, the Covenant makes us aware that the duties of state parties are (to use a conventional contrast whose utility will be questioned in later chapters) both *negative/hands-off* (don't torture) and *positive/affirmative* (provide a legal system to which individuals can have recourse in order to seek remedies for violations).

(9) The rights declared in the Covenant are not by their terms restricted to rights against *governmental* interference. That is, interference by non-governmental, private actors (the rapist, say) could as destructively impair the right to 'security of person' (Article 9). The state's duty to provide effective remedies can then be read to attach to conduct (rape) that was initially non-governmental.

(10) Two types of provisions in the Covenant limit states' obligations thereunder. (*a*) Article 4 dealing with a public emergency permits under closely stated conditions a temporary *derogation*—that is, deviation—from many of the rights declared by the Covenant. Thus states may consciously, purposively, explicitly depart from such rights—for example, from rights in Article 9 relating to arrest and detention. Note that under paragraph (2) certain rights are non-derogable. (*b*) A number of articles include *limitation clauses*—that is, provisions indicating that a given right cannot be absolute but must be adapted to meet a state's interest in protecting public safety, order, health or morals, or national security. See, for example, Articles 18 and 19. In Articles 21 and 22, the limitation clause is phrased in terms of permitting those restrictions on a right 'which are necessary in a democratic society.' Compare the broad provision of Article 29(2) of the UDHR, which is not linked to a specific right.

(11) Article 5 of the UDHR bans 'cruel, inhuman or degrading' punishment, but that instrument is not explicit about capital punishment. See Article 6, para. 2 of the ICCPR. The Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, became effective in 1991 (28 states parties as of September 1995). Article 1 provides that 'No one within the jurisdiction of a State Party to the present Protocol shall be executed. . . . Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.'

One can organize or classify the rights declared in the Covenant in various ways, depending on the purpose of the typology. Consider the adequacy of the following scheme that embraces most of the Covenant's rights, although it excludes such distinctive provisions as Article 1 on the self-determination of peoples and Article 27 on the enjoyment by minorities of their own cultures:

(*a*) Protection of the individual's physical integrity, as in provisions on torture, arbitrary arrest, arbitrary deprivation of life;
(*b*) procedural fairness when government deprives an individual of liberty, as in provisions on arrest, trial procedure and conditions of imprisonment;
(*c*) equal protection norms defined in racial, religious, gender and other terms;
(*d*) freedoms of belief, speech and association, such as provisions on the practice of religion, press freedom, and the right to hold assembly and form associations; and
(*e*) the right to political participation.

These five categories of rights can be seen to lie on a spectrum, moving from those such as torture at one extreme over which there exists a broad formal–verbal consensus among states (whatever the degree of violation by many states and the susceptibility of the rights to varying interpretations), to those at the other extreme whose purposes, basic meanings and even validity are formally disputed. For example, few if any states (even those that practice it) formally justify torture. A good number of states, however, may justify some form of religious or gender discrimination that should (such states argue) be viewed as permitted by other norms or goals of the human rights movement, or may justify different forms of political participation.

NOTE

In a report on its Fiftieth Session in 1994, the Human Rights Committee created by the ICCPR noted a proposal submitted to it for a possible draft optional protocol to that instrument that would add Article 9 paras. 3 and 4 and Article 14 to the list of non-derogable provisions under Article 4(2). The Committee's reaction was negative. It 'was satisfied that States parties generally understood that the right to habeas corpus and *amparo* should not be limited in situations of emergency,' and that the remedies provided in the relevant parts of Article 9, 'read in conjunction with article 2 were inherent in the Covenant as a whole.' There was a 'considerable risk' that such an optional protocol 'might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol.' Finally, the Committee observed that 'it would simply not be reasonable to expect that all provisions of article

14 can remain fully in force in any kind of emergency. Thus the inclusion of article 14 as such in the list of non-derogable provisions would not be appropriate.' GAOR 49th Sess., Supp. No. 40 (A/49/40), paras. 22–5.

Note the following observations about the progressive or immediate character of the obligations under the ICCPR, in Dominic McGoldrick, *The Human Rights Committee* (1991), at 12:

> There were marked differences of opinion during the drafting on the matter of the obligations that would be incurred by a State party to the ICCPR. Some representatives argued that the obligations under the ICCPR were absolute and immediate and that, therefore, a State could only become a party to the ICCPR after, or simultaneously with, its taking the necessary measures to secure those rights. If there were disparities between the Covenant and national law they could best be met by reservations. . . .
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> Against this view it was argued that the prior adoption of the necessary measures in domestic law was not required by international law. . . .
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> . . .
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> Proposals to provide that the necessary measures be taken within a specified time limit or within a reasonable time were rejected as was a suggestion that each State fix its own time limit in its instrument of ratification. The only clear intentions of the [Commission on Human Rights] that emerged were those of avoiding excessive delays in the full implementation of the Covenant and of not introducing the general notion of progressiveness that was a feature of the obligations under the then draft [International Covenant on Economic, Social and Cultural Rights].
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> The objections to the draft article 2(2) were again voiced in the Third Committee but the provision remained unchanged. The Committee's report stated that,
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> > It represented the minimum compromise formula, the need for which, particularly in new States building up their body of legislation, was manifest. The notion of implementation at the earliest possible moment was implicit in article 2 as a whole. Moreover, the reporting requirement in article 49 (later article 40) would indeed serve as an effective curb on undue delay.

QUESTIONS

1. Relying only on the preambles and texts of the UDHR and the ICCPR, how would you identify the reasons for those instruments, their justifications in moral and political thought, the moral and political traditions from which they derive? Why do you suppose there was such a sparse statement of reasons or justifications in these instruments?

2. Do you see in either of these instruments any departure from 'universal' premises, rights, and related obligations of states? That is, are there concessions in any provisions to different cultures or regions that would allow those cultures or regions to privilege their own traditions rather than follow these instruments' rules—for example, by inflicting certain severe modes of criminal punishment, or governing by theocracy or inherited rule?

3. Note the breadth and the susceptibility to varying understandings of the 'limitations' on rights in the ICCPR Articles referred to above. Compare the different approach of the United States Constitution, whose Bill of Rights (the first ten amendments) contains no formal equivalent of such limitation clauses. It has been primarily the task of the United States Supreme Court to develop comparable notions through its decisional law resolving conflicts—for example, between free speech and national security or pornography. In general, does one or the other approach seem to you preferable, to be perhaps more protective of individual rights?

ADDITIONAL READING

For analysis of the drafting process for vital provisions of the ICCPR, see the essays in Louis Henkin (ed.), *The International Bill of Rights* (1981).

NOTE

It is frequently stated that all rights declared in the ICCPR are 'equal and interdependent.' Within that formulation, the right of an indigent person to assigned legal assistance in a criminal case in Article 14(3) (c) is of the same rank, interdependent with, the right not to be tortured in Article 7. The following readings explore this issue of equality or hierarchy.

THEO VAN BOVEN, DISTINGUISHING CRITERIA OF HUMAN RIGHTS

In Karel Vasak and P. Alston (eds.), The International Dimensions of Human Rights, Vol. 1 (1982), at 43.

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There is another argument against making a distinction between fundamental human rights and other human rights. Such a distinction might imply that there is a hierarchy between various human rights according to their fundamental

character. However, in modern human rights thinking the indivisibility of human rights and fundamental freedoms is prevalent. This idea of indivisibility presupposes that human rights form, so to speak, a single package and that they cannot rank one above the other on a hierarchical scale.

This may all be true, but there still remain weighty arguments which militate in favour of distinguishing fundamental human rights from other human rights. Such fundamental rights can also be called elementary rights or suprapositive rights, i.e. rights whose validity is not dependent on their acceptance by the subjects of law but which are at the foundation of the international community. . . .

. . .

. . . The intensity of the prevailing sentiments against racism and racial discrimination, the awareness of urgency and the political climate have made the principle of racial non-discrimination one of the foundations of the international community as represented in the UN. Members of this community are bound by this principle on the basis of the UN Charter, even if they do not adhere to the various international instruments specifically aimed at the elimination of racial discrimination and apartheid. . . .

There is also a great deal of law in humanitarian conventions and in international human rights instruments supporting the existence of very fundamental human rights. This is that part of human rights law which does not permit any derogation even in time of armed conflict or in other public emergency situations threatening the life of the nation. The common article 3 of the four Geneva Conventions of 1949, setting out a number of minimum humanitarian standards which are to be respected in cases of conflict which are not of an international character, enumerates certain acts which 'are and shall remain prohibited at any time and in any place whatsoever.' The following acts are mentioned: '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment, (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized nations.' The universal validity of these fundamental prescriptions is underlined by the words 'at any time and in any place whatsoever' in this common article 3 of the four 1949 Geneva Conventions.

The International Covenant on Civil and Political Rights enumerates in article 4, para. 2, the rights from which no derogation is allowed in time of public emergency, viz. the right to life (article 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), the right not to be held in slavery or servitude (article 8, paras. 1 and 2), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11), the prohibition of retroactive application of criminal law (article 15), the right to recognition everywhere as a person before

the law (article 16) and the right to freedom of thought, conscience and religion (article 18). Regional human rights conventions contain a similar clause enumerating provisions from which no derogation may be made.

The fact that in a number of comprehensive human rights instruments at the worldwide and the regional level, certain rights are specifically safeguarded and are intended to retain their full strength and validity notably in serious emergency situations, is a strong argument in favour of the contention that there is at least a minimum catalogue of fundamental or elementary human rights.

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NOTE

Compare with van Boven's observations those in Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int. L. 1 (1986), at 21:

> . . . Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights. Historically, the notions of 'basic rights of the human person' and 'fundamental rights' have helped establish the *erga omnes* principle, which is so crucial to ensuring respect for human rights. Eventually, they may contribute to the crystallization of some rights, through custom or treaties, into hierarchically superior norms, as in the more developed national legal systems.
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> Yet the balance of pros and cons does not necessarily weigh clearly on the side of the pros. Resort to hierarchical terms has not been matched by careful consideration of their legal significance. Few criteria for distinguishing between ordinary rights and higher rights have been agreed upon. There is no accepted system by which higher rights can be identified and their content determined. Nor are the consequences of the distinction between higher and ordinary rights clear. Rights not accorded quality labels, i.e., the majority of human rights, are relegated to inferior, second-class, status. Moreover, rather than grapple with the harder questions of rationalizing human rights lawmaking and distinguishing between rights and claims, some commentators are resorting increasingly to superior rights in the hope that no state will dare—politically, morally and perhaps even legally—to ignore them. In these ways, hierarchical terms contribute to the unnecessary mystification of human rights, rather than to their greater clarity.
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> Caution should therefore be exercised in resorting to a hierarchical terminology. Too liberal an invocation of superior rights such as 'fundamental rights' and 'basic rights,' as well as *jus cogens*, may adversely affect the credibility of human rights as a legal discipline.

state whose nationality the alien possesses: on the other hand, obligations deriving from the outlawing of acts of aggression, and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.[1] Rights and obligations *erga omnes* may even be created by the actions of a limited number of states. There is, however, no agreed enumeration of rights and obligations *erga omnes*, and the law in this area is still developing, as it is in the connected matter of a state's ability, by analogy with the *actio popularis* (or *actio communis*) known to some national legal systems, to institute proceedings to vindicate an interest as a member of the international community as distinct from an interest vested more particularly in itself. . . .

. . .

States may, by and within the limits of agreement between themselves, vary or even dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is permissible. The latter—rules of *ius cogens*, or peremptory norms of general international law—have been defined in Article 53 of the Vienna Convention on the Law of Treaties 1969 (and for the purpose of that Convention) as norms 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'; and Article 64 contemplates the emergence of new rules of *ius cogens* in the future.

Such a category of rules of *ius cogens* is a comparatively recent development and there is no general agreement as to which rules have this character. The International Law Commission regarded the law of the Charter concerning the prohibition of the use of force as a conspicuous example of such a rule. Although the Commission refrained from giving in its draft Articles on the Law of Treaties any examples of rules of *ius cogens*, it did record that in this context mention had additionally been made of the prohibition of criminal acts under international law, and of acts such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate; the observance of human rights, the equality of states and the principle of

[1] [Eds.] The authors here refer in a footnote to the Case Concerning The Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain), [1970] I.C.J. Rep. 4. The relevant portion of that opinion of the International Court of Justice reads, at paras 33–4: '. . . [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.'

self-determination. The full content of the category of *ius cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals. . . .

The operation and effect of rules of *ius cogens* in areas other than that of treaties are similarly unclear. Presumably no act done contrary to such a rule can be legitimated by means of consent. . . .

OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), at 85.

Ch. VI. Resolutions and Political Texts

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Few issues of international law theory have aroused as much controversy as that engendered by resolutions and declarations of the General Assembly which appear to express principles and rules of law. Their adoption by large majorities through voting or consensus procedures has been seen by many as attempts to impose obligatory norms on dissenting minorities and to change radically the way in which international law is made.

It is, of course, true that such resolutions are not a formal source of law within the explicit categories of Article 38 (1) of the Statute of the International Court of Justice. . . .

. . . As the central global forum for the international community, with the competence to discuss all questions of international concern, with institutional continuity and a constitutional framework of agreed purposes and principles, the Assembly has become a major instrument of States for articulating their national interests, and seeking general support for them. The conception of Assembly resolutions as expressions of common interests and the 'general will' of the international community has been a natural consequence. It also has naturally followed that in many cases the effort is made to transform the 'general will' thus expressed into law. One obvious way of accomplishing that transformation is to use a resolution as a basis for the preparation of a treaty by the Assembly itself or by a diplomatic conference convened by it. The treaties are then open for adherence by member States and other States. . . .

Legal uncertainty has, however, been created when the Assembly adopted resolutions which purported to assert legal norms without recourse to the treaty process. Such resolutions 'declared the law' either in general terms or as applied to a particular case. Neither in form nor in intent were they recommendatory. Surprising as it may seem, the authority of the General Assembly to adopt such declaratory resolutions was accepted from the very beginning. At its first session, in 1946, the Assembly considered the Nuremberg Principles and they 'affirmed' them in a unanimous resolution. In

another resolution adopted at the same session, genocide was declared a crime under international law. This, too, was unanimous. No one questioned the Assembly's competence to adopt such resolutions despite the absence of explicit Charter authority to do so. The Assembly also interpreted and applied the Charter in particular cases, characterizing certain conduct as illegal. The resolutions condemning South Africa for apartheid and for its administration of South West Africa fall into this category. The competence of the Assembly to do this—that is, to designate conduct as illegal under the Charter and to assert obligations and rights applicable in particular cases—was not questioned.

What was, however, in question was the legal force of the declarations of law, whether general or particular. Could they be considered 'binding' when the Assembly lacked constitutional authority to adopt mandatory decisions concerning the subjects dealt with? If not binding, were they authoritative in some other sense? Was unanimity or near-unanimity a requirement for their authority? If nearly all States agreed on what is the law, was there a sufficient reason to deny effect to that determination? These and related questions gave rise to official perplexity and a considerable body of legal analysis. . . .

Lawyers are accustomed to pouring new wine into old bottles and keeping the old labels. Thus, the law-declaring resolutions that construed and 'concretized' the principles of the Charter—whether as general rules or in regard to particular cases—may be regarded as authentic interpretation by the parties of their existing treaty obligations. To the extent that they were interpretation, and agreed by all the member States, they fitted comfortably into an established source of law. . . .

But as we know the line between interpretation and new law is often blurred. Whenever a general rule is construed to apply to a new set of facts, an element of novelty is introduced; in effect, new content is added to the existing rule. This is even clearer when an authoritative body re-defines and makes more precise an existing rule or principle. In any such case, the question of degree can be raised: how far does the 'new' rule go beyond the agreed meaning of the old rule? Is the Charter being amended or simply interpreted? The answer is provided, not by logical analysis, but by the responses of those deemed competent to decide—namely, the States parties to the treaty. If they all agree in a formal resolution that the Charter means what the resolution says it does, that will be regarded as 'authentic' (that is, authoritative) interpretation. . . .

We come now to the declaratory resolution that purports to state the law independently of any Charter rule. . . . When all the States in the United Nations declare that a . . . norm is legally binding, it is difficult to dismiss that determination as ultra vires—or reduce it to a recommendation—because it was made in the General Assembly. The fact is that the declaration purports to express the *opinio juris communis*, not a recommendation. . . .

The . . . question is whether the assertion in good faith by all States that a norm is legally binding is sufficient to validate the norm as law even though

State practice is negligible or inconclusive. International lawyers differ on the answer. . . .

. . .

. . . Much of the debate has focused on the choice between two polar categories: 'binding' and 'hortatory' (i.e., without legal force *et al*). That categorization—however clear it may appear—seems much less appropriate than treating the law-declaring resolutions as evidence for the asserted proposition of law.

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Ch. XV. International Human Rights

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Human Rights as Customary International Law

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. . . [A] juristic debate has taken place for some years on whether human rights in whole or in part has become part of general customary international law. . . . If we have so extensive a network of treaty obligations, as suggested earlier, how important is it to determine the extent of customary law? Two answers may be given. First despite the many treaties and the considerable numbers of States parties to most of them, a significant number of States have not adhered to many of the treaties. They are therefore neither bound by the treaty obligations nor entitled to invoke those obligations against the parties. It is therefore of some consequence to determine their obligations and rights under customary law. A second reason is that the recognition of human rights in customary law allows not only the treaty non-parties, but also the parties to have recourse to international law remedies not provided for in the treaties. . . .

Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence. They include the following:

— the incorporation of human rights provisions in many national constitutions and laws;
— frequent references in United Nations resolutions and declarations to the 'duty' of all States to observe faithfully the Universal Declaration of Human Rights;

— resolutions of the United Nations and other international bodies condemning specific human rights violations as violative of international law;
— statements by national officials criticizing other States for serious human rights violations;
— a dictum of the International Court of Justice that obligations erga omnes in international law include those derived 'from the principles and rules concerning the basic rights of the human person' (*Barcelona Traction* Judgment, 1970);
— some decisions in various national courts that refer to the Universal Declaration as a source of standards for judicial decision.

None of the foregoing items of 'evidence' of custom conform to the traditional criteria. General statements by international bodies (such as the United Nations General Assembly or the Tehran Conference on Human Rights) that the 'Universal Declaration constitutes an obligation for the members of the international community' are not without significance, but their weight as evidence of custom cannot be assessed without considering actual practice. National constitutions and legislation similarly require a measure of confirmation in actual behaviour. One can readily think of numerous constitutions that have incorporated many of the provisions of the Universal Declaration or other versions of human rights norms, but these provisions are far from realization in practice. Constitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice or 'general principles' of law.

Should we then reject all of the affirmations of human rights principles as obligatory on the ground that infringements are widespread, often gross and generally tolerated by the international community? Or should we minimize the negative practice and treat the verbal affirmations as persuasive evidence that the Universal Declaration has now become customary law? Some international lawyers answering this second question in the affirmative have asserted that the Declaration 'is now part of the customary law of nations and therefore binding on all States'.

Although only a few legal scholars have taken this position, they are often cited by human rights advocates in national tribunals and in publications. The argument for treating the Declaration as law is also bolstered by noting that its principles have been included in many national constitutions and laws and consequently may be reasonably regarded as 'general principles of law accepted by civilized nations', a source of general international law under Article 38 of the Statue of the International Court of Justice. . . . A third theory for attributing legal force to the Declaration is premised on the provision of the United Nations Charter (Article 56) that pledges members to take action to achieve certain ends of the Charter, including human rights. It is suggested that the Declaration by authoritatively spelling out the recognized human rights gives specific content to the obligation.

These three lines of legal argument are generally linked by their proponents

in human rights advocacy. It is not inconceivable that in time they will carry the day for the Declaration to be treated as obligatory. However, for the present, their reach exceeds their grasp. Neither governments nor courts have accepted the Universal Declaration as an instrument with obligatory force. Many have, of course, lauded its principles as standards to be achieved and in specific instances have rhetorically relied on the Declaration as a touchstone of legality. . . . But these particular references fall short of recognizing the Declaration as obligatory in law. It remains difficult to do so in the face of the clear intention of the governments to consider it as non-binding. . . .

This conclusion, however, does not dispose of claims that some important human rights included in the Declaration have become customary law (and/or general principles of law) and therefore binding on all States. The evidence for this must, of course, focus on the specific rights in question. As noted earlier, such evidence is rarely to be found in the traditional patterns of State practice involving claims and counter-claims between two States. Instead, one must look for 'practice' and *opinio juris* mainly in the international forums where human rights issues are actually discussed, debated and sometimes resolved by general consensus. These are principally organs of the United Nations and of regional bodies. In those settings, governments take positions on a general and specific level: they censure, condemn, or condone particular conduct. An evaluation of those actions and their effects on State conduct provides a basis for judgments on whether a particular right or principle has become customary international law. Such inquiries may have to be broadened to include pronouncements by national leaders, legislative enactments, judicial opinions, and scholarly studies. No single event will provide the answer. One essential test is whether there is a general conviction that particular conduct is internationally unlawful. Occasional violations do not nullify a rule that is widely observed. The depth and intensity of condemnation are significant indicators of State practice in this context. The extent of agreement across geographical and political divisions is also pertinent. Applying these indicators on a global scale is obviously not an easy task, nor is it a one-time effort. Attitudes, practices and expectations are in flux and judgments may often change. Nonetheless there is little doubt that some human rights are recognized as mandatory for all countries, irrespective of treaty. The most obvious are the prohibitions against slavery, genocide, torture and other cruel, inhuman and degrading treatment. No government would contend that these prohibitions apply only to parties to the treaties that outlaw them. The list does not stop there. The ALI Restatement (Third) of 1987[2] adds the following actions as unlawful 'for a state to practice, encourage or condone':

— The murder or causing the disappearance of individuals;
— Prolonged arbitrary detention;
— Systematic racial discrimination.

[2] [Eds.] Restatement (Third), Foreign Relations Law of the United States (1987). Section 702, to which the text refers, appears at p. 145, *infra*.

The Restatement's list also includes a more general category as violative of customary law, to wit: 'consistent patterns of gross violations of internationally recognized human rights'. . . .

The Restatement's enumeration of customary law human rights is well-founded as far as it goes, but developments affecting human rights in the past decade indicate that the list of customary law rights may have significantly increased. Studies carried out for the United Nations Commission on Human Rights which have examined national laws on a global scale as well as governmental and scholarly statements reveal that several rights have been widely invoked as principles of general international law. The examples include:

— The right to self-determination of peoples;
— The individual right to leave and return to one's country;
— The principle of non-refoulement for refugees threatened by persecution.

There is a well-intentioned tendency among human rights lawyers to add to the list of customary law rights, especially 'due process' rights. Theodor Meron, for example, has suggested that a number of basic rights of the accused stipulated in the Covenant on Political and Civil Rights (Article 14) are also customary law. His indicators are the inclusion of these rights in national law generally and references to them in treaties and other international instruments. However, evidence that these rights are secured in most countries is lacking. . . . Even where they are on the books, they are often honored in the breach, not the observance. . . .

However, recent developments in various parts of the world indicate that certain human rights have penetrated deeply into the consciousness of peoples in many countries. Violations are more and more resented in places where previously they had been ignored or seen as unavoidable. Most striking in this respect are the changes in Eastern Europe and in the Soviet Union in recent years (especially 1987–1990). Individual human rights were emphasized in the popular demands and given effect in the new political arrangements. The rights were asserted as fundamental entitlements recognized by the international community. Protection against arbitrary arrest, against political trials and against lack of procedural rights were emphasized. Freedom of speech and of peaceful assembly were demanded as basic rights. Political participation through genuine elections, ensured by secret ballot, was another salient demand. It is true that these rights are in the International Covenant on Civil and Political Rights to which the USSR and other States in Eastern Europe have long been parties though not in substantial compliance. But the treaty compliance issue was subsidiary; the main point was that the rights were now demanded as basic and essential whether or not in treaties. The dramatic reversal of the long prevalent political statist ideology had worldwide repercussions, foremost of which was an intensified awareness of the importance of basic rights.

. . .

Present tendencies also suggest that other human rights may be on their way to acceptance as general international law, especially in virtue of their widespread inclusion in national law plus general recognition of their international significance. Several economic and social rights may well meet that dual test—in particular, the right to basic sustenance, and to public assistance in matters of health, welfare and basic education. ILO practice indicates that trade union rights, including freedom of association, are widely accepted as 'international common law'. Also significant is the widespread recognition of the rights of women to full equality and to protection against discrimination. These rights have been affirmed and emphasized in numerous declarations as well as in some international conventions, though in many respects the gap between the proclaimed rights and actual conditions remains great. A positive trend is that many countries have enacted legislation that prohibits gender discrimination by State action. The prevalence of these laws in conjunction with the United Nations Charter's prohibition of discrimination based on sex provides a strong argument for holding that such discrimination is an international delict.

. . .

Whatever the doctrinal theory, the political dynamics that mark the demands for human rights make it almost certain that the international law of human rights will continue to have a deeper and broader basis than the treaties alone. The powers that govern States are not immune from pressures based on a social consciousness of the limits of State authority. . . .

. . .

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994), at 19.

One of the special characteristics of international law is that violations of law can lead to the formation of new law. Of course, this characteristic is more troublesome for those who regard law as rules, and less troublesome for those who regard law as process. But whether one believes that international law consists of rules that have been derived from consent or natural law; or whether one believes international law is a process of decision-making, with appropriate reliance on past trends of decision-making in the light of current context and desired outcomes, there still remains the question of how the 'rules' or the 'trend of decision' change through time. And, in so far as these rules or trends of decisions are based on custom, then there is the related question of what legal significance is to be given to practice that is inconsistent with the perceived rules or trends of decision.

. . .

If a customary rule loses its normative quality when it is widely ignored, over a significant period of time, does this not lead to a relativist view of the substantive content of international law, with disturbing implications? . . .

A second example: all states agree that international law prohibits genocide (and that this total prohibition is today rooted in customary international law and not just in treaty obligations). So what if some states from time to time engage in genocide? Here we may safely answer that genocide, while it sometimes occurs and while its very nature makes *all* norm compliance shocking, is certainly not the majority practice. The customary law that prohibits genocide remains intact, notwithstanding appalling examples of non-compliance. Let us look at a third, more difficult example. No one doubts that there exists a norm prohibiting torture. No state denies the existence of such a norm; and, indeed, it is widely recognized as a customary rule of international law by national courts. But it is equally clear from, for example, the reports of Amnesty International, that *the great majority* of states systematically engage in torture. If one takes the view that non-compliance is relevant to the retention of normative quality, are we to conclude that there is not really any prohibition of torture under customary international law? . . .

. . .

New norms require both practice and *opinio juris* before they can be said to represent customary international law. And so it is with the gradual death of existing norms and their replacement by others. The reason that the prohibition on torture continues to be a requirement of customary international law, even though widely abused, is not because it has a higher normative status that allows us to ignore the abuse, but because *opinio juris* as to its normative status continues to exist. No state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition. A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*.

VIEWS OF SCHOLARS

Compare the views of the following scholars with Schachter's remarks about (a) contemporary conceptions of customary law in relation to acts of international organizations and (b) the related issue of the status of the UDHR.

Louis Henkin[3]

Henkin refers to a number of fields of international law that initially developed by custom, with its requirement of 'consistent general practice plus

[3] International Law: Politics, Values and Functions. 216 Collected Courses of Hague Academy of International Law. Receuil des Cours 13 (Vol. IV, 1989), at 54.

opinio juris.' His examples include aspects of diplomatic immunities, many principles of the law governing treaties, state responsibility to foreign nationals, some laws of war, much of the law of the sea, and 'substantial human rights law.' He states:

> Unlike law made by treaty, this authentic customary law ordinarily has not been made intentionally, purposefully, by a 'conspiracy' of States. Nor is it the product of deliberate exercises of 'will' by States acting separately, aiming to develop new law. Customary law was not *made*, it *resulted*, from an accretion of practices, though often the practice of individual States was intended to conform to what others had done, and often it was thought to be required by law.

In explaining why the general principle of consent as a basis for obligation in international law doesn't apply to states created after a customary norm has been established (so that such states are bound by that norm), Henkin says:

> That result can be explained (and even justified) in that, unlike treaties, customary law is not *created* but *results*; that it is therefore not a product of the will of States but a 'systemic creation', reflecting the 'consent' of the international system, not the consent of individual States.

Henkin later comments on contemporary customary law and efforts by states to 'create new customary law by purposeful activity,' such as General Assembly resolutions.

> The purposive creation of custom is a radical innovation, and indeed reflects a radical conception. Whereas law was *made* by treaty but *grew* by custom, now there is some tendency to treat custom as a means, alternative to treaty-making, for deliberate legislation. Using the concept of custom for that purpose brings with it the traditional definition, but now practice sometimes means activity designed to create the norm rather than to reflect it.

Bruno Simma and Philip Alston[4]

The authors describe reasons for the effort to locate human rights norms in custom, including several of the reasons noted in the preceding excerpts from Schachter. They point to an additional factor. States may be parties to a human rights treaty like the ICCPR that is relevant to litigation in domestic courts—relevant, say, to a potential claim by a defendant in a criminal proceeding that the process to which he was subjected by a state party violates Article 14 of the ICCPR. However, the courts in that state may not be able to rule on the applicability of the ICCPR to the defendant's case, because that

[4] The Sources of Human Rights Law: Custom, Jus Cogens, and General Principle, 12 Australian Y. B. Int. L. 82 (1992).

treaty is neither automatically incorporated into the state's legal system nor has it been enacted as domestic law by the state's legislature. See pp. 726–50, *infra*. In such circumstances where a *treaty* does not constitute *internal* law that state courts can apply, international custom may nonetheless constitute a source of human rights law which such courts can invoke.

The traditional understanding of custom, the authors argue, emphasized state practice; 'deeds were what counted, not just words.' The rules thereby emerging may have been limited in scope, but they have 'several undoubted advantages. They are hard and solid; they have been carefully hammered out on the anvil of actual, tangible interaction among States; and they allow reasonably reliable predictions as to future State behavior.' Through institutions such as the General Assembly, the notion of 'practice' itself has changed into 'paper practice: the words, texts, votes and excuses themselves.'

Thomas Buergenthal[5]

Buergenthal states that 'few international lawyers would deny that the [Universal] Declaration is a normative instrument that creates legal obligations for the Member States of the UN'. Such dispute as exists about its 'legal character' concerns whether all or only some of the rights that it declares are 'binding as such and under what circumstances.' He observes:

> The process leading to the transformation of the Universal Declaration from a non-binding recommendation to an instrument having a normative character was set in motion, in part at least, because the effort to draft and adopt the Covenants remained stalled in the UN for almost two decades. During that time the need for authoritative standards defining the human rights obligations of UN Member States became ever more urgent. As time went on, the Declaration came to be utilized with ever greater frequency for that purpose.

Buergenthal cautions that a 'careful analysis of the relevant state practice' suggests that not all rights proclaimed in the Declaration have to date acquired the status of customary international law. He then quotes the views of a 'distinguished author,' Louis Sohn, who wrote:

> The Declaration . . . is now considered to be an authoritative interpretation of the U.N. Charter, spelling out in considerable detail the meaning of the phrase 'human rights and fundamental freedoms,' which Members States agreed in the Charter to promote and observe. The Universal Declaration has joined the Charter . . . as part of the constitutional structure of the world community. The Declaration, as an authoritative listing of human rights, has become a basic component of international

[5] International Human Rights in a Nutshell (1988). The quotation by Buergenthal of Louis Sohn that appears in the following text is taken from Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1, 16 (1982).

customary law, binding all states, not only members of the United Nations.

Robert Jennings and Arthur Watts[6]

The authors discuss the 'considerable' impact on the traditional sources of international law of changes since World War II in the international community, particularly the growth of international organizations. The vital fact is that states

> have in a short space of time developed new procedures through which they can act collectively. While at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from the traditional sources of international law, there may come a time when the collective actions of the international community within the framework provided by international organisations will acquire the character of a separate source of law.

Through such organizations, the international community can express a general consensus on a particular matter, contributing to the development of custom 'in a way never before possible.' Collective action often takes the form of adoption of resolutions, which may serve functions as diverse as 'declaring' what is believed to be existing law, authoritatively interpreting a legal instrument such as the organization's own constitutive document, and articulating new norms. The authors emphasize

> the dual capacity in which states now act within international organisations, as individual states and as part of the collectivity of the membership of the organisation. It is the change in international organisations from being merely a gathering of individual states to a collective institution of the international community which has contributed most of the changing nature of international organisations in relation to the sources of international law.

Nonetheless, the authors caution, in assessing the legal as opposed to political character or significance of such resolutions, it is important to keep in mind that even a unanimously adopted resolution of the General Assembly 'does not necessarily reflect an *opinio juris* or give rise forthwith to a new customary rule,' and it is important to be attentive to 'the facts relating to the practice to which the resolution relates. . . .'

[6] Oppenheim's International Law (Jennings and Watts, eds.), Vol. 1 (9th ed. 1992), at 45.

QUESTION

Consider the following analysis: 'Far from becoming outmoded and even irrelevant because of the many widely ratified human rights treaties, custom has achieved heightened significance. Once viewed by positivists as "tacit consent" and thereby assimilated to the consensual regime of treaties, custom now has become the treaty itself in shallow disguise, resting apparently not on "tacit" but on "explicit" consent. A resolution voted unanimously or by a large majority in the General Assembly is "law" as much as a treaty. It is indeed superior to the treaty in that it binds all states including those still to be born. Given the new postwar structure of international organizations where states are almost continuously in immediate touch with each other, and thus where multilateral instruments can be decided on promptly rather than go through the awkward procedures of an earlier age, this development may have been inevitable. Probably these new modes of communication with their attendant convenience and speed best explain the heightened significance of custom in the field of human rights.' Do you agree?

RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES

American Law Institute, 1987.

§702. Customary International Law of Human Rights

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.

Comment:

a. Scope of customary law of human rights. This section includes as customary law only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed. The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.

b. State policy as violation of customary law. In general, a state is responsible for acts of officials or official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree or instruction. The violations of human rights cited in this section, however, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy. . . .

A government may be presumed to have encouraged or condoned acts prohibited by this section if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators. . . .

Even when a state is not responsible under this section because a violation is not state policy, the state may be responsible under some international agreement that requires the state to prevent the violation. . . .

. . .

l. Gender discrimination. The United Nations Charter (Article 1(3)) and the Universal Declaration of Human Rights (Article 2) prohibit discrimination in respect of human rights on various grounds, including sex. Discrimination on the basis of sex in respect of recognized rights is prohibited by a number of international agreements, including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and more generally by the Convention on the Elimination of All Forms of Discrimination Against Women, which, as of 1987, had been ratified by 91 states and signed by a number of others. The United States had signed the Convention but had not yet ratified it. The domestic laws of a number of states, including those of the United States, mandate equality for, or prohibit discrimination against, women generally or in various respects. Gender-based discrimination is still practiced in many states in varying degrees, but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law. . . .

. . .

m. Consistent pattern of gross violations of human rights. The acts enumerated in clauses (a) to (f) are violations of customary law even if the practice is not consistent, or not part of a 'pattern,' and those acts are inherently 'gross' violations of human rights. Clause (g) includes other infringements of recognized human rights that are not violations of customary law when committed singly or sporadically (although they may be forbidden to states parties to the International Covenants or other particular agreements); they become violations of customary law if the state is guilty of a 'consistent pattern of gross violations' as state policy. A violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violation. All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights, but

some rights are fundamental and intrinsic to human dignity. Consistent patterns of violation of such rights as state policy may be deemed 'gross' *ipso facto*. These include, for example, systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave a country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination. A state party to the Covenant on Civil and Political Rights is responsible even for a single, isolated violation of any of these rights; any state is liable under customary law for a consistent pattern of violations of any such right as state policy.

n. Customary law of human rights and jus cogens. Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.

o. Responsibility to all states (erga omnes). Violations of the rules stated in this section are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated.

NOTE

In the United States, the *Restatements of Law* represent an important reference for many legal issues, although they have no official, legal status. These *Restatements* are adopted and promulgated by the American Law Institute, a private organization not affiliated with the United States Government, whose membership consists of judges, legal academicians, and lawyers involved in private practice and in government. The drafts presented to the Institute for its approval and adoption are generally prepared by leading academicians, who may consult advisory committees with a broader membership.

Such was the case with the *Restatement (Third) of the Foreign Relations Law of the United States*, other portions of which appear in later chapters. The introduction to that *Restatement* states (at p. ix) that it is 'in no sense an official document of the United States.' It notes that in some particulars its rules 'are at variance' with positions taken by the United States Government. Nonetheless, despite this independence and non-official status, it is inevitable that a *Restatement* dealing with international law will in general reflect the broad positions taken by the United States rather than, say, inconsistent or polar positions taken by other, perhaps hostile states.

QUESTIONS

1. Suppose that persons unconnected to the government—secret groups or well-known gangs of private citizens that hate a given minority—attack members of that minority and their property. The state apparatus—police, prosecutors—gives much less attention to such attacks and the related harm than it does to crimes against other members of society. What provision(s) of the ICCPR would be relevant to a claim (a) that the members of the groups or gangs have violated that instrument, or (b) that the state itself has violated it? Does §702 of the *Restatement* affect your answer?

2. Does either the ICCPR or §702 support (a) a civil action for monetary compensation, based on international law and brought by the victim against members of the gang referred to in the preceding question, or (b) a criminal action based on international law brought by the state against the group members who assaulted the victim?

C. HUMAN RIGHTS CHALLENGE TO CONCEPTIONS OF SOVEREIGNTY AND DOMESTIC JURISDICTION

We are now familiar with some implications of the human rights movement's radical premise that a state's treatment of its own citizens, its internal governance on many significant matters, is subject to the norms of international human rights. How can that premise coexist with the classical conception of the state? Are there fixed conceptions of the state, of what it 'is' and 'must be,' and of what related conceptions like autonomy, sovereignty or domestic jurisdiction 'are' or 'must be,' that continue to stand in bold opposition to the challenge of the human rights movement? Or has the nature of the state, and therefore of these allied conceptions. undergone similar radical change? Such are the themes of this Section C.

LEO GROSS, THE PEACE OF WESTPHALIA, 1648–1948

42 Am. J. Int. L. 20 (1948).

[The Peace of Westphalia of 1648 provided a general settlement bringing to an end the Thirty Years' War among several European powers, the Holy Roman Empire, and parts thereof. The Peace, with its adverse consequences for the Empire, is broadly understood as the inauguration of the European state system. In this article, Gross considers the implications of this settlement

and its underlying principles for the new international order and international law. The brief excerpts that follow comment on the waning and waxing of different conceptions of the state and of international law that were also examined in the writings of Schachter, p. 42, *supra*, and Koskenniemi, p. 50, *supra*—for example, positivism (voluntarism, consent, related to strict notions of state sovereignty) and naturalism (natural law, the sense of an objective order of nature and law standing above the states, related to qualified notions of sovereignty). Gross comments in these excerpts on the writings of some major theorists of international law who influenced the changing conceptions of the relation between the state and that law: Victoria (1486–1546), Suarez (1548–1617), Grotius (1583–1645), and Vattel (1714–67).]

The acceptance of the United Nations Charter by the overwhelming majority of the members of the family of nations brings to mind the first great European or world charter, the Peace of Westphalia. To it is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority.

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. . . It would seem possible to distinguish . . . trends of thought on the subject of the binding force of international law prior to 1648. In Victoria one might discern the attempt to base international law on an objective foundation irrespective of the will of the states and to conceive international law as a law above states. In Suarez the objective foundation is at least overshadowed if not replaced by a subjective foundation in the will of the states. Suarez presented the *jus gentium* as a law between states. . . .

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Grotius and several subsequent writers still maintain natural or divine law alongside of customary law as a source of international law. It would seem, however, that with Grotius the accent begins to be transferred from the Law of Nature or divine law to that branch of human law which 'has received its obligatory force from the will of nations, or of many nations.'. . . . [I]t may be useful to conclude this brief survey with a few remarks about Vattel. Vattel, regarded as a Grotian, still maintains the distinction between different types of branches of the Law of Nations. Within the positive law of nations, based on the agreement of nations, he differentiates three divisions: the voluntary, the conventional, and the customary law. The voluntary law proceeds from their presumed consent, the conventional law from their express consent, and the customary law from their tacit consent. Positive international law is distinguished from the natural or necessary law of nations which Vattel undertakes to treat separately. . . .'

. . . [Vattel] declares that while the necessary law is at all times obligatory upon the conscience, and that a nation must never lose sight of it when deliberating on the course it must pursue in order to fulfill its duty, it must consult the voluntary law 'when there is question of what it can demand from other states.' It many not be unreasonable to conclude that according to Vattel only those rules of the law of nations which proceed from and are based on the consent of states are enforceable in international relations. . . .

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. . . From the 18th century and in particular, from Vattel onward, however, there can be no doubt as to the trend of the development. It was predominately positivist and consensual. The will of states seems to explain both the contents and the binding force of international law. The concept of the Family of Nations recedes in the background. To have paved the way for this development by liquidating, with a degree of apparent finality, the idea of the Middle Ages of an objective order of things personified by the Emperor in the secular realm, would seem to be one of the more vital aspects of the consequences of the Peace of Westphalia and of its place in the evolution of international relations. Viewed in this light the answer to the question formulated above cannot be doubtful. Instead of heralding the era of a genuine international community of nations subordinated to the rule of the law of nations, it led to the era of absolutist states, jealous of their territorial sovereignty to a point where the idea of an international community became an almost empty phrase and where international law came to depend upon the will of states more concerned with the preservation and expansion of their power than with the establishment of a rule of law. . . .

It may be said, by way of summary, that on the threshold of the modern era of international relations there were two doctrines with respect to the binding force of international law and the existence of an international community of states. The doctrine of Victoria is characterized by an objective approach to the problem of the binding force of international law and by an organic conception of the international community of states. The other doctrine . . . breaks to the fore in the work of Vattel who, emphasizing the independence rather than the interdependence of states, wrote the international law of political liberty. The growth of the voluntaristic conception of international law is accompanied by a weakening of the notion that all states form and are part of an international community. . . . In this era the liberty of states becomes increasingly incompatible with the concept of the international community, governed by international law independent of the will of states. On the contrary this era may be said to be characterized by the reign of positivism in international law. This positivism could not admit the existence of a society of states for the simple reason that it was unable to find a treaty or custom, proceeding from the will of states, which could be interpreted as the legal foundation of a community of states. In the nineteenth century, after the Napoleonic wars, there may be discerned in the Congress [of Vienna, 1814–15]

and Concert [of Europe system growing out of the Congress] the beginning of a conscious effort to establish a community of states based on the will of all states or at least on the will of the Great Powers. The Hague Peace Conferences, the League of Nations and, we may confidently assert, the United Nations are further stages in this development cognizable by positive international law.

This reaction against the unrestrained liberty of states, recognized as self-destructive in its ultimate implications was accentuated by a reaction against the prevailing voluntaristic conception of international law. . . . It is common to all these schools of thought that they strive to vindicate for international law a binding force, independent of the will of the states and to substitute for the doctrine that international law is a law of coordination, the old-new doctrine, that international law is, and, if it is to be law, must be, a law of subordination, that is, a law above states.

An international law thus conceived could be interpreted as a law of an international community constituting a legal order for the existing states. It would seem doubtful, however, whether this result can be achieved without the creation of some new institutions or the strengthening of existing institutions. . . .

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R. B. J. WALKER AND SAUL MENDLOVITZ, INTERROGATING STATE SOVEREIGNTY

in Walker and Mendlovitz (eds.), Contending Sovereignties: Redefining Political Community (1990), at 1.

The claim that profound structural transformations are undermining the principle of state sovereignty has been advanced by many analysts from quite different theoretical traditions. No longer, it is said, can states pretend to be autonomous or to exercise a monopoly on the legitimate use of violence in a specific territory. The most important forces that affect people's lives are global in scale and consequence. Even the most powerful states recognize serious global constraints on their capacity to affirm their own national interest above all else. In view of capacities for nuclear destruction, the global mobility of capital, and a new awareness of the fragility of the planetary ecology, the organization of political life within a fragmented system of states appears to be increasingly inconsistent with emerging realities.

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. . . Despite persistent attempts to reify the state as an eternal presence in human affairs, and despite continuing appeals to national identity and the principle of nonintervention, questions about both the meaning and

significance of state sovereignty are again firmly on political and scholarly agendas.

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. . . Despite evidence about how states have changed historically, and about how different forms of the state have emerged in various parts of the world and in relation to different locations within geopolitical and economic structures, the state itself has been treated as either the only possible arena in which serious political life can take place or as a merely transient prelude to a universal community of humankind. Eternally present or imminently absent: these options are deeply embedded in our understanding of what it means to be realistic—or utopian—in political life. . . .

Between these options lies a litany of well-known though notoriously imprecise concepts: we may refer to processes of internationalization or globalization, for example, or speak of interdependence and world politics. . . .

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What, for example, is it that is supposedly interdependent (or even dependent)? It could be states, in which case the term is little more than new packaging for a very old theme. The very notion of a state system implies that states are already interdependent in some sense. Much of the history of the modern state system can be interpreted as a series of responses to new forms of interdependence. The Treaty of Westphalia (1648), for example, affirmed a mutual recognition of the need to prevent religious warfare from overwhelming fragile accommodations between secular states. The formalizations of international law and tacit agreements about the rules of the game; the supposedly responsible behavior of the great powers and the institutionalization of international organizations; structural arrangements such as the balance of power; regional alliances; spheres of influence; diplomatic conventions: these are all responses to the interdependence of states. Yet they are usually understood as the necessary conditions of the interstate order that make state sovereignty possible, rather than as fundamental challenges to state sovereignty. Contemporary forms of interdependence may require more complex forms of cooperation between states, but these will only seem radically novel to those who confuse the history of the state system with abstract models of anarchy or a Hobbesian state of nature.

The term *interdependence* has also come to refer to much more than relations between states. It is used in conjunction with various accounts of economic, technological, social, and cultural interaction, of global networks of communication and exchange that refuse to privilege the territorial boundaries of sovereign states. Yet if it is not only states that are interdependent, it is not at all clear what the other subjects of interdependence might be. One might be referring, for example, to multinational corporations or professional organizations, to money traders, computer networks, social movements, or even individuals.

In this case the claim to novelty is more plausible, as well as disconcerting.

For here we quickly run up against the conventional limits of our understanding of what political life can be. What does it mean to speak of all individuals as in some sense interdependent, as part of a common system or even of a global society? What does it mean to speak of the global organization of production, distribution, and exchange, when people's political lives and identities are framed and articulated within particular states, each still jealous of its autonomy and national identity? . . .

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The possibility of anything that might be called world politics rather than interstate relations is in fact denied explicitly by the principle of state sovereignty. This principle affirms the priority of particular peoples—the citizens of particular states—over any universalizing claims to humanity as such. The implication of this affirmation is already apparent from the infamy that still clings to the name of Machiavelli. Recognizing the incongruity between the demands of statemanship or civic *virtù* and the universalizing claims of Christian virtue, Machiavelli had the temerity to privilege the former over the latter. Machiavelli's reputation still lingers, but his radicalism has become formalized as the taken-for-granted foundation of modern political life.

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The principle of state sovereignty formalizes a specific answer to questions about who we are as political beings that were posed in early modern Europe. As an answer, it poses new questions—and suggests appropriate answers to them—in turn. Once we affirm that we are citizens first and humans second—and that when push comes to shove, the claims of citizenship (nationalism, national interest, national security, and so on) must take priority over the claims of humanity in general (universal ethics, universal human rights), some way must be found to resolve the contradiction.

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Yet while there has been considerable interest in the questions posed by the principle of state sovereignty, there has been much less reflection on the questions to which state sovereignty is itself an answer. Who are 'we'? What is the political community within which we ought to be thinking about principles of freedom and obligation, justice and democracy? How ought we to understand the relationship between specific communities and other communities, and between specific communities and humanity in general? How ought we to understand the apparent contradiction between the cultural parochialism of state sovereignty as a product of specifically Western experiences and the embrace of state sovereignty everywhere, not least in connection with the mobilization of nationalist resistances to Western hegemonies? How do states manage to sustain their claims to autonomous authority in the face of competing claims to cultural identity, economic interest, and local commitments? What, in fact, is the political status of 'humanity'?

VIEWS OF SCHOLARS

Consider the following views about the meaning of sovereignty in contemporary international law and argument. Brownlie[7] states that the

> sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.

He describes the principal corollaries of states' sovereignty and equality as

> (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.

Koskenniemi[8] observes that it is 'notoriously difficult to pin down the meaning of sovereignty,' but that nonetheless the literature characteristically starts with a definition. Usually the concept is connected with ideas of independence (external sovereignty) and self-determination (internal sovereignty). He quotes a classic definition in an arbitral decision to the effect that sovereignty 'in the relations between States signifies independence; independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of a State.' Sovereignty thus implies freedom of action by a state.

If, argues Koskenniemi, this or any agreed-on definition of sovereignty had a clear, ascertainable meaning, then 'whether an act falls within the State's legitimate sphere of action could always be solved by simply applying [that definition] to the case.' But '[t]here simply is no fixed meaning, no natural extent to sovereignty at all.' Thus in disputes between two states, each may base its argument on its own sovereignty. Assuming that 'sovereignty had a fixed content would entail accepting that there is an antecedent material rule which determines the boundaries of State liberty regardless of the subjective will or interest of any particular State.' Such material boundaries not stemming from the free choice of the state 'will appear as unjustified coercion.' It is indeed 'impossible to define "sovereignty" in such a manner as to contain our present perception of the State's full subjective freedom and that of its objective submission to restraints to such freedom.'

[7] Ian Brownlie, Principles of Public International Law (4th ed. 1990), Ch. XIII, 287.

[8] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989), Ch. 4.

Antonio Cassese, in *Human Rights in a Changing World* (1990) at 13, identifies several characteristics of the prior international community. It was dominated by 'individualistic relationships among [state] members of this anarchic society,' such as the principle of bilateral reciprocity with respect to obligations and remedies. 'The international community was truly a juxtaposition of subjects, each concerned only with its own well-being and its freedom of manoeuvre, each pursuing only its own economic, political and military interests . . . .' Peoples and individuals did not 'count' but were 'absorbed and overshadowed by the "princes": the sovereign states, the only real actors on the world stage.' He comments on the postwar system:

> These two great doctrines [human rights and the self-determination of peoples] have had an extremely important role in international life. They have subverted the very foundations of the world community, by introducing changes, adjustments and realignments to many political and legal institutions. . . . To be sure, they have not changed the actual structure of that community or the main rules of the game. Sovereign states have remained the true holders of power; authority continues to be distributed among various powers; there are still no centralized agencies charged with stating, ascertaining and enforcing the law; each powerful state continues in the main to deal with national interests, with little weight being attributed to collective needs going beyond the requirement to harmonize aspirations and necessities of several states. Nevertheless, the two doctrines have introduced seeds of subversion into this framework, destined sooner or later to undermine and erode the traditional structures and institutions, and gradually—over a very broad space of time, the course of which cannot yet be foreseen—to revolutionize those structures and institutions.

NOTE

The next two readings stress those human rights provisions that point to popular political participation and sovereignty, and that challenge the traditional association of a state with its government, whatever that government's character. Human rights ideals affect the basic political structure of the state, and thus the legitimacy of the sovereign as well as the abstract idea of sovereignty. At least for certain purposes, should recognition of a state's sovereignty depend on that state's compliance with norms of popular participation that rest government on the consent of the people?

HENRY STEINER, THE YOUTH OF RIGHTS

104 Harv. L. Rev. 917 (1991), at 929.

. . . Unlike many components of classical international law, the human rights movement was not meant to work out matters of reciprocal convenience

among states—for example, sovereign or diplomatic immunities—or to aim only at regulating areas of historical conflict among states—for example, uses of the sea or airspace, or treatment by a state of its alien population. Rather it reached broad areas of everyday life within states that are vital to the internal rather than international distribution of political power. As international law's aspirations grew, as that law became more critical of and hence more distanced from states' behavior, the potential for conflict between human rights advocates within a state and that state's controlling elites escalated.

Even the most consensual of rights, the right not to be tortured, has a subversive potential. If, as [an] Amnesty International report suggests, torture amounts to the price of dissent because it is 'most often used as an integral part of a government's security strategy,' abolishing torture lowers that price. Oppressive regimes prefer to keep the price high.

Other rights included in the *Universal Declaration* and the *Civil–Political Rights Covenant* influence the structure of government more directly. Abolishing discrimination on grounds of race, ethnicity, religion, or gender can radically alter economic and social arrangements and redirect political power. Protecting rights of speech, expression, and association will give citizens not only security against arbitrary state action, but also the chance to develop a diverse and vibrant civil society that can influence the directions of the state as effectively as governmental policies influence it. Entrenched structures of domination—landholding patterns, power over rural labor, virtual enslavement of children or women or given minorities—may become open to effective challenge.

The stakes for power rise as we move further along the spectrum of human rights. The major human rights instruments empower citizens to 'take part' in government and to vote in secrecy in genuine, periodic, and nondiscriminatory elections. In given circumstances, an authoritarian government can stop torturing and arresting without surrendering its monopoly of power. As events in Eastern Europe illustrate, however, such a government cannot grant the right to political participation without signing its death warrant. 'Throw out the rascals' speaks the more dramatically after decades of unchosen and oppressive regimes.

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Particular clusters of civil-political rights thus challenge many of the world's governments in unavoidable, implacable ways. To some extent the range of human rights that I have mentioned respond to a 'disaster' dimension of the human rights movement. From that perspective, the movement seeks primarily to avert or terminate catastrophes stemming from gross abuses of power—at the extreme another genocide, at less draconian levels the systematic violations of rights to physical integrity in many repressive states. The premise to its goal of protection is captured in the familiar maxim, 'Power tends to corrupt and absolute power corrupts absolutely.' Its modern roots lie in the

rule of law tradition, in the notion of law as fences protecting us from each other and, most important, from the state.

But the aspirations of the human rights movement reach beyond the goal of preventing disasters. The movement also has a 'utopian' dimension that envisions a vibrant and broadly based political community. Such a vision underscores the potential of the human rights movement for conflict with regimes all over the world. A society honoring the full range of contemporary human rights would be hospitable to many types of pluralism [and unwilling to embrace or impose] one final truth, at least to the point of allowing and protecting difference. It would not stop at the protection of negative rights but would encourage citizens to exercise their right to political participation, one path toward enabling peoples to realize the right to self-determination. It would ensure room for dissent and alternative visions of social and political life by keeping open and protecting access to the roads toward change.

Violations of human rights, particularly those of a systematic character, are then never gratuitous. Correctly or incorrectly, those holding power understand abuse and terror as instrumental to their keeping it. Sadism and cruelty will be all too evident, but they are harnessed to a politically purposeful scheme rather than fostered or permitted by states for their own sake. [The sorry condition of human rights] in many states should generally be traced to a recurrent structural phenomenon related to power and ideology rather than to individual pathologies.

The fight over rights therefore becomes the fight over the redistribution of power—sometimes direct and unadorned, sometimes imbedded in ideological struggles or in complex ethnic conflicts. How else could South African elites view the insistence of political opponents on one-person-one-vote? How else could the former communist leaders of Eastern Europe have viewed demands for political pluralism? Moreover, some leaders succeeding to power in societies undergoing transformation will surely experience the desire to retain it, denouncing the rights that they now proclaim. The struggle is ongoing, relentless.

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W. MICHAEL REISMAN, SOVEREIGNTY AND HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL LAW

84 Am. J. Int. L. 866 (1990), at 869.

[Reisman contrasts an earlier conception of state sovereignty ('insulating from legal scrutiny and competence a broad category of events' within a state, later captured in the concept of 'domestic jurisdiction') with the conception inaugurated with the eighteenth century revolutions of the popular will as the source of political authority. Government authority became based on the consent of the people within the state. He refers to Article 21(3) of the UDHR

with its reference to the 'will of the people' as the 'basis of the authority of government.']

Although the venerable term 'sovereignty' continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its 'invasion' of the sovereign's *domaine réservé*. The United Nations Charter replicates the 'domestic jurisdiction–international concern' dichotomy, but no serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any state' and hence insulated from international law.

This contemporary change in content of the term 'sovereignty' also changes the cast of characters who can violate that sovereignty. Of course, popular sovereignty is violated when an outside force invades and imposes its will on the people. One thinks of the invasion of Afghanistan in 1979 or of Kuwait in 1990. But what happens to sovereignty, in its modern sense, when it is not an outsider but some home-grown specialist in violence who seizes and purports to wield the authority of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list (often the only choice)? Is such a seizer of power entitled to invoke the international legal term 'national sovereignty' to establish or reinforce his own position in international politics?

Under the old international law, the internal usurper was so entitled, for the standard was de facto control: the only test was the effective power of the claimant. . . . [But that test] stands in stark contradiction to the new constitutive, human rights-based conception of popular sovereignty. . . .

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In many countries, the internal political situation is murky and constitutional procedures for the orderly transfer of power are nonexistent or ineffective. In a flurry of coups and putsches, both outsiders and insiders may be unable to ascertain the popular will, especially if the disorder or tyranny has prevented it from being consulted or expressed. Even in the absence of elections—indeed, even when there are 'supervised' elections—it is often clear that the vast majority of the people detest those who have assumed power and characterize themselves as the government. It is more difficult, however, to say who the people would wish in their stead. . . .

But in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people's choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country.

When those confirmed wishes are ignored by a local caudillo who either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty. Cross-border military actions should certainly never be extolled, for they are necessarily brutal and destructive of life and property. They may well be unlawful for a variety of other reasons. But if they displace the usurper and emplace the people who were freely elected, they can be characterized, in this particular regard, as a violation of sovereignty only if one uses the term anachronistically. . . .

This is not to say that every externally motivated action to remove an unpopular government is now permitted, or that officer corps that feel obsolescence hard upon them can claim a new raison d'être and start scouring the globe for opportunities for 'democratizing' interventions. Authoritative conclusions about the lawfulness of the unilateral use of force, no less than about any other unilateral action, turn on many contextual factors: e.g., the contingencies allegedly justifying the unilateral use, the availability of feasible persuasive alternatives, the means of coercion selected, the level of coercion used (the classic test of necessity and proportionality), whether the objectives of the intervener include internationally illicit aims, the aggregate consequences of inaction, and the aggregate consequences of action. But it is to say that the suppression of popular sovereignty may be a justifying factor, not a justification *per se* but a *conditio sine qua non*. And it is to say that the word 'sovereignty' can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy.

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors. . . . President Marcos violated Philippine sovereignty, General Noriega violated Panamanian sovereignty, and the Soviet blockade of Lithuania violated its sovereignty. Fidel Castro violates Cuban sovereignty by mock elections that insult the people whose fundamental human rights are being denied, no less than the intelligence of the rest of the human race. . . .

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The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component. . . .

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Unambiguous situations, however, may be exceptions. When the internationally supervised elections result in an absence of consensus on who should govern, *or* the integrity of the elections is doubtful, *or* there have been no elections, *or* a civil insurrection has left diverse groups vying for power, no one can be sure that the unilateral intervener from the outside is implementing popular wishes. To varying extents, the intervener will be shaping them. In some circumstances, the banner of popular sovereignty can become a fig leaf for its suppression by foreign intervention, especially when governments bent on intervention maintain stables of alternative local leaders who can be brought forward to authorize an invasion at the appropriate time. In practice, therefore, there may be a factual 'gray' area between unequivocal expressions of popular will through internationally supervised, observed or validated elections, on the one hand, and the atrocities that warrant humanitarian intervention, on the other. Situations falling into the gray area will simply not lend themselves to unilateral action.

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ADDITIONAL READING

Helmut Steinberger, *Sovereignty*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 10 (1987) at 397.

NOTE

The following decision of the Permanent Court of International Justice is among the best known judicial opinions on the question of domestic jurisdiction. Consider what relation the notion of domestic jurisdiction as used in this opinion bears to the ideas of sovereignty just discussed.

TUNIS–MOROCCO NATIONALITY DECREES

Permanent Court of International Justice, 1923.
P.C.I.J., Ser. B, No. 4.

[Article 15 of the Covenant of the League of Nations provided, in effect, that any dispute between members of the League likely to lead to a rupture that was not submitted to arbitration under another Covenant provision should be submitted to the Council of the League. The Council could hear the facts and make recommendations. Paragraph 8 of Article 15 stated:

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council should so report, and shall make no recommendation as to its settlement.

In the *Tunis–Morocco* case, the notion of domestic jurisdiction was relevant to the competence of the Council of the League. It is relevant in other contexts as well, including many involving human rights issues. In all such settings, the states parties to a dispute or an international organ or a third-party decision-maker are required to identify for one or another purpose the critical boundary line between matters regulated to some degree by international law and matters recognized to be within the unfettered discretion of national governments (i.e., recognized to be a matter of domestic jurisdiction). The opinion in *Tunis–Morocco Nationality Decrees* tells us that the question of where to draw that line 'is an essentially relative question; it depends upon the development of international relations.'

The definition, or indeed the very notion, of a boundary line raises some vexing issues. The line could be described in several ways. For example, matters within a state's domestic jurisdiction could be identified by stating the sum of all relevant rules of international law that impose restraints or affirmative duties on states. A state's rules or conduct not within that sum could then be viewed as within its domestic jurisdiction. Alternatively, one could follow an 'essentialist' theory and attempt affirmatively to describe those matters recognized—now, forever?—to be within a state's domestic jurisdiction. Brownlie, *op. cit* at 292, notes that the concept 'is mysterious only because many have failed to see that it really stands for a tautology.'

We here describe the relevance of domestic jurisdiction in the context of the competence of political organs of the United Nations. Article 2(7) of the Charter provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Note the difference in wording between Article 15(8) of the Covenant of the League and this Article 2(7). As in other contexts in which the issue of domestic jurisdiction arises, Article 2(7) involves the fundamental tension in international relations between state sovereignty and external restraints on that sovereignty. All treaties, as well indeed as all norms of customary international law, implicity address this tension and resolve it in their different ways. In the case of the Charter, note how Articles 1 and 2 reflect the tension; compare the 'internationalist' spirit of Articles 1(1) and 2(6) with the traditional themes of state sovereignty in paras. (1), (4) and (7) of Article 2.

Within the United Nations, states have frequently invoked Article 2(7) to support their argument that the General Assembly is acting beyond its powers by debating certain issues, whether or not the debate in question terminates with concrete action by the Assembly such as the voting of a recommendation or resolution. States' arguments resisting the Assembly's consideration of a matter also involve the broad mandates for the General

Assembly of Article 10, authorizing it to 'discuss any questions or any matters within the scope of the present Charter' as well as to 'make recommendations' to member states on such questions or matters, and of Article 13, authorizing it to initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms.'

The issues leading to tensions between the General Assembly and a member state have frequently involved human rights issues, ranging from colonialism to the apartheid regime of South Africa. As early as 1946 the Assembly condemned discrimination in South Africa as in violation of the Charter despite that state's claim that how it treated its own citizens was a matter of domestic jurisdiction. In these situations, the Assembly has interpreted Article 2(7) restrictively, in order to permit debate and resolutions on issues that generally have a clear international impact, even if there is no consensus over the degree to which international law does or should regulate the matter.

The International Court of Justice has never been asked for an advisory opinion whether the Assembly's action with respect to a given human rights issue (debate alone, recommendation, general or specific resolution, declaration) amounted to a forbidden intervention into domestic jurisdiction. In the meantime, the continuing practice of the political organs of the UN in overriding the claim of domestic jurisdiction, particularly but not exclusively with respect to human rights issues, may well have created new law on the question, at least with respect to its meaning in Article 2(7). Given the breadth of the UN's concerns and its universal membership, that meaning is likely to erode the significance of claims of domestic jurisdiction in international law generally.

NOTE

Consider the following observations in Oscar Schachter, *International Law in Theory and Practice* (1991) at 332. Schachter notes the views of many international lawyers that 'domestic jurisdiction is only the negative of international obligation, it has no positive content of its own.' But, he argues, this logic

> does not entirely suffice to solve the problem of domestic jurisdiction. The reason for this is that States do in fact recognize that even though a 'matter' may be governed by an international obligation, it may under some circumstances be regarded as appropriate for domestic action alone. For example, a right to a fair trial is clearly internationally recognized; however an isolated or minor infringement of that right would not be regarded as of international concern. The same would hold for cases of discrimination on grounds of race or sex. The particular cases fall within domestic jurisdiction even if the relevant obligation applies to the class of infringements. It may be argued that the examples only show that States do not

defining characteristic (race, sex, elderly citizens), some formed out of shared interests (labor unions, business associations, environmental groups). The liberal state, by definition committed to pluralism, must accomodate different types of groups, and maintain the framework of rights in which they can struggle for recognition, power and survival.

Such issues indicate how much is open and debated within liberalism about the significance of the priority of the individual in the contemporary liberal state—or different types of liberal states. Should we, for example, understand the 'individual' *abstractly*, as similar in vital respects everywhere, both within the same state and universally? Or do we understand the individual *contextually*, as influenced or even determined by ethnic, cultural, national, religious and other traditions and communities? Should we even phrase the question in such dramatic contrasts, or should we rather assume that the answers are too complex for any clear choice between them?

Since the birth of the human rights movement, and particularly since the collapse of the Soviet Union, such issues about the individual and the collective have taken on great pungency in the contradictions bred, on the one hand, by the spread of both liberal ideology with its emphasis on the individual and of market ideology with its stress on private initiative, and on the other hand, by the often savage bursts of ethnic nationalism in many parts of the world with their stress on collective rather than individual identity. See Chapter 14, *infra*.

The emphasis in both liberalism and the human rights movement on individual 'rights' leads to one final observation related to several of this chapter's readings. Rights are no more determinate in meaning, no less susceptible to varying interpretations and disputes among states, than any other moral, political or legal conception—for example, 'property,' or 'sovereignty,' or 'consent,' or 'national security.' Consider, for example, the different values and aspirations that have been attributed to one conventional phrase in many human rights instruments, the 'right to life.' Within liberal states, different institutional solutions have been brought to the question of who should determine and develop the content of rights, who should resolve the many and puzzling conflicts among rights. In the international arena, this problem becomes all the more complex. What mechanisms, what institutional framework, what allocation or separation of powers, what blend of overtly political and judicial resolution of these issues, will we find in the international human rights movement? Such issues are examined in Part C.

ADDITIONAL READING

Two histories of liberalism are Harold Laski, *The Rise of Liberalism* (1936), and Guido de Ruggiero, *The History of European Liberalism* (1927). Two contemporary collections of articles on the liberal tradition by leading theorists writing from a range of perspectives are Nancy Rosenblum (ed.), *Liberalism and the Moral Life* (1989), and Michael Sandel (ed.), *Liberalism and its Critics* (1984). The latter book

includes the prominent essay of Isaiah Berlin, *Two Concepts of Liberty*, which in turn is examined in Charles Taylor, *What's Wrong with Negative Liberty*, in Alan Ryan (ed.), *The Idea of Freedom* 175 (1979). Leading theoretical works developing the liberal tradition with respect to concepts of rights and justice include Ronald Dworkin, *Taking Rights Seriously* (1977), and *A Matter of Principle* (1985); and John Rawls, *A Theory of Justice* (1971), and *The Law of Peoples*, 20 Critical Inquiry 3b (1993). A defense of liberalism from a modern philosophical perspective is found in Richard Rorty, *Contingency, Irony, and Solidarity* (1989), particularly chapters 3 and 4. Criticism of inherited forms of liberal democracy and a program for its development are set forth in Roberto Unger, *Democratic Experimentalism* (forthcoming 1995).

B. UNIVERSALISM AND CULTURAL RELATIVISM

COMMENT ON THE UNIVERSALIST–RELATIVIST DEBATE

One of the intense debates in the human rights movement involves the 'universal' or 'relative' character, related to the 'absolute' or 'contingent' character, of the rights declared. The contest between the universal–relative positions and between the absolute–contingent positions is an old one. It took on renewed vigor in light of the human rights movement's erosion of notions of sovereignty, domestic jurisdiction, and cultural autonomy that in an earlier period had enjoyed greater strength. Indeed, the advocates of cultural relativism often employ the ideas clustered around those notions to sustain stronger, more traditional ideas of state autonomy.

To put it simply, the partisans of universality claim that international human rights like equal protection or physical security or free speech, religion and association are and must be the same everywhere. This applies at least as to the rights' substance, for universalists must concede that many basic rights (such as the right to a fair criminal trial) allow for culturally influenced forms of implementation or realization (i.e., not all states are required to use the jury in its Anglo-American form).

The advocates of cultural relativism claim that rights and rules about morality (most, some, a few) are encoded in and thus depend on cultural context, the term 'culture' often being used in a broad and diffuse way that may go beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures. Hence notions of right (and wrong) and moral rules necessarily differ throughout the world because the cultures in which they inhere themselves differ. Thus this relativist position can be understood simply to assert as an empirical matter that the world contains

A. THE NOTION OF 'RIGHTS': ORIGINS AND RELATION TO 'DUTIES'

We here consider different understandings, historical and contemporary, of the notion of 'rights' and inquire whether rights have inherent implications for a society's moral, political and socio-economic order. For example, does rights rhetoric in a constitution and statutes, or in a dominant moral and political theory, point to an individualistic or communitarian or other type of society? Does it necessarily assume certain institutional arrangements for government, such as a constitutional separation of powers and particularly an independent judiciary?

Exploration of such questions provides background to the discussion of cultural relativism in Section B. The readings begin with descriptions of the evolution from earlier concepts of natural law and natural rights to contemporary notions of right.

BURNS WESTON, HUMAN RIGHTS

20 New Encyclopaedia Britannica (15th ed. 1992) at 656.

The expression 'human rights' is relatively new, having come into everyday parlance only since World War II and the founding of the United Nations in 1945. It replaces the phrase 'natural rights,' which fell into disfavour in part because the concept of natural law (to which it was intimately linked) had become a matter of great controversy, and the later phrase 'the rights of Man' . . .

. . .

It was primarily for the 17th and 18th centuries, however, to elaborate upon this modernist conception of natural law as meaning or implying natural rights. The scientific and intellectual achievements of the 17th century . . . encouraged a belief in natural law and universal order: and during the 18th century, the so-called Age of Enlightenment, a growing confidence in human reason and in the perfectability of human affairs led to its more comprehensive expression. Particularly to be noted are the writings of the 17th-century English philosopher John Locke—arguably the most important natural law theorist of modern times—and the works of the 18th-century Philosophes centred mainly in Paris, including Montesquieu, Voltaire, and Jean-Jacques Rousseau. Locke argued in detail, mainly in writings associated with the Revolution of 1688 (the Glorious Revolution), that certain rights self-evidently pertain to individuals as human beings (because they existed in 'the state of nature' before humankind entered civil society); that chief among

them are the rights to life, liberty (freedom from arbitrary rule), and property; that, upon entering civil society (pursuant to a 'social contract'), humankind surrendered to the state only the right to enforce these natural rights, not the rights themselves; and that the state's failure to secure these reserved natural rights (the state itself being under contract to safeguard the interests of its members) gives rise to a right to responsible, popular revolution. The Philosophes, building on Locke and others and embracing many and varied currents of thought with a common supreme faith in reason, vigorously attacked religious and scientific dogmatism, intolerance, censorship, and social-economic restraints. They sought to discover and act upon universally valid principles harmoniously governing nature, humanity, and society, including the theory of the inalienable 'rights of Man' that became their fundamental ethical and social gospel.

All this liberal intellectual ferment had, not surprisingly, great influence on the Western world of the late 18th and early 19th centuries. Together with the practical example of England's Revolution of 1688 and the resulting Bill of Rights, it provided the rationale for the wave of revolutionary agitation that then swept the West, most notably in North America and France. Thomas Jefferson, who had studied Locke and Montesquieu and who asserted that his countrymen were a 'free people claiming their rights as derived from the laws of nature and not as the gift of their Chief Magistrate,' gave poetic eloquence to the plain prose of the 17th century in the Declaration of Independence proclaimed by the 13 American Colonies on July 4, 1776: '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.' Similarly, the Marquis de Lafayette . . . imitated the pronouncements of the English and American revolutions in the [French] Declaration of the Rights of Man and of the Citizen of August 26, 1789. Insisting that 'men are born and remain free and equal in rights,' the declaration proclaims that 'the aim of every political association is the preservation of the natural and imprescriptible rights of man,' identifies these rights as 'Liberty, Property, Safety and Resistance to Oppression,' and defines 'liberty' so as to include the right to free speech, freedom of association, religious freedom, and freedom from arbitrary arrest and confinement (as if anticipating the Bill of Rights added in 1791 to the Constitution of the United States of 1787).

In sum, the idea of human rights, called by another name, played a key role in the late 18th- and early 19th-century struggles against political absolutism. It was, indeed, the failure of rulers to respect the principles of freedom and equality, which had been central to natural law philosophy almost from the beginning, that was responsible for this development. . . .

. . . [B]ecause they were conceived in essentially absolutist—'inalienable,' 'unalterable,' 'eternal'—terms, natural rights were found increasingly to come into conflict with one another. Most importantly, the doctrine of natural rights came under powerful philosophical and political attack from both the right and the left.

In England, for example, conservatives Edmund Burke and David Hume united with liberal Jeremy Bentham in condemning the doctrine, the former out of fear that public affirmation of natural rights would lead to social upheaval, the latter out of concern lest declarations and proclamations of natural rights substitute for effective legislation. In his *Reflections on the Revolution in France* (1790), Burke, a believer in natural law who nonetheless denied that the 'rights of Man' could be derived from it, criticized the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the 'monstrous fiction' of human equality, which, he argued, serves but to inspire 'false ideas and vain expectations in men destined to travel in the obscure walk of laborious life.' Bentham, one of the founders of Utilitarianism and a nonbeliever, was no less scornful. 'Rights,' he wrote, 'is the child of law; from real law come real rights; but from imaginary laws, from 'law of nature,' come imaginary rights. . . . Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts.' Hume agreed with Bentham: natural law and natural rights, he insisted, are unreal metaphysical phenomena.

This assault upon natural law and natural rights, thus begun during the late 18th century, both intensified and broadened during the 19th and early 20th centuries. John Stuart Mill, despite his vigorous defense of liberty, proclaimed that rights ultimately are founded on utility. The German jurist Friedrich Karl von Savigny, England's Sir Henry Maine, and other historicalists emphasized that rights are a function of cultural and environmental variables unique to particular communities. And the jurist John Austin and the philosopher Ludwig Wittgenstein insisted, respectively, that the only law is 'the command of the sovereign' (a phrase of Thomas Hobbes) and that the only truth is that which can be established by verifiable experience. By World War I, there were scarcely any theorists who would or could defend the 'rights of Man' along the lines of natural law. . . .

Yet, though the heyday of natural rights proved short, the idea of human rights nonetheless endured in one form or another. The abolition of slavery, factory legislation, popular education, trade unionism, the universal suffrage movement—these and other examples of 19th-century reformist impulse afford ample evidence that the idea was not to be extinguished even if its transempirical derivation had become a matter of general skepticism. But it was not until the rise and fall of Nazi Germany that the idea of rights—human rights—came truly into its own. . . .

. . .

To say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope—which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom,

social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content—these and kindred issues are matters of ongoing debate and likely will remain so as long as there exist contending approaches to public order and scarcities among resources.

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DAVID SIDORSKY, CONTEMPORARY REINTERPRETATIONS OF THE CONCEPT OF HUMAN RIGHTS

in Sidorsky (ed.), Essays on Human Rights 88 (1979), at 89.

. . .

In a context in which escalating rhetorical support for human rights as a cause célèbre coexists with systematic abuse of many of these rights, it is not surprising that the very meaning of human rights has become contested. Radically different definitions and interpretations of human rights have been proposed, each of which claims the banner of human rights. . . .

. . .

In turning to the contemporary interpretations and the current uses of the concept of human rights, even before examining the ways in which the idea is contested, an appropriate starting point is the recognition that the term seems to be fulfilling two different, although consistent, functions. On the one hand, the phrase *universal human rights* is used to assert that universal norms or standards are applicable to all human societies. This assertion has its roots in ancient ideas of universal justice and in medieval notions of natural law. . . .

On the other hand, the idea of human rights is used to affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny. This idea has its classic source in seventeenth- and eighteenth-century theories of natural rights. . . .

. . .

The Theory of Natural Rights

The theory of natural rights had a major influence in the development of the political self-consciousness of modern Western society. The idea of natural rights as the sole justification for any political society was a challenge to all established political authority. From the perspective of the theory of natural rights, all the recognized theories of legitimacy—the divine rights of kings, the pragmatic necessity of stable political rule, conformity to divine or natural law or rootedness in historical and institutional traditions—were inadequate. A

political regime was justified only if it satisfied the natural rights of its citizens.

The current function of the theory of human rights, unlike the doctrine of natural rights, is not primarily that of serving as a principle of legitimacy within a particular national state. It has become part of an effort to develop standards of achievement with respect to citizens' rights within an international community. Yet it is significant in this context to recognize the continuity between the traditional theory of natural rights and recent formulations of human rights. Six elements of that continuity merit special examination.

First, it was characteristic of theorists of natural rights to develop a list of specific rights. Although these rights allegedly derived from the universal and evident desires of all men, the content of various bills or declarations of rights differed. The appearance or omission of a specified right, like the right to property, was an index of the importance given in social policy to the defense or realization of that right. This tradition has been adopted in the theory of human rights and has resulted, for example, in the articulation of the more extended list of thirty rights that mark the Universal Declaration of Human Rights.

Second, in all traditional theories of natural rights, such rights were ascribed only to human beings. . . .

The further implication is that any human being, solely by virtue of his potential ability to exercise rational choice, had rights. It was in this sense that the theory of natural rights proposed the equality of all men. Since having natural rights was intrinsically connected to being a human being, there was a basis for the later transition from the phraseology of *natural rights* to that of *human rights*.

Third, a major characterization of natural rights derived from this belief that rights are the properties of persons capable of exercising rational choice. For, when men asserted their natural rights they were expressing their autonomy as individuals. Hence, the model or pattern for the exercise of natural rights became the protection of the sphere of the autonomous individual from arbitrary incursion by the state or other coercive association. The listing of the right to life, for example, did not involve a commitment to the extension or universalization of health care or to actions for shaping a safer environment but to a rule of law that would restrain arbitrary acts of violence, especially those of governmental authorities, against individuals. Similarly, the natural right to liberty did not refer to support of policies that would enhance self-realization through the universalization of education, but it did require the legal protection of individuals against arbitrary imprisonment.

Since the natural rights of men were bound intrinsically to their capacity to exercise rational choice as autonomous beings, the list of natural rights comprised what have been termed negative freedoms, rather than positive liberty, that is, the freedoms that protect the individual *from* the invasion of his domain of selfhood or privacy rather than the freedom of the individual or group *to* achieve its purposes or ideals. This stress is evident in the many

detailed lists of the declarations or bills or rights that proliferated in the late eighteenth and early nineteenth centuries. The inclusion of a number of human rights that relate to social and economic development is a point of difference between the classic theory of natural rights and the theory that led to the Universal Declaration of Human Rights. That inclusion, and the priority to be assigned to social and economic rights, has become the single most contested item in discussions of contemporary theory of human rights.

Fifth, natural rights, as the adjective shows, derive from the order of *nature* or from the nature of 'natural man' but not from society or history. Indeed, as truths of nature they were held to be rationally self-evident: that is, if the meaning of the term is understood, then all rational beings could intuitively know that men had natural rights. In this view, the recognition that the theory of natural rights had its genesis in the rise to power of the middle class no more shows the relativity of natural rights than the fact that the calculus was discovered in seventeenth-century Germany or England makes its truth relative to that place and time. While rational intuition is no longer relevant for the contemporary views of human rights, the belief that rights are universal, and not relative, to particular social or historical culture has become, if anything, even more important in their use as international norms.

NOTE

The following three readings describe their authors' understandings of basic characteristics of rights in contemporary legal and political discourse. Two of the authors compare these characteristics with the tradition of natural law and natural rights; each draws different distinctions between those traditions and contemporary usage. All three authors stress the priority attaching to claims based on rights, and each notes the problem of conflicts among rights. Klare explores the issue of conflict, as well as the related problem of the indeterminacy of rights discourse. Taylor stresses that recent decades have moved us from an initial orthodoxy about the individualistic nature of rights to conceptions of collective rights and positive obligations of states.

EUGENE KAMENKA, HUMAN RIGHTS, PEOPLES' RIGHTS

in James Crawford (ed.), The Rights of Peoples (1988), at 127.

Rights are claims that have achieved a special kind of endorsement or success: legal rights by a legal system; human rights by widespread sentiment or an international order. All rights arise in specific historical circumstances. They

are claims made, conceded or granted by people who are themselves historically and socially shaped. They are asserted by people on their own behalf or as perceived and endorsed implications of specific historical traditions, institutions and arrangements or of a historically conditioned theory of human needs and human aspirations, or of a human conception of a Divine plan and purpose. In objective fact as opposed to (some) subjective feeling, they are neither eternal nor inalienable, neither prior to society or societies nor independent of them. Some such rights can be singled out, and they often are singled out, as social ideals, as goals to strive toward. But even as such, they cannot be divorced from social content and context.

Claims presented as rights are claims that are often, perhaps usually, presented as having a special kind of importance, urgency, universality, or endorsement that makes them more than disparate or simply subjective demands. Their success is dependent on such endorsement—by a government or a legal system that has power to grant and protect such rights, by a tradition or institution whose authority is accepted in those circles that recognize these claims as rights, by widespread social sentiment, regionally, nationally, or internationally.

Claims, whether presented as rights or not, conflict. So do the traditions, institutions and authorities that endorse the claim as a right. They conflict both with each other and, often, in their internal structure, implications and working out. . . .

The concept of human rights is no longer tied to belief in God or natural law in its classical sense. But it still seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities. Like moral claims more generally, it asserts in its own behalf moral and sometimes even logical priority—connection with the very concept (treated as morally loaded) of what it means to be a human being or a person, or of what it means to behave morally. These are questions on which moral philosophers do have a certain expertise, at least in seeing where the difficulties lie, and on which they, like ordinary people throughout the world, have long disagreed and continue to disagree.

CHARLES TAYLOR, HUMAN RIGHTS: THE LEGAL CULTURE

in UNESCO, Philosophical Foundations of Human Rights (1986), at 49.

. . .

Our legal tradition, at least in the West, accords a special position to what are called 'personal' rights (*droits subjectifs*). By recognizing certain rights, we give individuals or groups within society the power to set limits on the actions of that

society. . . . As a subject of law, I have the power under law to assert my right, thus rendering the decision or legislation in question null and void. . . .

The American philosopher of law, Ronald Dworkin, borrows an image from the game of bridge to explain this principle: it is as though the individual were given a 'trump' card that enables him to invalidate the results of the normal social decision-making process whenever it encroaches on his protected sphere. . . . The point is that if any attempt is made to inhibit my freedom of speech, I can play my 'trump' card and have the decision revoked in a court of law.

This legal system corresponds to certain conceptions of man and society. In order to grasp what makes it special, it may be compared with a system where political decisions are also restricted by a fundamental law but where there are no personal rights. Thus, the fundamental law might prohibit others from killing me, imprisoning me, silencing me, etc., without giving me the right to life, liberty, free speech, etc. in the modern sense. At first glance, it might seem that the same thing is being said in a different way in the two cases. In point of fact, however, there is a major difference between them.

In a system of personal rights, the law does not confine itself to proscribing action X or Y: the individual is also empowered to annul the measures causing X or Y. The limits imposed by the law are regarded as privileges enjoyed by individuals, as a legal power at their disposal.

. . .

The system of personal rights thus has two effects: (a) it places limits on the actions of governments and on collective decisions by offering a measure of protection to individuals and specific groups; (b) it offers individuals and specific groups the right to seek redress and gives them a margin of liberty in the imposition of these limits.

It shares characteristic (a) with every system of fundamental law, including pre-modern natural law. Characteristic (b), however, is peculiar to it.

We have seen, therefore, how deeply the system of personal rights is rooted in the political traditions and ways of thinking of the West today. It goes hand in hand with the assertion of the status of the individual, of his liberty and of his precedence over society. . . .

. . . This is not to say that the performance of Western societies in the field of human rights has been particularly brilliant. One has only to think of the dramatic interruptions (such as the Nazi regime, the Latin American dictatorships, etc.) or the systematic injustices practised throughout the course of Western history (the age-long violation of the rights of certain social classes and of women) or the external behaviour of the same societies—colonialism, imperialism—reflecting contempt for the rights of other peoples.

But the main question which arises is whether the system of personal rights can have equal relevance in political cultures which do not attach the same fundamental importance to the freedom of the individual or of specific groups. This requires not only (a) a conception of human well-being going beyond the

individual's welfare as a member of society, but also (b) a conception of such well-being as including the power to determine, on the basis of this broader definition and within certain limits, the individual's relationship with society and with its forms and functions.

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To sum up, we can identify two conceptions of rights: 'A', the original Western conception, that of personal rights, and 'B', the conception of rights as fundamental social objectives that cannot be abandoned. The two approaches logically tend towards different enumerations of rights: 'A' concentrates mainly on the individual's ability to determine the way society behaves towards him and hence is concerned with life, freedom of speech, of association, opinion and religion; the right to a trial that fulfils certain requirements if he is charged with an offence, etc. Conception 'B' naturally tends towards a 'social' bill of rights: full employment, guaranteed income, education, etc., which may be achieved by social action.

However, there is a basic ambiguity. Approaches 'A' and 'B' cannot be clearly distinguished as two independently valid points of view, because most of the supporters of 'B' would also claim to be fulfilling the conditions of 'A'. This confusion is not likely to be dispelled overnight.

. . .

We have been speaking so far in terms of individual rights. But certain rights may also be claimed on behalf of communities. Natural law originated in the seventeenth century in the context of a strictly atomistic view of society. It has developed since then and with it the designation of the rights that we claim. This has happened in two main ways. First, Romanticism drew attention to man's national dimension. It made us see man as a cultural being who develops his humanity through a language and through the body of knowledge that has already been expressed in a culture, whether it be in the form of art, music, literature, or family and political traditions, etc.

The result is that if gaps or deficiencies appear in the language or if the expressions of the culture become inaccessible for whatever reason, the very development of the individual's personality is threatened.

But languages and cultures are the property of certain communities. Isolated individuals cannot create or preserve them; only societies can. If there is a right to be claimed—that of preserving one's language and culture—it will have to be attributed to the community. In this case it is the right of the nation or of the cultural group that is at issue.

If this cultural view of man is accepted, it is natural to claim, as the complement of individual liberty, the right of peoples to self-determination. For if man is a cultural being, and there are significant differences between cultures, and if cultures are also reflected in differing political traditions, each people must be able to determine its own political destiny in the interests of full self-expression.

. . .

The second great change since the seventeenth century has been the gradual abandonment of atomistic premises. If the individual is regarded as self-sufficient, the right to life requires only that others refrain from attacking him. But when one considers the extent to which the very conditions of life—especially those of a fully human existence—are assured by society, it must be conceded that the right of the individual may demand not only the non-interference of others but their active assistance.

. . .

The result is that today we proclaim such rights as that to education which can only be assured by collective action. The right to education is observed only if society assumes the task of promoting it. Modern enumerations of rights therefore entail positive action. And this is what facilitates the transition from conception 'A' to conception 'B' referred to above.

These two changes, concerning collective rights and positive obligations, have radically transformed our conception of rights. They have made it far more complex and difficult to apply. The requirements deriving from different kinds of rights, both individual and collective and imposing both negative and positive obligations, come into conflict with each other. It has become much more difficult to draw up a clear and coherent list of rights that may be applied without conflict in practical situations. Moreover, the conflict between different kinds of rights is often related to a worsening social conflict. The language of rights lends itself easily to extravagance and intransigence.

Nevertheless, it seems difficult, if not impossible, to abandon this language, for it corresponds to something essential in our modern culture. It is the reflection in the political and legal fields of our fundamental conception of the human person and human dignity. It would indeed be difficult for us to renounce it.

QUESTIONS

Taylor relates the notion of rights as powers of individuals to set limits on the actions of a society, to the notion of rights as 'trump' cards defeating state action 'whenever it encroaches on [the individual's] protected sphere.' He seems to relate this idea to 'Conception A' rights, while 'Conception B' rights are associated with rights as 'fundamental social objectives' that may be expressed in a 'social' bill of rights and that require 'positive action' by the state.

Do you find this distinction helpful? A 'right to food' surely falls into 'Conception B,' but what of the right to vote in elections, or to a fair trial, or to life? Might those too be seen as 'fundamental social objectives' and require 'positive action' by the state? What kind of action?

KARL KLARE, LEGAL THEORY AND DEMOCRATIC RECONSTRUCTION

25 U. of Brit. Colum. L. Rev. 69, (1991), at 97.

[The author here discusses the appropriate place of 'rights' in the formal legal structures and guarantees and in the legal–political discourse of the postcommunist states of Central-East Europe. He concludes that 'it seems obvious that postcommunist law should be founded upon an explicit charter of human rights guarantees. How could there be any doubt of the central place of rights in democratic legal reconstruction?' Nonetheless, Klare notes, recent debates among western legal scholars have developed a serious 'critique of rights,' and he undertakes to summarize 'some of the major lines of criticism advanced by the rights skeptics.' The following excerpts deal with two aspects of this critique and Klare's responses thereto.]

A second branch of rights skepticism concerns the efficacy and limitations of the rights tradition in relationship to social change. . . . [T]he skeptics call attention to certain self-imposed limitations internal to rights discourse stemming from its embrace of the public/private distinction. Rights thinking has predominantly concerned the relationship between the individual and the state. As traditionally understood, the human rights project is to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power.

Unquestionably, a just society requires such protections, but human freedom can also be invaded or denied by nongovernmental forms of power, by domination in the so-called 'private sphere'. Human dignity is denied by *de jure* racial segregation, but it is also denied by employers who discriminate on the basis of race, Laws barring adult homosexuals from privately and consensually expressing their sexuality deny freedom and autonomy, but so, too, do homophobic social practices such as housing discrimination and gay bashing. The expression of dissent can be inhibited by the cost of media access as well as by abuses of state power. Rights charters almost invariably concern restrictions on state power and therefore leave intact many forms of 'private' domination, including hierarchies of class, race, gender and sexual preference. The skeptics argue that the vision of freedom embodied in the rights tradition is for this reason partial and incomplete.

Given the injustices committed by the Stalinist regimes, it is understandable that the first priority of postcommunist lawyers is to guard against the abuse of state power. . . . Granting this, the argument goes, to realize freedom in all aspects of life, to establish arrangements in all social contexts that will be committed to human dignity, self-realization and equality, requires a deep transformation, in both East and West, not only of governmental but also of non-state institutions and practices that are left untouched by conventional human rights doctrine. A strong version of rights skepticism suggests that the fixation on the

individual/state relationship in the rights tradition actually diverts intellectual and political resources from other, needed approaches to social justice.

Here again, it is conceivable that rights discourse can be transformed to accommodate these criticisms; that we can articulate a panoply of self-determination rights in social and economic life. . . .

This brings us to a third aspect of contemporary rights skepticism, the so-called 'indeterminacy critique'. In its strongest versions, rights discourse purports to supply a political criteria for evaluating institutions and practices and for resolving social conflict. The very power of a claim of right is that it is founded upon universal values, that it transcends all particular understandings of appropriate social organization. A successful rights claimant trumps majoritarian sentiment regarding the good life. . . .

. . .

. . . The initial problem is that many of the most important rights concepts are formulated at an exceedingly high level of abstraction. Because human rights concepts tend to be very elastic and open-ended, they are capable of being given a wide range of meanings, including inconsistent meanings. Take freedom of speech, for example. One meaning is the right to dissent and to criticize the powers that be. Yet the right to free speech can also be given quite a different meaning, as, e.g., in the American cases barring government from trying to prevent the distortion of the electoral process by corporate campaign contributions. In the former interpretation, free speech permits individuals to unfreeze hierarchy and open up political debate, whereas in the latter case, the right to free speech is mobilized to reinforce domination by entrenched power. Or, take the right to privacy, the right to be left alone by government with regard to certain intimate matters. For most feminists, this connotes a right to choice about reproduction and abortion. But the right to privacy regarding intimate personal matters has long had a less savory invocation as a justification for why courts should not intervene to prevent or punish domestic violence. An interesting aspect of rights-fixated political cultures, such as we have in the United States, is that anybody and everybody can and does formulate their political claims in rights terms.

Thus, rights concepts are sufficiently elastic so that they can mean different things to different people. People who seek to reinforce hierarchy and perpetuate domination can speak the language of rights, often with sincerity. But there is an even deeper problem. Even those who would consistently invoke rights in the service of self-determination, autonomy and equality find that rights concepts are internally contradictory. That is because, like all of legal discourse, rights theory is an arena of conflicting conceptions of justice and human freedom. For example, democratic thinking, particularly within the liberal tradition, contains conceptions of rights as freedom of action and also of rights as guarantors of security. It contains conceptions of rights as protection from state power and also of rights to invoke state power to protect the individual from powerful private groups. Proponents of democracy have advanced

conceptions of rights to freedom of association and also conceptions of rights of excluded minorities to insist on membership in important groups. Rights theories contain conceptions of equality as identical treatment of those similarly situated and also theories of equality as protection for those not similarly situated. Human rights discourse holds that its claims are universal yet also embodies a belief in the right of all peoples to cultural autonomy and self-determination.

Thus, choices must be made in elaborating any structure of human rights guarantees, just as in the course of specifying market structures, and the choices bear socially and politically significant consequences.

The problem is that rights discourse itself does not provide neutral decision procedures with which to make such choices.

. . .

. . . My point here is that, by itself, rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. In order to resolve rights conflicts, it is necessary to step outside the discourse. One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts.

If the processes of concretizing rights concepts and of resolving rights conflicts extend beyond the traditional discourse of rights onto the terrain of social theory and political philosophy, it follows that rights rhetoric must be politicized in order to serve as a foundation for legal reconstruction. . . . Surely it is insufficient to think of human rights practice in terms of obtaining the correct list of rights and then enacting them into a code. Rather, postcommunist lawyers must think of rights discourse and rights charters as relatively open media in which to advance visions of socially desirable institutions and practices. That is, the rights foundation of legal reconstruction is an invitation to make political philosophy, not only in promulgating the initial charters, but at every step along the way of articulating and interpreting rights concepts and filling them with concrete legal and institutional meaning. But this revised, 'politicized' conception of human rights discourse and practice in postcommunist legal reconstruction sits uneasily with the idea of an autonomous rule of law that is ostensibly the basis of the whole enterprise.

. . .

NOTE

Klare describes as one branch of 'rights skepticism' the belief that 'human freedom can also be invaded or denied by non-governmental forms of action, by

domination in the so-called "private sphere".' Human rights, however, are principally associated with checks on the public sphere of state action. This theme of the distinction between the private and public recurs throughout the coursebook. It is developed more systematically in Chapter 13 on women's rights, and figures in the Note and Questions at the end of Section D of this chapter.

A number of different understandings about rights—their nature, content and consequences—appear in the readings in Chapters 3 and 4. Consider the following lists, setting forth in the left column assertions or understandings about rights that typify one important tradition of rights discourse within liberal societies against a list in the right column of polar understandings. These lists are relevant to the analysis of issues of cultural relativism in Sections B to D of this chapter. Consider these polar characterizations of 'rights' as:

inalienable	socially constructed, given and taken
absolute	contingent
universal	particular, culturally specific
eternal, ahistorical	time bound, historicist
rights based on equal human dignity	rights based on utility, power

QUESTION

Klare stresses that 'choices must be made in elaborating any structure of human rights guarantees . . . and the choices bear socially and politically significant consequences. The problem is that rights discourse itself does not provide neutral decision procedures with which to make such choices. . . . In order to resolve rights conflicts, it is necessary to step outside the discourse.'

Apply this observation to a conception as basic as the 'right to life.' What 'choices' about the meaning of this conception are before legislatures, courts or advocates elaborating this right, and through what methods or processes can differences among those choices be resolved? What does Klare mean by the necessity to 'step outside the discourse'?

NOTE

The following two readings comment on duty-oriented rather than rights-oriented ordering through law and cultural tradition. Cover comments on the legal culture of Judaism with its stress on obligations imposed by God rather than on rights. He suggests historical reasons why Western states and Judaism developed in these different ways. Kenyatta describes aspects of the education of the young in the Gikuyu people in Kenya, particularly the inculcation of elements of social obligations and duty. Although the cultural and religious contexts and the content of the duties referred to are radically different in these two readings, they both suggest important consequences of an orientation towards duty/obligation.

Note that the duties/obligations referred to in these readings are *not* the same as duties within a *scheme of rights* that are understood as correlative to the described rights. For example, your basic right to be free from torture imposes a correlative (that is, corresponding) duty on the state not to torture. The following readings talk of duties imposed on *individuals* rather than on the state or other collective entity (and also distinct from the characteristic duties of individuals to respect the rights of other individuals, as expressed in state tort or criminal law). A distant analogy to such imposition of duties on individuals is provided by Article 29(1) of the UDHR. But the language of individual duty in the universal human rights system is rare. A closer analogy to the present readings, particularly the excerpts from Kenyatta, is provided by the African Charter on Human and Peoples' Rights, examined at p. 689, *infra*.

ROBERT COVER, OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER

5 J. of Law and Relig. 65 (1987).

I. Fundamental Words

Every legal culture has its fundamental words. When we define our subject this weekend as human rights, we also locate ourselves in a normative universe at a particular place. The word 'rights' is a highly evocative one for those of us who have grown up in the post-enlightenment secular society of the West. . . .

Judaism is, itself, a legal culture of great antiquity. It has hardly led a wholly autonomous existence these past three millennia. Yet, I suppose it can lay as much claim as any of the other great legal cultures to have an integrity to its basic categories. When I am asked to reflect upon Judaism and human rights, therefore, the first thought that comes to mind is that the categories are wrong. I do not mean, of course, that basic ideas of human dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to 'human rights.' The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system's 'rights', is the word 'mitzvah' which literally means commandment but has a general meaning closer to 'incumbent obligation.'

Before I begin an analysis of the differing implications of these two rather different key words, I should like to put the two words in a context—the contexts of their respective myths. For both of us these words are connected to fundamental stories and receive their force from those stories as much as from the denotative meaning of the words themselves. The story behind the term 'rights' is the story of social contract. The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security. The myth makes the collective

arrangement the product of individual choice and thus secondary to the individual. 'Rights' are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else. Rights are traded for collective security. But some rights are retained and, in some theories, some rights are inalienable. In any event the first and fundamental unit is the individual and 'rights' locate him as an individual separate and apart from every other individual.

I must stress that I do not mean to suggest that all or even most theories that are founded upon rights are 'individualistic' or 'atomistic.' Nor would I suggest for a moment that with a starting point of 'rights' and social contract one must get to a certain end. Hobbes as well as Locke is part of this tradition. And, of course, so is Rousseau. Collective solutions as well as individualistic ones are possible but, it is the case that even the collective solutions are solutions which arrive at their destination by way of a theory which derives the authority of the collective from the individual. . . .

The basic word of Judaism is obligation or mitzvah. It, too, is intrinsically bound up in a myth—the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments. In all Rabbinic and post Rabbinic embellishment upon the Biblical account of Sinai this event is the Code for all Law. All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.

. . .

What have these stories to do with the ways in which the law languages of these respective legal cultures are spoken? Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a 'Rights' movement is started. Civil rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we 'take rights seriously' we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing. . . .

Indeed, to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated or 'free' when he or she reaches maturity. Nor does she/he become *sui juris*. No, the child becomes bar or bat mitzvah, literally one who is of the obligations. Traditionally, the parent at that time says a blessing. Blessed is He that has exonerated me from the punishment of this child. The primary legal distinction between Jew and non-Jew is that the non-Jew is only obligated to the 7 Noachide commandments. . . .

The Uses of Rights and Obligations

The Jewish legal system has evolved for the past 1900 years without a state and largely without much in the way of coercive powers to be exercised upon the adherents of the faith. I do not mean to idealize the situation. The Jewish communities over the millennia have wielded power. Communal sanctions of banning and shunning have been regularly and occasionally cruelly imposed on individuals or groups. Less frequently, but frequently enough, Jewish communities granted quasi-autonomy by gentile rulers, have used the power of the gentile state to discipline dissidents and deviants. Nonetheless, there remains a difference between wielding a power which draws on but also depends on preexisting social solidarity, and, wielding one which depends on violence. . . .

In a situation in which there is no centralized power and little in the way of coercive violence, it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary. The myth of divine commandment creates that web. . . . It was a myth that created legitimacy for a radically diffuse and coordinate system of authority. But while it created room for the diffusion of authority it did not have a place for individualism. One might have independent and divergent understandings of the obligations imposed by God through his chosen people, but one could not have a world view which denied the obligations.

The jurisprudence of rights, on the other hand, has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories. Certainly, it may be argued, it has been essential to counterbalance the development of the state with a myth which a) establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security—i.e., one must tell a story about the States's utility or service to us, and b) potentially justifies individual and communal resistance to the Behemoth. It may be true as Bentham so aptly pointed out that natural rights may be used either apologetically or in revolutionary fashion, and there is nothing in the concept powerful enough analytically to constrain which use it shall be put to. Nevertheless, it is the case that natural right apologies are of a sort that in their articulation they limit the most far-reaching claims of the State, and the revolutionary ideology that can be generated is also of a sort which is particularly effective in countering organic statist claims.

Thus, there is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the western nation state while the ideology of mitzvoth or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries.

. . .

. . . [T]he Maimonides system contrasts the normative world of mitzvoth with the world of vanity—hebel. It seems that Maimonides, in this respect, as in so many others has hit the mark. A world centered upon obligation is not,

really cannot be, an empty or vain world. Rights, as an organizing principle, are indifferent to the vanity of varying ends. But mitzvoths because they so strongly bind and locate the individual must make a strong claim for the substantive content of that which they dictate. The system, if it's content be vain, can hardly claim to be a system. The rights system is indifferent to ends and in its indifference can claim systemic coherence without making any strong claims about the fullness or vanity of the ends it permits.

. . .

JOMO KENYATTA, FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU

(1965), at 109.

[These excerpts are taken from a description by Kenyatta, who later became the first post-colonial president of Kenya, of the Gikuyu people (often rendered in English as 'Kikuyu') in that country. The excerpts stress elements of duty inculcated in Gikuyu children, and appear in Chapter 5, 'System of Education.']

[The children] are also taught definitely at circumcision the theory, as it were, of respect to their parents and kinsfolk. Under all circumstances they must stay with them and share in their joys and sorrows. It will never do to leave them and go off to see the world whenever they take the notion, especially when their parents are in their old age. They must give them clothes, look after their garden, herd their cattle, sheep and goats, build their grain stores and houses. It thus becomes a part of their outlook on life that their parents shall not suffer want nor continue to labour strenuously in their old age while their children can lend a hand and do things to give them comfort.

This respect and duty to parents is further emphasised by the fact that the youth or girl cannot advance from one stage to another without the parent's will and active assistance. The satisfaction of all a boy's longings and ambitions depends on the father's and family's consent. . . .

. . .

The teaching of social obligations is again emphasised by the classification of age-groups to which we have already referred. This binds together those of the same status in ties of closest loyalty and devotion. Men circumcised at the same time stand in the very closest relationship to each other. When a man of the same age-group injures another it is a serious magico–religious offence. They are like blood brothers; they must not do any wrong to each other. It ranks with an injury done to a member of one's own family. The age-group (*riika*) is thus a powerful instrument for securing conformity with tribal usage. The selfish or reckless youth is taught by the opinion of his gang that it does

not pay to incur displeasure. He will not be called to eat with the others when food is going. He may be put out of their dances, fined, or even ostracised for a time. If he does not change his ways he will find his old companions have deserted him.

. . . The age-groups do more than bind men of equal standing together. They further emphasise the social grades of junior and senior, inferior and superior. We see the same principle in evidence all through the various grades. . . .

Owing to the strength and numbers of the social ties existing between members of the same family, clan and age-group, and between different families and clans through which the tribe is unified and solidified as one organic whole, the community can be mobilised very easily for corporate activity. House-building, cultivation, harvesting, digging trap-pits, putting up fences around cultivated fields, and building bridges, are usually done by the group; hence the Gikuyu saying: '*Kamoinge koyaga ndere*,' which means collective activities make heavy tasks easier. In the old days sacrifices were offered and wars were waged by the tribe as a whole or by the clan. Marriage contracts and ceremonies are the affairs of families and not of individuals. Sometimes even cattle are bought by joint effort. Thus the individual boy or girl soon learns to work with and for other people. An old man who has no children of his own is helped by his neighbour's children in almost everything. His hut is built, his garden dug, firewood is cut and water is fetched for him. If his cattle, sheep or goats are lost or in difficulties the children of his neighbour will help to bring them back, at great pains and often at considerable risk. The old man reciprocates by treating the children as though they were his own. Children learn this habit of communal work like others, not by verbal exhortations so much as by joining with older people in such social services. . . . All help given in this way is voluntary, and kinsfolk are proud to help one another. There is no payment or expectation of payment. They are well feasted, of course. This is not regarded as payment, but as hospitality. The whole thing rests on the principle of reciprocal obligations. It is taken for granted that the neighbour whom you assist in difficulty or whose house you help to build will do the same for you when in similar need. Those who do not reciprocate these sentiments of neighbourliness are not in favour. . . .

. . .

The selfish or self-regarding man has no name or reputation in the Gikuyu community. An individualist is looked upon with suspicion and is given a nickname of *mwebongia*, one who works only for himself and is likely to end up as a wizard. He may lack assistance when he needs it. . . .

In the Gikuyu community there is no really individual affair, for every thing has a moral and social reference. The habit of corporate effort is but the other side of corporate ownership; and corporate responsibility is illustrated in corporate work no less than in corporate sacrifice and prayer.

In spite of the foreign elements which work against many of the Gikuyu

institutions and the desire to implant the system of wholesale Westernisation, this system of mutual help and the tribal solidarity in social services, political and economic activities are still maintained by the large majority of the Gikuyu people. It is less practised among those Gikuyu who have been Europeanised or detribalised. The rest of the community look upon these people as mischief-makers and breakers of the tribal traditions, and the general disgusted cry is heard: '*Mothongo ne athogonjire borori*,' i.e. the white man had spoiled and disgraced our country.

. . .

The striking thing in the Gikuyu system of education, and the feature which most sharply distinguishes it from the European system of education, is the primary place given to personal relations. Each official statement of educational policy repeats this well-worn declaration that the aim of education must be the building of character and not the mere acquisition of knowledge. . . .

. . .

QUESTIONS

1. 'A duty-based social order seems inherently less subject to universalization (with respect to the duties imposed on individuals) than a rights-based social order (with respect to the rights attributed to individuals). That is, the content of duties (obligations toward elders, toward the community, toward God) seem to be very particular and bound to a given context, a product of a given religion or political or social culture, whereas individuals' rights seem to be more divorced from a particular context and can therefore be stated more abstractly.' Do you agree? Any examples?

2. '"Individual rights" necessarily imply equality among all rights holders, which is to say among all members of society. This in fact is what the contemporary human rights instruments declare. To the contrary, duties can be (and frequently are) defined so as to impose hierarchy, status, and discrimination in a given social order.' Do you agree? Any examples?

3. 'Different from a regime of rights, a regime of duties intrinsically exerts an inward, centripetal force. It draws individual duty-bearers into the society, connects them intricately with other individuals and the community in a variety of ways, blurs the separate identity of the individual from society, and leads to a more communal and collective structure of life.' Do you agree?

4. Note that Article 2(3) of the ICCPR requires states to provide all persons whose rights have been violated with 'an effective remedy,' and to develop particularly the possibilities of 'judicial remedy.' Do rights imply a preference for or even require individual (judicial or other) remedies (cf. Taylor, p. 173, *supra*)

against the state, whereas a regime of individual duties is less likely to provide such remedies?

5. Can you imagine instead of a human rights movement a 'human duties movement' that would be informed by similar values and goals? How would its constitutional foundation, a Universal Declaration of Human Duties, read?

NOTE

As several prior readings underscore, rights as a fundamental language of law, politics and morals grew within and are associated with the Western tradition of liberalism. This is not to say that the values and goals expressed through rights language, particularly through the kinds of rights that we have seen in the UDHR and the ICCPR, are exclusive to that tradition. Many of them, may be expressed through other languages as well.

As background for the discussion of cultural relativism in Section B, it will be helpful to have in mind some characteristics of liberal political thought and the liberal state. The following Comment provides that background.

COMMENT ON SOME CHARACTERISTICS OF THE LIBERAL POLITICAL TRADITION

Observers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights that it declares, stems principally from the liberal tradition of Western thought. That observation lies at the core of argument by states from non-Western parts of the world that some basic provisions in instruments like the UDHR or ICCPR are inappropriate and inapplicable to their circumstances. Those instruments, the argument goes, purport to give a genuinely universal expression to certain tenets of liberal political culture. But those tenets stem from and should be applied only to states within this Western political tradition. Thus liberal thought and practices inform much contemporary debate about the meaning and relevance of cultural relativism.

For the purpose of facilitating some comparisons between liberalism and the human rights movement, this Comment sketches basic characteristics that observers would associate with the different expressions of the liberal tradition during this century. The Comment has a limited historical scope, not reaching back to the origins of liberal thought in earlier centuries and the Age of Enlightenment, or to the significant changes in that body of thought in the nineteenth century.

The liberal political tradition has never been and surely is not today a

monolithic body of thought requiring one and only one form of government. It is not then surprising that the very term 'liberal' has assumed different meanings, from the liberal economics associated with the *laissez faire* school of the nineteenth century to contemporary associations of liberalism in a country like the United States with a more active and engaged state concerned with the general welfare of the population and with regulation of the market and non-governmental actors—the modern regulatory and welfare state so familiar to Western states.

The contemporary expressions of liberal thought by theorists like Dworkin or Rawls depart significantly from the writings of the classical theorists influencing its development, like Bentham, Kant, Locke, Mill, Rousseau and Tocqueville. The differences among such classical writers are reflected in the distinct versions of liberal ideology and the varied structures and practices of self-styled liberal democracies. This variety and ongoing transformation suggest caution in making inclusive and dogmatic comparisons between, say, liberalism and the human rights movement, which has during this last half century generated its own internal conflicts and has undergone significant change.

No characteristic of the liberal tradition is more striking that its emphasis on the individual. Liberal political theory and the constitutive instruments of many liberal states frequently employ basic concepts or premises like the dignity and autonomy of the individual, and respect that is due the individual. The vital concept of equality informs these terms: the equal dignity of all human beings, the equal respect to which individuals are entitled, the equal right of all men and women for self-realization. It is not then surprising that equal protection and equal opportunities without repressive discrimination constitute so cardinal a value of contemporary liberalism. In general, the protection of minorities against invidious discrimination continues to be a central concern for the liberal state.

Such stress on the individual informs basic justifications for the state. The liberal state rests on, its legitimacy stems from, the consent of the people within it. Within liberal theory, that consent is both hypothetical, as in the notion of a social contract among the inhabitants of a state of nature to create the political state, and institutionalized through typical practices such as periodic elections. Such ideas are explicit in the basic human rights instruments. Note Article 21 of the UDHR ('The will of the people shall be the basis of the authority of government') and Article 25 of the ICCPR (the importance of elections 'guaranteeing the free expression of the will of the electors').

From the start, liberal theory has been attentive to the risk of abuse of the individual by the state. The rights language that is found in constitutional bills of rights, statutory provisions for basic rights, political traditions not expressed in positive law, and writings of theorists and advocates responds to this need for protection against the state. The rights with which the individual is endowed limit governmental power—the right not to be tortured, not to be discriminated against on stated grounds. Historically the protection of the

property right against interference by the state and others played a major role in liberal theory.

Sometimes such rights are referred to as 'negative': the hands-off or non-interference rights (don't touch), or the right to be interfered with (as by arrest, imprisonment) only pursuant to stated processes. It is partly the prominence of the rights related to notions of individual liberty, autonomy and choice and of the right related to property protection that produces the sharp division in much liberal thought between the state and individual, between government and non-governmental sectors, between what are often referred to as the public and private realms or spheres of action.

This conception of negative rights, and of negative freedom as the absence of external constraints, together with the historical alliance of political liberalism with conceptions of a free market and *laissez faire*, led to liberalism's early emphasis on sharply limited government. The tension between that early ideology and background, and the growing emphasis over more than a century on the welfare and regulatory functions of the modern liberal state, remains central to much political and moral debate today.

That debate is related to an opposition that has developed in liberal thought between *negative* rights or negative liberty (freedom), and *positive or affirmative* rights or liberty (freedom). Those terms have acquired different meanings, to be explored in this and later chapters. For example, 'positive rights' have been described as entitlements of individuals that the state not simply respect the 'private' sphere of inviolability of the individual (the negative rights), but also 'act' in particular ways to benefit the individual, perhaps by providing education or health care. In this sense, the 'positive rights' of individuals such as the right to education or health care impose duties on the state to provide the necessary institutions or resources.

In a different and more ample sense, *positive liberty* has been described as 'liberty to' as opposed to 'liberty from'—for example, the liberty to realize oneself, to satisfy one's real interests, to achieve individual self-determination. One form of such positive liberty facilitated by the state would be governmental policies and institutions fostering the active political participation of citizens in electoral and other processes that help to determine the allocation ways in which public power is executed. Through such positive liberty, the individual can participate in the creation and recreation of self and state. The state readily and naturally becomes involved in this search by individuals for positive liberty, characteristically by creating the conditions that make the individual quest more likely to succeed, but at the dangerous authoritarian extreme by attempting to define the content of genuine self-realization and by coercing individuals to achieve it.

What an individual should seek in life, what idea of the good in life that individual holds, how the individual seeks self-realization, remain in the liberal state matters of individual choice to which both negative and positive conceptions of rights and freedom are relevant. That state must be open to a variety of ends, a variety of conceptions of the good, that individuals will

express. The liberal state must then be a pluralist state. Its structure of rights, going beyond the rights to personal security and equal protection to include rights of conscience and speech and association, facilitates and protects the many types of diversity within pluralism, as well as ongoing argument in the public arena about the forms and goals of social and political life.

Precisely what governmental structures best realize such liberal principles is among the disputed features of the liberal tradition. The liberal state is closely associated with the ideal of the rule of law, hence with some minimum of separation of government powers such as an independent judiciary that can protect individual rights against executive abuse. The fear of tyranny of the majority lies at the foundation of the argument for restrictions on governmental power through a constitutional bill of rights limiting or putting conditions on what government can do. How to enforce that bill of rights against the executive and legislature has never achieved a consensus among liberal states. They vary in the degree to which they subject legislative action to judicial review, hence in the degree to which governmental power, even if supported by a freely voting majority of the population, can abridge or transform or abolish rights.

The liberal tradition continues to be subjected to deep challenges from within and without, and thus continues its process of evolutionary change. During and particularly after the cold war, its interaction with states of the developing world posed complex issues in relation to efforts of some of those states to develop new forms of government and economy. For example, the relationships in the former Communist states of Central and East Europe among liberalism, privatization and property rights, markets and regulation thereof, and the provision of welfare remain ambiguous and in flux. More generally, questions of the relationship between liberalism and a market economy, or liberalism and ethnic nationalism, have assumed heightened prominence. In a Western country such as the United States, liberalism responds to challenges from diverse perspectives such as communitarian ideas, civic republicanism, and multiculturalism (cultural particularism).

Some of these contemporary challenges underscore a continuing debate within liberalism, the two sides to which can lead to significantly different political and social orders: *individual* or *group* identity as primary. The group may be—to use the conventional porous and overlapping terms—national, linguistic, religious, cultural, ethnic. At the extreme, it is not compatible with the liberal creed for a governing order to subordinate individuals to the demands of such kinds of groups. With respect to the core values of liberalism, individual rights remain lexically prior to the demands of a culture or group for collective identity or group solidarity.

Nonetheless, the liberal state is hardly hostile to groups as such. It is not blind to the influence of groups (religious, cultural, ethnic) or of group and cultural identity in shaping the individual. Indeed, the political life of modern liberal democracies is largely constituted by the interaction, lobbying and other political participation of groups, some of which are natural in their

take a violation seriously unless it is 'gross' or 'systematic' and that this reflects judgments made on political or prudential grounds. Even if that is true, it is not inconsistent with recognizing that States also have an obligation to recognize that the 'domestic jurisdiction' principle merits consideration in determining whether an infringement of a right should be taken up by others. . . .

QUESTIONS

1. Compare the preceding comment by Schachter with §702 of the Restatement, p. 145, *supra*. Are they to the same effect?

2. Does the *Tunis–Morocco* opinion leave any room for some eternal, 'essentialist' conception of domestic jurisdiction or state sovereignty, such that matters within it are forever immune from international regulation? How would you determine the content of such a conception—through what method, under what assumptions—and what difficulties would you encounter in doing so?

3. Consider the following thoughts: 'Did the human rights movement erode sovereignty and domestic jurisdiction? The answer is "yes, of course" and "no, of course not," depending on what you're referring to. The "yes" answer is almost tautological. First, human rights ideas are distanced from state behavior, way above it in terms of moral norms, hence very critical, utopian. Second, they are meant to control conduct within a state involving relations between a government and citizens. Put those two notions together, and sovereignty is no longer what it was. But have human rights norms seriously affected state behavior? That's where the "no" answer comes in.' Comment.

ADDITIONAL READING

Anthony D'Amato, *Domestic Jurisdiction*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 10 (1987), at 132.

4

What are Rights, Are They Everywhere, and Everywhere the Same?: Cultural Relativism

Thus far the materials have described but barely commented on the fundamental characteristic of the UDHR and ICCPR, their foundation in the rhetoric and concept of *rights*. Many view that rhetoric as unproblematic, as the central and inevitable component of a discourse about human dignity and about humane treatment of individuals by governments. Others, to the contrary, view a discourse about rights as alien and harmful, disruptive of traditional social structures. Consider the following queries:

(1) Why do we have a human rights rather than human duties movement? Why does the language of rights dominate the texts of the declarations and treaties as well as, in many states, the slogans and polemics of political debate?
(2) Is that language intrinsically superior to other possible ones. Is it essential to the values and goals of the human rights movement? Or is the currency of international human rights a matter of historical contingency, in that the postwar movement in fact found its roots in liberal rights-oriented political cultures?
(3) Do any particular characteristics or substantive content necessarily attach to the language of rights? Or are rights empty receptacles open to many different types of values and ideas—for example, a right to social stability and to ongoing tradition as opposed, say, to a right to free speech and political advocacy?
(4) Are the language of rights and the content of rights in the UDHR or ICCPR universal? Or are the values that are incorporated in these instruments particular (relative) to given cultures or states? If so, are there ways of bridging the differences among cultures or states so that all are bound to recognize the same rights?

Such are the questions that we encounter in Chapter 4. The first two sets of questions are addressed in Section A, while Sections B, C and D explore the last two sets under the broad rubric of cultural relativism.

an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures.

But the strong relativist position goes beyond arguing that there is—as a matter of fact, empirically—an impressive diversity. It attaches an important consequence to this diversity: that no transcendent or trans-cultural ideas of right can be found or agreed on, and hence that no culture (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on others what must be understood as its own ideas. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights movement.

On their face, human rights instruments are surely on the 'universalist' side of this debate. The landmark instrument is the *Universal* Declaration of Human Rights. The two Covenants, with their numerous states parties from all the world's regions, speak in universal terms: 'everyone' has the right to liberty, 'all persons' are entitled to equal protection, 'no one' shall be subjected to torture, 'everyone' has the right to an adequate standard of living. Even the vital limitations of certain rights on grounds of 'public health or order' or 'national security' are cast in universal terms, although their interpretation will surely differ among cultures and states. The text of these basic instruments makes no explicit concession to cultural variation. (The regional instruments examined in Chapter 10, particularly the African Charter on Human and Peoples' Rights, do express cultural variation.)

To the relativist, these instruments and their pretension to universality may suggest nothing so strongly as the arrogance or 'cultural imperialism' of the West, given the West's traditional urge—expressed for example in political ideology (liberalism) and in religious faith (Christianity)—to view its own forms and beliefs as universal, and to attempt to universalize them. Moreover, the push to universalization of norms is said by some relativists to destroy diversity of cultures and hence amounts to another form of homogenization in the modern world. But the debate between these two positions follows no simple route. It is open to a range of views and strategies that the materials in Sections B and C explore.

During the cold war, such debates (sometimes no more than highly politicized accusations, routine polemics) were dominantly between the Communist world (and its sympathizers) and the Western democracies. The Western democracies charged the Communist world with violating many basic rights, particularly those of a civil and political character. That world replied both by charging the West with violations of the more important economic and social rights, and by asserting that the political and ideological structures of Communist states pointed toward a different understanding of rights.

That debate died more-or-less together with the Soviet Union. Today it continues in different form, often in North–South (or West–East) framework, or in a religious (West–Islam) framework, or more broadly between developing (Third World) and developed (Western–Northern) countries. It also includes non-state actors such as indigenous peoples.

NOTE

The two introductory readings come out of the rich anthropological literature on cultural relativism. Anthropologists have long had to wrestle with these issues, in the context of their ethnographic writings about diverse cultures with practices and values often departing radically from the West and subject to extreme censure from the perspective of Western moral thought. Such writings seek to describe, explain, understand the alien culture, within the framework of one or another theoretical perspective or methodology. Hence the role of the anthropologist has traditionally been very different from that of the human rights investigator and advocate who assesses a state's conduct against international standards.

Nonetheless, what should be the stance of the anthropologist toward practices and values that are offensive from a Western viewpoint? Ought she to be critical of them, or to the contrary be tolerant and accepting, or simply be distant and neutral while in the role of observer and explainer? If critical, under what standards would she criticize?

Most of the anthropological debate on such issues developed before the international human rights movement became prominent in the 1970s, and makes no reference to that movement. The Statement on Human Rights, p.198, *infra*, is an exception to this observation. Moreover, bear in mind in the following readings that the human rights movement addresses primarily states—individual rights against the state—whereas ethnographic writings involve peoples or tribes or societies, all non-state (often sub-state) entities. Hence these rich and suggestive anthropological writings are relevant to cultural relativism in human rights settings more by analogy than direct application.

ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY

(1983), at 8.

. . . Herskovits wrote that cultural relativism developed because of

> the problem of finding valid cross-cultural norms. In every case where criteria to evaluate the ways of different peoples have been proposed, in no matter what aspect of culture, the question has at once posed itself: 'Whose standards?' . . . [T]he need for a cultural relativistic point of view has become apparent because of the realization that there is no way to play this game of making judgments across cultures except with loaded dice.

Ethical relativism is generally conceived as standing at the opposite pole from absolutism, which is the position that there is a set of moral principles

that are universally valid as standards of judgment. One absolutist ethical theory is the traditional Christian view that right and wrong are God-given, and that all people may be judged according to Christian values. A wide range of purely secular ethical theories have also developed. . . .

It is the *content* of moral principles, not their existence, that is variable among human beings. It seems that all societies have some form of moral system, for people everywhere evaluate the actions of kinsmen, neighbors, and acquaintances as virtuous, estimable, praiseworthy, and honorable, or as unworthy, shameful, and despicable. These evaluations take objective form as sanctions, such as open praise or rebuke; and in extreme cases, violence and execution. The ubiquity of the moral evaluation of behavior apparently is a feature which sets humanity apart from other organisms. . . .

. . .

Chapter 4. The Call for Tolerance

. . . By and large ethical relativists have been anthropologists and not philosophers, and it is chiefly in the anthropological literature that we find arguments in its favor. Two people in particular have stood out as its proponents in the United States, Melville Herskovits and Ruth Benedict, both of whom were students of Boas. Almost without exception, the philosophers are disapproving, for usually they mention ethical relativism only to criticize it while in the course of arguing some other ethical theory.

At least two very different versions of ethical relativism have been advanced by anthropologists, and these need to be distinguished since they have their own faults and virtues. The first is sometimes classified (erroneously, as we shall see) as a form of skepticism, and I will call it the Boasian version of ethical relativism. . . . Skepticism in ethics is the view that nothing is really either right or wrong, or that there are no moral principles with a reasonable claim to legitimacy. It has been suggested that the Boasian position differs from this on one main point: Boasian relativism implies that principles of right and wrong do have some validity, but a very limited one, for they are legitimate only for the members of the society in which they are found. The values of the American middle class are valid for middle-class Americans, but not for the Trobriand Islanders, and vice versa.

Philosophers have presented a wide range of arguments against Boasian ethical relativism. . . . According to this argument, Boasian relativism is in essence a moral theory that gives a central place to one particular value. . . . It contains a more or less implicit value judgment in its call for tolerance: it asserts that we *ought* to respect other ways of life. . . . Herskovits wrote: 'The very core of cultural relativism is the social discipline that comes of respect for differences—of mutual respect. Emphasis on the worth of many ways of life, not one, is an affirmation of the values in each culture.

. . .

. . . The call for tolerance was an appeal to the liberal philosophy regarding human rights and self-determinism. It expressed the principle that others ought to be able to conduct their affairs as they see fit, which includes living their lives according to the cultural values and beliefs of their society. Put simply, what was at issue was human freedom.

The call for tolerance (or for the freedom of foreign peoples to live as they choose) was a matter of immediate, practical importance in light of the pattern of Western expansion. As Western Europeans established colonies and assumed power over more and more of the globe, they typically wanted both to Christianize and civilize the indigenous peoples. Christian rituals were fostered or imposed, and 'pagan' practices were prohibited, sometimes with force. The practice of plural marriage was condemned as a barbaric custom, and Western standards of modesty were enforced in an attempt to improve morals by covering the body. In the Southwest of North America, Indians who traditionally had lived in scattered encampments were made to settle in proper villages like 'civilized' people. The treatment of non-Western societies by the expanding nations of the West is a very large blot on our history, and had the Boasian call for tolerance—and for the freedom of others to define 'civilization' for themselves—been heard two or three centuries earlier, this blot might not loom so large today.

. . .

To develop a moral theory around the principle of tolerance raises the need to justify that principle: what reasons or grounds can be given to make the case that cultural differences ought to be respected? . . . The relativists make the error of deriving an 'ought' statement from an 'is' statement. To say that values vary from culture to culture is to describe (accurately or not) an empirical state of affairs in the real world, whereas the call for tolerance is a value judgment of what ought to be, and it is logically impossible to derive the one from the other. The fact of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill-health.

Let us assume that we do find a set of values shared by all cultures. Would the relativist want to claim that these moral principles are legitimate ones for the world to embrace? What if the universal standard we discover is that all people are intolerant of other cultures—which is not very far-fetched? Clearly the ethical relativists would not throw aside their value of tolerance, but they would be forced to recognize that it is an error to think that the presence or absence of universal values among human cultures is a suitable base on which to build a moral philosophy.

. . .

Chapter 5: The Limits of Tolerance

The Boasian version of ethical relativism is subject to even harsher criticism . . . in its commitment to the status quo. The approval it enjoins seems to be absolute, leaving no room for judgment. . . .

The moral principle of tolerance that is proposed by Boasian relativism carries the obligation that one cannot be indifferent toward other ways of life—it obligates us to approve what others do. So if missionaries or government officials were to interfere in Yanomamo affairs for the purpose of reducing violence, the relativist would be obligated to oppose these moves in word if not action. Similarly, by the strict logic of relativism, Chagnon was wrong to insist that the mother feed her emaciated child. The Boasian relativist is placed in the morally awkward position of endorsing the infant's starvation, the rape of abducted women, the massacre of whole villages. . . .

Chapter 6. A Growing Disaffection

. . .

We can now understand why ethical relativism has fallen on such hard times in spite of the resurgence of pessimism during the 1960s and later. First, it has been the experience of most anthropologists that non-Western peoples (and especially Third World nations) want change, at least to some extent: second, it is clear that they are often disadvantaged if it does not come; third, anthropologists by and large have altered their thinking about the relativity of material interests and improvement: most today consider these to be general values that can be applied throughout the world.

Not only has relativism fallen on hard times, it has become the subject of angry criticism, much of it from the Third World, which tends to conceive anthropologists as conservative in their attitudes toward change and therefore as promoting the subservience of the underdeveloped nations. . . .

. . .

Whatever the cause, according to the radical critique, relativism has played directly into the hands of the oppressors throughout the world by its tacit support of the status quo. The relativists have not recognized that the exotic cultures to which they grant equal validity are poverty-stricken, powerless, and oppressed. William Willis comments that the relativist 'avoids the distress and misery' of foreign peoples who are 'cringing and cursing at the aggressive cruelty' of the Western nations (p. 126). This avoidance of the matter of oppression 'helps explain the lack of outrage that has prevailed in anthropology until recent years.' Willis writes: 'Since relativism is applied only to "aboriginal" customs, it advises colored peoples to preserve those customs that contributed to initial defeat and subsequent exploitation. . . . Hence, relativism defines the good life for colored peoples differently than for white people, and the good colored man is the man of the bush' (p. 144). Instead of leaving cultures as they are, as museum pieces, we should help to bring about change—or, better, we should help the oppressed to bring about change.

. . .

AMERICAN ANTHROPOLOGICAL ASSOCIATION, STATEMENT ON HUMAN RIGHTS

49 Amer. Anthropologist No. 4, 539 (1947).

[In 1947, the Commission on Human Rights created under the UN Charter was considering proposals for a declaration on basic human rights. Ultimately the instrument took the form of the Universal Declaration of Human Rights voted by the UN General Assembly in 1948. The Statement from which the following excerpts are taken was submitted to the Commission in 1947 by the Executive Board of the American Anthropological Association. It uses several terms or designations to refer to the pending document that became the UDHR.]

The problem faced by the Commission on Human Rights of the United Nations in preparing its Declaration on the Rights of Man must be approached from two points of view. The first, in terms of which the Declaration is ordinarily conceived, concerns the respect for the personality of the individual as such and his right to its fullest development as a member of his society. In a world order, however, respect for the cultures of differing human groups is equally important.

These are two facets of the same problem, since it is a truism that groups are composed of individuals, and human beings do not function outside the societies of which they form a part. The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.

. . . How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?

. . .

If we begin, as we must, with the individual, we find that from the moment of his birth not only his behavior, but his very thought, his hopes, aspirations, the moral values which direct his action and justify and give meaning to his life in his own eyes and those of his fellows, are shaped by the body of custom of the group of which he becomes a member. The process by means of which this is accomplished is so subtle, and its effects are so far-reaching, that only after considerable training are we conscious of it. Yet if the essence of the Declaration is to be, as it must, a statement in which the right of the individual to develop his personality to the fullest is to be stressed, then this must be based on a recognition of the fact that the personality of the individual can develop only in terms of the culture of his society.

. . .

. . . Doctrines of the 'white man's burden' have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations. Rationalized in terms of ascribing cultural inferiority to these peoples, or in conceptions of their backwardness in development of their 'primitive mentality,' that justified their being held in the tutelage of their superiors, the history of the expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established.

The values of the ways of life of these peoples have been consistently misunderstood and decried. Religious beliefs that for untold ages have carried conviction and permitted adjustment to the Universe have been attacked as superstitious, immoral, untrue. And, since power carries its own conviction, this has furthered the process of demoralization begun by economic exploitation and the loss of political autonomy. . . .

We thus come to the first proposition that the study of human psychology and culture dictates as essential in drawing up a Bill of Human Rights in terms of existing knowledge:

1. *The individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences.*

There can be no individual freedom, that is, when the group with which the individual identifies himself is not free. There can be no full development of the individual personality as long as the individual is told, by men who have the power to enforce their commands, that the way of life of his group is inferior to that of those who wield the power.

. . .

2. *Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered.*

This principle leads us to a further one, namely that the aims that guide the life of every people are self-evident in their significance to that people. . . .

3. *Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.*

Ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples. What is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history. The saint of one epoch

would at a later time be confined as a man not fitted to cope with reality. Even the nature of the physical world, the colors we see, the sounds we hear, are conditioned by the language we speak, which is part of the culture into which we are born.

The problem of drawing up a Declaration of Human Rights was relatively simple in the eighteenth century, because it was not a matter of *human* rights, but of the rights of men within the framework of the sanctions laid by a single society. . . .

Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. . . .

. . .

QUESTIONS

1. From the perspective of the 1990s, how would you respond to (a) the charge that the UDHR must be a 'statement of rights conceived in terms of the values prevalent in the countries of Western Europe and America,' and (b) the charge that an attempt to impose different values on millions of peoples spread throughout the world is but another example of a Western colonialism that systematically destroyed for its own gain the cultures that it conquered and ruled?

2. Consider whether one should distinguish between arguments of cultural relativism (a) applied to indigenous peoples who are relatively isolated, often tribal, and long settled in a given territory, and who seem to be the subject of the Statement on Human Rights, and (b) applied to the contemporary state.

NOTE

Consider:

BRITANNUS (*shocked*):
Caesar, this is not proper.

THEODOTUS (*outraged*):
How?

CAESAR (*recovering his self-possession*):
Pardon him Theodotus: he is a barbarian, and thinks that the customs of his tribe and island are the laws of nature.

Caesar and Cleopatra, Act II
George Bernard Shaw

The next two articles examine cultural relativism from the perspective of two major religions and related national cultures: Hinduism and Islam. They

express two very different approaches to this issue. Pannikar concentrates on India and on the 'traditional Hindu, Jain and Buddhist conceptions of reality.' He looks for equivalents of international human rights in a given non-Western culture—in his case, in Hindu society. 'There are no trans-cultural values, for the simple reason that a value exists as such only in a given cultural context. But there may be cross-cultural values, and a cross-cultural critique is indeed possible.'

An-Na'im examines the 'Muslim world.' Committed to international human rights and of the Islamic faith, he argues that 'human rights advocates in the Muslim world must work within the framework of Islam to be effective . . . [and] should struggle to have their interpretations of the relevant [Islamic] texts adopted as the new Islamic scriptural imperatives for the contemporary world.' Those interpretations would be broadly consistent with the norms of international human rights. An-Na'im's emphasis then is on the relation between the international system and a given religious tradition, and on the need for reconciliation through reinterpretation of the tradition, rather than on the identification of cross-cultural values among different systems.

PANNIKAR, IS THE NOTION OF HUMAN RIGHTS A WESTERN CONCEPT?

120 Diogenes 75 (1982).

We should approach this topic with great fear and respect. It is not a merely 'academic' issue. Human rights are trampled upon in the East as in the West, in the North as in the South of our planet. Granting the part of human greed and sheer evil in this universal transgression, could it not also be that Human Rights are not observed because in their present form they do not represent a universal symbol powerful enough to elicit understanding and agreement?

. . .

I. The Method of Inquiry

1. *Diatopical Hermeneutics*

It is claimed that Human Rights are universal. This alone entails a major philosophical query. Does it make sense to ask about conditions of universality when the very question about conditions of universality is far from universal? Philosophy can no longer ignore this inter-cultural problematic. Can we extrapolate the concept of Human Rights, from the context of the culture and history in which it was conceived, into a globally valid notion? Could it at least *become* a universal symbol? Or is it only one particular way of expressing—and saving—the *humanum?*

Although the question posed in the title is a legitimate one, there is something disturbing in this formulation as it was given to me. At least at first glance, it would seem to offer only one alternative: either the notion of

Universal Human Rights is a Western notion, or it is not. If it is, besides being a tacit indictment against those who do not possess such a valuable concept, its introduction into other cultures, even if necessary, would appear as a plain imposition from outside. It would appear, once again, as a continuation of the colonial syndrome, namely the belief that the constructs of one particular culture (God, Church, Empire, Western civilization, science, modern technology, etc.) have, if not the monopoly, at least the privilege of possessing a universal value which entitles them to be spread over all the Earth. If not, that is, if the concept of Universal Human Rights is not exclusively a Western concept, it would be difficult to deny that many a culture has let it slumber, thus again giving rise to an impression of the indisputable superiority of Western culture. . . .

Our question is a case in point of *diatopical hermeneutics*: the problem is how, from the [locus or context] of one culture, to understand the constructs of another.[1] It is wrong-headed methodology to begin by asking: Does another culture also have the notion of Human Rights?—assuming that such a notion is absolutely indispensable to guarantee human dignity. No question is neutral, for every question conditions its possible answers.

2. *The homeomorphic equivalent*

I was once asked to give the Sanskrit equivalents of the twenty-five key Latin words supposed to be emblematic of Western culture. I declined, on the grounds that that which is the foundation of one culture need not be the foundation for another. Meanings are not transferable here. Translations are more delicate than heart transplants. So what must we do? We must dig down to where a homogeneous soil or a similar problematic appears: we must search out the *homeomorphic equivalent*—to the concept of Human Rights in this case . . . .[2]

Thus we are not seeking merely to transliterate Human Rights into other cultural languages, nor should we be looking for mere analogies; we try instead to find the homeomorphic equivalent. If, for instance, Human Rights are considered to be the basis for the exercise of and respect for human dignity, we should investigate how another culture satisfies the equivalent need—and this can be done only once a common ground (a mutually understandable language) has been worked out between the two cultures. Or perhaps we should ask how the idea of a just social and political order could be formulated within a certain culture, and investigate whether the concept of Human Rights is a particularly appropriate way of expressing this order. A traditional Confucian might see this problem of order and rights as a question of 'good

[1] [Eds.] The author means by this term 'diatopical hermeneutics' (a) the fact that the contexts or loci of different cultures that are historically unrelated 'make it problematic to understand one tradition with the tools of another,' and (b) the related attempt through hermeneutics (the method of interpretation) to bridge that gulf.

[2] The two words Brahman and God, for instance, are neither analogous nor merely equivocal (nor univocal, of course). They are not exactly equivalent either. They are homeomorphic. They perform a certain type of respectively corresponding function in the two different traditions where these words are alive.

order. To put it another way, the culture which has given birth to the concept of Human Rights should also be called upon to become a universal culture. This may well be one of the causes of a certain uneasiness one senses in non-Western thinkers who study the question of Human Rights. They fear for the identity of their own cultures.

. . .

The following parallelism may be instructive. To assume that without the explicit recognition of Human Rights life would be chaotic and have no meaning belongs to the same order of ideas as to think that without the belief in one God as understood in the Abrahamic tradition human life would dissolve itself in total anarchy. This line of thinking leads to the belief that Atheists, Buddhists and Animists, for instance, should be considered as human aberrations. In the same vein: either Human Rights, or chaos. This attitude does not belong exclusively to Western culture. To call the stranger a barbarian is all too common an attitude among the peoples of the world. . . .

2. *Cross-Cultural Critique*

There are no trans-cultural values, for the simple reason that a value exists as such only in a given cultural context. But there may be cross-cultural values, and a cross-cultural critique is indeed possible. The latter does not consist in evaluating one cultural construct with the categories of another, but in trying to understand and criticize one particular human problem with the tools of understanding of the different cultures concerned, at the same time taking thematically into consideration that the very awareness and, much more, the formulation of the problem is already culturally bound. Our question is then to examine the possible cross-cultural value of the issue of Human Rights, an effort which begins by delimiting the cultural boundaries of the concept. The dangers of cultural westocentrism are only too patent today.

a) We have already mentioned the particular historical origins of the Declaration of Human Rights. To claim universal validity for Human Rights in the formulated sense implies the belief that most of the peoples of the world today are engaged in much the same way as the Western nations in a process of transition from more or less mythical *Gemeinschaften* (feudal principalities, self-governing cities, guilds, local communities, tribal institutions . . .) to a 'rationally' and 'contractually' organized 'modernity' as known to the Western industrialized world. This is a questionable assumption. No one can predict the evolution (or eventual disintegration) of those traditional societies which have started from different material and cultural bases and whose reaction to modern Western civilization may therefore follow hitherto unknown lines.

. . .

b) We may now briefly reconsider the three assumptions mentioned above. They may pass muster, insofar as they express an authentically valid human

issue from one particular context. But the very context may be susceptible to a legitimate critique from the perspective of other cultures. To do this systematically would require that we choose one culture after another and examine the assumptions of the Declaration in the light of each culture chosen. We shall limit ourselves here to token reflections under the very broad umbrella of a pre-Modern, non-Western state of mind.

i) There is certainly a *universal human nature* but, first of all, this nature does not need to be segregated and fundamentally distinct from the nature of all living beings and/or the entire reality. Thus exclusively *Human* Rights would be seen as a violation of 'Cosmic Rights' and an example of selfdefeating anthropocentrism, a novel kind of apartheid. To retort that 'Cosmic Rights' is a meaningless expression would only betray the underlying cosmology of the objection, for which the phrase makes no sense. But the existence of a different cosmology is precisely what is at stake here. We speak of the laws of nature; why not also of her rights?[3]

Secondly, the interpretation of this 'universal human nature,' i.e. Man's self-understanding, belongs equally to this human nature. Thus to single out one particular interpretation of it may be valid, but it is not universal and may not apply to the entirety of human nature.

Thirdly, to proclaim the undoubtedly positive concept of Human Rights may turn out to be a Trojan horse, surreptitiously introduced into other civilizations which will then all but be obliged to accept those ways of living, thinking and feeling for which Human Rights is the proper solution in cases of conflict. . . .

ii) Nothing could be more important than to underscore and defend the *dignity of the human person*. But the person should be distinguished from the individual. The individual is just an abstraction, i.e. a selection of a few aspects of the person for practical purposes. My *person*, on the other hand, is also in 'my' parents, children, friends, foes, ancestors and successors. 'My' person is also in 'my' ideas and feelings and in 'my' belongings. If you hurt 'me,' you are equally damaging my whole clan, and possibly yourself as well. Rights cannot be individualized in this way. Is it the right of the mother, or of the child?—in the case of abortion. Or perhaps of the father and relatives as well? Rights cannot be abstracted from duties; the two are correlated. The dignity of the human person may equally be violated by your language, or by your desecrating a place I consider holy, even though it does not 'belong' to me in the sense of individualized private property. You may have 'bought' it for a sum of money, while it belongs to me by virtue of another order altogether. An individual is an isolated knot; a person is the entire fabric around that

[3] [Eds.] The author here uses a number of related concepts. *Cosmos* refers broadly to a universe regarded as an orderly and harmonious whole. *Cosmology* refers generally to a branch of philosophy concerned with the origin and structure of the universe. An *anthropocentric* view refers to one in which man is viewed as a central fact of the universe, and reality is interpreted in terms of human values and experiences. *Anthropomorphism* refers to the attribution of human characteristics to inanimate or natural phenomena.

knot, woven from the total fabric of the real. The limits to a person are not fixed, they depend utterly on his or her personality. Certainly without the knots the net would collapse; but without the net, the knots would not even exist.

To aggressively defend my individual rights, for instance, may have negative, i.e. unjust, repercussions on others and perhaps even on myself. The need for consensus in many traditions—instead of majority opinion—is based precisely on the corporate nature of human rights.

. . .

iii) *Democracy* is also a great value and infinitely better than any dictatorship. But it amounts to tyranny to put the peoples of the world under the alternative of choosing either democracy or dictatorship. Human Rights are tied to democracy. Individuals need to be protected when the structure which is above them (Society, the State or the Dictator—by whatever name) is not qualitatively superior to them, i.e. when it does not belong to a higher order. Human rights is a legal device for the protection of smaller numbers of people (the minority or the individual) faced with the power of greater numbers. . . . In a hierarchical conception of reality, the particular human being cannot defend his or her rights by demanding or exacting them independently of the whole. The wounded order has to be set straight again, or it has to change altogether. Other traditional societies have different means to more or less successfully restore the order. The rāja may fail in his duty to protect the people, but will a Declaration of Human Rights be a corrective unless it also has the power to constrain the rāja? Can a democracy be imposed and remain democratic?

. . .

In short, the cross-cultural critique does not invalidate the Declaration of Human Rights, but offers new perspectives for an internal criticism and sets the limits of validity of Human Rights, offering at the same time both possibilities for enlarging its realm, if the context changes, and of a mutual fecundation with other conceptions of Man and Reality.

. . .

IV. An Indian Reflection

The word 'Indian' here has no political connotations. It does not refer to the 'nation' with the third largest Islamic population in the world, but to the traditional Hindu, Jain and Buddhist conceptions of reality.

. . .

The starting point here is not the individual, but the whole complex concatenation of the Real. In order to protect the world, for the sake of the protection of this universe, says Manu, He, Svayambhū, the Self-existent.

arranged the castes and their duties. Dharma is the order of the entire reality, that which keeps the world together. The individual's duty is to maintain his 'rights;' it is to find one's place in relation to Society, to the Cosmos, and to the transcendent world.

It is obvious from these brief paragraphs that here the discourse on 'Human Rights' would take on an altogether different character. It would distract us from the purpose of this article to look now for the homeomorphic equivalent of Human Rights in a culture pervaded with the conception of dharma. We adduce this Indian example only to be able to elaborate in a fuller way the question of our title.

. . .

3. Human Rights are not Rights only. They are also duties and both are interdependent. Humankind has the 'right' to survive only insofar as it performs the duty of maintaining the world (*lokasamgraha*). We have the 'right' to eat only inasmuch as we fulfill the duty of allowing ourselves to be eaten by a hierarchically higher agency. Our right is only a participation in the entire metabolic function of the universe.

We should have, if anything, a Declaration of Universal Rights and Duties in which the whole of Reality would be encompassed. Obviously, this demands not only a different anthropology but also a different cosmology and an altogether different theology—beginning with its name. . . .

. . .

6. Both systems (the Western and the Hindu) make sense from and within a given and accepted myth. Both systems imply a certain kind of consensus. When that consensus is challenged, a new myth must be found. The broken myth is the situation in India today, as it is in the world at large. That the rights of individuals be conditioned only by their position in the net of Reality can no longer be admitted by the contemporary mentality. Nor does it seem to be admissible that the rights of individuals be so absolute as not to depend at all on the particular situation of the individual.

In short, there is at present no endogenous theory capable of unifying contemporary societies and no imposed or imported ideology can be simply substituted for it. A mutual fecundation of cultures is a human imperative of our times.

. . .

V. By Way of Conclusion

Is the concept of Human Rights a Western conception?

Yes.

Should the world then renounce declaring or enforcing Human Rights?

. . .

No.

Three qualifications, however, are necessary:

1. For an authentic human life to be possible within the *megamachine* of the modern technological world, Human Rights are imperative. This is because the development of the notion of Human Rights is bound up with and given its meaning by the slow development of that megamachine. How far individuals or groups or nations should collaborate with this present-day system is another question altogether. But in the contemporary political arena as defined by current socio-economic and ideological trends, the defense of Human Rights is a sacred duty. Yet it should be remembered that to introduce Human Rights (in the definite Western sense, of course) into other cultures before the introduction of *techniculture* would amount not only to putting the cart before the horse, but also to preparing the way for the technological invasion—as if by a Trojan horse, as we have already said. And yet a technological civilization without Human Rights amounts to the most inhuman situation imaginable. The dilemma is excruciating. This makes the two following points all the more important and urgent.

2. Room should be made for other traditions to develop and formulate their own homeomorphic views corresponding to or opposing Western 'rights.' Or rather, these other world traditions should make room for themselves, since no one else is likely to make it for them. This is an urgent task; otherwise it will be impossible for non-Western cultures to survive, let alone to offer viable alternatives or even a sensible complement. Here the role of a cross-cultural philosophical approach is paramount. The need for human pluralism is often recognized in principle, but not often practiced, not only because of the dynamism which drives the paneconomic ideology, linked with the megamachine, to expand all over the world, but also because viable alternatives are not yet theoretically worked out.

3. An intermediary space should be found for mutual criticism that strives for mutual fecundation and enrichment. Perhaps such an interchange may help bring forth a new myth and eventually a more humane civilization. The dialogical dialogue appears as the unavoidable method.

. . .

If many traditional cultures are centered on God, and some other cultures basically cosmocentric, the culture which has come up with the notion of Human Rights is decisively anthropocentric. Perhaps we may now be prepared for a cosmotheandric vision of reality in which the Divine, the Human and the Cosmic are integrated into a whole, more or less harmonious according to the performance of our truly human rights.

ABDULLAH AHMED AN-NA'IM, HUMAN RIGHTS IN THE MUSLIM WORLD

3 Harv. Hum. Rts. J. 13 (1990).

INTRODUCTION

Historical formulations of Islamic religious law, commonly known as Shari'a, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of Shari'a to regulate the behavior of Muslims derives from its moral and religious authority as well as the formal enforcement of its legal norms. As such, Shari'a influences individual and collective behavior in Muslim countries through its role in the socialization processes of such nations regardless of its status in their formal legal systems. For example, the status and rights of women in the Muslim world have always been significantly influenced by Shari'a, regardless of the degree of Islamization in public life. Of course, Shari'a is not the sole determinant of human behavior nor the only formative force behind social and political institutions in Muslim countries.

. . .

I conclude that human rights advocates in the Muslim world must work within the framework of Islam to be effective. They need not be confined, however, to the particular historical interpretations of Islam known as Shari'a. Muslims are obliged, as a matter of faith, to conduct their private and public affairs in accordance with the dictates of Islam, but there is room for legitimate disagreement over the precise nature of these dictates in the modern context. Religious texts, like all other texts, are open to a variety of interpretations. Human rights advocates in the Muslim world should struggle to have their interpretations of the relevant texts adopted as the new Islamic scriptural imperatives for the contemporary world.

A. Cultural Legitimacy for Human Rights

The basic premise of my approach is that human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance. While cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is, in my view, an extremely significant one. Thus, the underlying causes of any lack or weakness of legitimacy of human rights standards must be addressed in order to enhance the promotion and protection of human rights in that society.

. . . This cultural illegitimacy, it is argued, derives from the historical conditions surrounding the creation of the particular human rights instruments. Most African and Asian countries did not participate in the formulation of

the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations. When they did participate in the formulation of subsequent instruments, they did so on the basis of an established framework and philosophical assumptions adopted in their absence. For example, the preexisting framework and assumptions favored individual civil and political rights over collective solidarity rights, such as a right to development, an outcome which remains problematic today. Some authors have gone so far as to argue that inherent differences exist between the Western notion of human rights as reflected in the international instruments and non-Western notions of human dignity. In the Muslim world, for instance, there are obvious conflicts between Shari'a and certain human rights, especially of women and non-Muslims.

. . . In this discussion, I focus on the principles of legal equality and nondiscrimination contained in many human rights instruments. These principles relating to gender and religion are particularly problematic in the Muslim world.

. . .

II. ISLAM, SHARI'A AND HUMAN RIGHTS

. . .

A. The Development and Current Application of Shari'a

To the over nine hundred million Muslims of the world, the Qur'an is the literal and final word of God and Muhammad is the final Prophet. During his mission, from 610 A.D. to his death in 632 A.D., the Prophet elaborated on the meaning of the Qur'an and supplemented its rulings through his statements and actions. This body of information came to be known as Sunna. He also established the first Islamic state in Medina around 622 A.D. which emerged later as the ideal model of an Islamic state. . . .

While the Qur'an was collected and recorded soon after the Prophet Muhammad's death, it took almost two centuries to collect, verify, and record the Sunna. Because it remained an oral tradition for a long time during a period of exceptional turmoil in Muslim history, some Sunna reports are still controversial in terms of both their authenticity and relationship to the Qur'an.

Because Shari'a is derived from Sunna as well as the Qur'an, its development as a comprehensive legal and ethical system had to await the collection and authentication of Sunna. Shari'a was not developed until the second and third centuries of Islam. . . .

. . .

Shari'a is not a formally enacted legal code. It consists of a vast body of jurisprudence in which individual jurists express their views on the meaning of the Qur'an and Sunna and the legal implications of those views. Although

most Muslims believe Shari'a to be a single logical whole, there is significant diversity of opinion not only among the various schools of thought, but also among the different jurists of a particular school. . . .

Furthermore, Muslim jurists were primarily concerned with the formulation of principles of Shari'a in terms of moral duties sanctioned by religious consequences rather than with legal obligations and rights and specific temporal remedies. They categorized all fields of human activity as permissible or impermissible and recommended or reprehensible. In other words, Shari'a addresses the conscience of the individual Muslim, whether in a private, or public and official, capacity, and not the institutions and corporate entities of society and the state.

. . .

Whatever may have been the historical status of Shari'a as the legal system of Muslim countries, the scope of its application in the public domain has diminished significantly since the middle of the nineteenth century. Due to both internal factors and external influence, Shari'a principles had been replaced by European law governing commercial, criminal, and constitutional matters in almost all Muslim countries. Only family law and inheritance continued to be governed by Shari'a. . . .

Recently, many Muslims have challenged the gradual weakening of Shari'a as the basis for their formal legal systems. Most Muslim countries have experienced mounting demands for the immediate application of Shari'a as the sole, or at least primary, legal system of the land. These movements have either succeeded in gaining complete control, as in Iran, or achieved significant success in having aspects of Shari'a introduced into the legal system, as in Pakistan and the Sudan. Governments of Muslim countries generally find it difficult to resist these demands out of fear of being condemned by their own populations as anti-Islamic. Therefore, it is likely that this so-called Islamic fundamentalism will achieve further successes in other Muslim countries.

The possibility of further Islamization may convince more people of the urgency of understanding and discussing the relationship between Shari'a and human rights, because Shari'a would have a direct impact on a wider range of human rights issues if it became the formal legal system of any country. . . .

I believe that a modern version of Islamic law can and should be developed. Such a modern 'Shari'a' could be, in my view, entirely consistent with current standards of human rights. These views, however, are appreciated by only a tiny minority of contemporary Muslims. To the overwhelming majority of Muslims today, Shari'a is the sole valid interpretation of Islam, and as such *ought* to prevail over any human law or policy.

B. Shari'a and Human Rights

In this part, I illustrate with specific examples how Shari'a conflicts with international human rights standards. . . .

. . .

The second example is the Shari'a law of apostasy. According to Shari'a, a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense punishable by death. This aspect of Shari'a is in complete conflict with the fundamental human right of freedom of religion and conscience. The apostasy of a Muslim may be inferred by the court from the person's views or actions deemed by the court to contravene the basic tenets of Islam and therefore be tantamount to apostasy, regardless of the accused's personal belief that he or she is a Muslim.

The Shari'a law of apostasy can be used to restrict other human rights such as freedom of expression. A person may be liable to the death penalty for expressing views held by the authorities to contravene the official view of the tenets of Islam. Far from being an historical practice or a purely theoretical danger, this interpretation of the law of apostasy was applied in the Sudan as recently as 1985, when a Sudanese Muslim reformer was executed because the authorities deemed his views to be contrary to Islam.[4]

A third and final example of conflict between Shari'a and human rights relates to the status and rights of non-Muslims. Shari'a classifies the subjects of an Islamic state in terms of their religious beliefs: Muslims, *ahl al-Kitab* or believers in a divinely revealed scripture (mainly Christian and Jews), and unbelievers. In modern terms, Muslims are the only full citizens of an Islamic state, enjoying all the rights and freedoms granted by Shari'a and subject only to the limitations and restrictions imposed on women. *Ahl al-Kitab* are entitled to the status of *dhimma*, a special compact with the Muslim state which guarantees them security of persons and property and a degree of communal autonomy to practice their own religion and conduct their private affairs in accordance with their customs and laws. In exchange for these limited rights, *dhimmis* undertake to pay *jizya* or poll tax and submit to Muslim sovereignty and authority in all public affairs. . . .

According to this scheme, non-Muslim subjects of an Islamic state can aspire only to the status of *dhimma*, under which they would suffer serious violations of their human rights. *Dhimmis* are not entitled to equality with Muslims. [Economic and family law illustrations omitted.]

. . .

[4] . . . The Salman Rushdie affair illustrates the serious negative implications of the law of apostasy to literary and artistic expression. Mr Rushdie, a British national of Muslim background, published a novel entitled, The Satanic Verses, in which irreverent reference is made to the Prophet of Islam, his wives, and leading companions. Many Muslim governments banned the book because their populations found the author's style and connotations extremely offensive. The late Imam Khomeini of Iran sentenced Rushdie to death *in absentia* without charge or trial. . . .

IV. A CASE STUDY: THE ISLAMIC DIMENSION OF THE STATUS OF WOMEN

. . .

The present focus on Muslim violations of the human rights of women does not mean that these are peculiar to the Muslim world.[5] As a Muslim, however, I am particularly concerned with the situation in the Muslim world and wish to contribute to its improvement.

The following discussion is organized in terms of the status and rights of Muslim women in the private sphere, particularly within the family, and in public fora, in relation to access to work and participation in public affairs. This classification is recommended for the Muslim context because the personal law aspects of Shari'a, family law and inheritance, have been applied much more consistently than the public law doctrines.[6] The status and rights of women in private life have always been significantly influenced by Shari'a regardless of the extent of Islamization of the public debate.

A. Shari'a and the Human Rights of Women

. . . The most important general principle of Shari'a influencing the status and rights of women is the notion of *qawama*. *Qawama* has its origin in verse 4:34 of the Qur'an: 'Men have *qawama* [guardianship and authority] over women because of the advantage they [men] have over them [women] and because they [men] spend their property in supporting them [women].' According to Shari'a interpretations of this verse, men as a group are the guardians of and superior to women as a group, and the men of a particular family are the guardians of and superior to the women of that family.

. . . For example, Shari'a provides that women are disqualified from holding general public office, which involves the exercise of authority over men, because, in keeping with the verse 4:34 of the Qur'an, men are entitled to exercise authority over women and not the reverse.

Another general principle of Shari'a that has broad implications for the status and rights of Muslim women is the notion of *al-hijab*, the veil. This means more than requiring women to cover their bodies and faces in public.

[5] It is difficult to distinguish between Islamic, or rather Shari'a, factors and extra-Shari'a factors affecting the status and rights of women. The fact that women's human rights are violated in all parts of the world suggests that there are universal social, economic, and political factors contributing to the persistence of this state of affairs. Nevertheless, the articulation and operation of these factors varies from one culture or context to the next. In particular, the rationalization of discrimination against and denial of equality for women is based on the values and customs of the particular society. In the Muslim world, these values and customs are supposed to be Islamic or at least consistent with the dictates of Islam. It is therefore useful to discuss the Islamic dimension of the status and rights of women.

[6] The private/public dichotomy, however, is an artificial distinction. The two spheres of life overlap and interact. The socialization and treatment of both men and women at home affect their role in public life and vice versa. While this classification can be used for analysis in the Muslim context, its limitations should be noted. It is advisable to look for both the private and public dimensions of a given Shari'a principle or rule rather than assume that it has only private or public implications.

According to Shari'a interpretations of verses 24:31, 33:33,[7] 33:53, and 33:59[8] of the Qur'an, women are supposed to stay at home and not leave it except when required to by urgent necessity. When they are permitted to venture beyond the home, they must do so with their bodies and faces covered. *Al-hijab* tends to reinforce women's inability to hold public office and restricts their access to public life. They are not supposed to participate in public life, because they must not mix with men even in public places.

. . . In family law for example, men have the right to marry up to four wives and the power to exercise complete control over them during marriage, to the extent of punishing them for disobedience if the men deem that to be necessary.[9] In contrast, the co-wives are supposed to submit to their husband's will and endure his punishments. While a husband is entitled to divorce any of his wives at will, a wife is not entitled to a divorce, except by judicial order on very specific and limited grounds. Another private law feature of discrimination is found in the law of inheritance, where the general rule is that women are entitled to half the share of men.

In addition to their general inferiority under the principle of *qawama* and lack of access to public life as a consequence of the notion of *al-hijab*, women are subjected to further specific limitations in the public domain. For instance, in the administration of justice, Shari'a holds women to be incompetent witnesses in serious criminal cases, regardless of their individual character and knowledge of the facts. In civil cases where a woman's testimony is accepted, it takes two women to make a single witness. *Diya*, monetary compensation to be paid to victims of violent crimes or to their surviving kin, is less for female victims than it is for male victims.

. . . These overlapping and interacting principles and rules play an extremely significant role in the socialization of both women and men. Notions of women's inferiority are deeply embedded in the character and attitudes of both women and men from early childhood.

. . .

C. Muslim Women in Public Life

A similar and perhaps more drastic conflict exists between reformist and conservative trends in relation to the status and rights of women in the public domain. Unlike personal law matters, where Shari'a was never displaced by secular law, in most Muslim countries, constitutional, criminal, and other public law matters have come to be based on secular, mainly Western, legal

[7] [O Consorts of the Prophet . . .] And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular prayer, and give regular charity; and obey God and His Apostle. And God only wishes to remove all abomination from you, ye Members of the Family, and to make you pure and spotless.

[8] O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And God is Oft-Forgiving, Most Merciful.

[9] Polygamy is based on verse 4:3 of the Qur'an. The husband's power to chastise his wife to the extent of beating her is based on verse 4:34 of the Qur'an.

concepts and institutions. Consequently, the struggle over Islamization of public law has been concerned with the reestablishment of Shari'a where it has been absent for decades, or at least since the creation of the modern Muslim nation states in the first half of the twentieth century. In terms of women's rights, the struggle shall determine whether women can keep the degree of equality and rights in public life they have achieved under secular constitutions and laws.

. . .

. . . Educated women and other modernist segments of society may not be able to articulate their vision of an Islamic state in terms of Shari'a, because aspects of Shari'a are incompatible with certain concepts and institutions which these groups take for granted, including the protection of all human rights. To the extent that efforts for the protection and promotion of human rights in the Muslim world must take into account the Islamic dimension of the political and sociological situation in Muslim countries, a modernist conception of Islam is needed.

V. ISLAMIC REFORM AND HUMAN RIGHTS

. . .

Islamic reform needs must be based on the Qur'an and Sunna, the primary sources of Islam. Although Muslims believe that the Qur'an is the literal and final word of God, and Sunna are the traditions of his final Prophet, they also appreciate that these sources have to be understood and applied through human interpretation and action. . . .

A. An Adequate Reform Methodology

. . . The basic premise of my position, based on the work of the late Sudanese Muslim reformer *Ustadh* Mahmoud Mohamed Taha, is that the Shari'a reflects a historically-conditioned interpretation of Islamic scriptures in the sense that the founding jurists had to understand those sources in accordance with their own social, economic, and political circumstances. In relation to the status and rights of women, for example, equality between men and women in the eight and ninth centuries in the Middle East, or anywhere else at the time, would have been inconceivable and impracticable. It was therefore natural and indeed inevitable that Muslim jurists would understand the relevant texts of the Qur'an and Sunna as confirming rather than repudiating the realities of the day.

In interpreting the primary sources of Islam in their historical context, the founding jurists of Shari'a tended not only to understand the Qur'an and Sunna as confirming existing social attitudes and institutions, but also to emphasize certain texts and 'enact' them into Shari'a while de-emphasizing other texts or interpreting them in ways consistent with what they believed to

be the intent and purpose of the sources. Working with the same primary sources, modern Muslim jurists might shift emphasis from one class of texts to the other, and interpret the previously enacted texts in ways consistent with a new understanding of what is believed to be the intent and purpose of the sources. This new understanding would be informed by contemporary social, economic, and political circumstances in the same way that the 'old' understanding on which Shari'a jurists acted was informed by the then prevailing circumstances. The new understanding would qualify for Islamic legitimacy, in my view, if it is based on specific texts in opposing the application of other texts, and can be shown to be in accordance with the Qur'an and Sunna as a whole.

For example, the general principle of *qawama*, the guardianship and authority of men over women under Shari'a, is based on verse 4:34 of the Qur'an. . . . This verse presents *qawama* as a consequence of two conditions: men's advantage over and financial support of women. The fact that men are generally physically stronger than most women is not relevant in modern times where the rule of law prevails over physical might. Moreover, modern circumstances are making the economic independence of women from men more readily realized and appreciated. In other words, neither of the conditions—advantages of physical might or earning power—set by verse 4:34 as the justification for the *qawama* of men over women is tenable today.

The fundamental position of the modern human rights movement is that all human beings are equal in worth and dignity, regardless of gender, religion, or race. This position can be substantiated by the Qur'an and other Islamic sources as understood under the radically transformed circumstances of today. For example, in numerous verses the Qur'an speaks of honor and dignity for 'humankind' and 'children of Adam,' without distinction as to race, color, gender, or religion. By drawing on those sources and being willing to set aside archaic and dated interpretations of other sources, such as the one previously given to verse 4:34 of the Qur'an, we can provide Islamic legitimacy for the full range of human rights for women.

Similarly, numerous verses of the Qur'an provide for freedom of choice and non-compulsion in religious belief and conscience.[10] These verses have been either de-emphasized as having been 'overruled' by other verses which were understood to legitimize coercion, or 'interpreted' in ways which permitted such coercion. For example, verse 9:29 of the Qur'an was taken as the foundation of the whole system of *dhimma*, and its consequent discrimination against non-Muslims. Relying on those verses which extoll freedom of religion rather than those that legitimize religious coercion, one can argue now that the *dhimma* system should no longer be part of Islamic law and that complete equality should be assured regardless of religion or belief. The same argument

[10] See, for example, verse 2:256 of the Qur'an which provides: 'Let there be no compulsion in religion: Truth stands out clear from error . . .' In verse 18:29 God instructs the Prophet: 'Say, the Truth is from your Lord. Let him who will, believe, and let him who will, reject [it]'.

can be used to abolish all negative legal consequences of apostasy as inconsistent with the Islamic principle of freedom of religion.

[Discussion omitted of mechanisms and methods within Islam for development and reform.]

. . . The ultimate test of legitimacy and efficacy is, of course, acceptance and implementation by Muslims throughout the world.

B. Prospects for Acceptance and Likely Impact of the Proposed Reform

. . .

. . . Governments of Muslim countries, like many other governments, formally subscribe to international human rights instruments because, in my view, they find the human rights idea an important legitimizing force both at home and abroad. . . .

Nevertheless, the proposed reform will probably be resisted because it challenges the vested interests of powerful forces in the Muslim world and may upset male-dominated traditional political and social institutions. These forces probably will try to restrict opportunities for a genuine consideration of this reform methodology. . . .

Consequently, the acceptance and implementation of this reform methodology will involve a political struggle within Muslim nations as part of a larger general struggle for human rights. I would recommend this proposal to participants in that struggle who champion the cause of justice and equality for women and non-Muslims, and freedom of belief and expression in the Muslim world. Given the extreme importance of Islamic legitimacy in Muslim societies, I urge human rights advocates to claim the Islamic platform and not concede it to the traditionalist and fundamentalist forces in their societies. I would also invite outside supporters of Muslim human rights advocates to express their support with due sensitivity and genuine concern for Islamic legitimacy in the Muslim world.

. . .

NOTE

Iran is a party to the International Covenant on Civil and Political Rights. Its obligation under Article 40 of the Covenant is to submit periodic reports to a body created by the Covenant, the Human Rights Committee. The report is meant to describe, and to evaluate in terms of consistency with the provisions of the Covenant, the protection of civil and political rights in Iran.

Iran submitted such a report to the Committee in 1982.[11] Its representative

[11] Report Submitted by Iran under Article 40 of International Covenant on Civil and Political Rights, CCPR/C/SR. 364, 365, 366, 368, July 19–21, 1982.

human rights. Consider how these conceptions differ, and what the consequences of that difference might be for a human rights regime.

RHODA HOWARD, DIGNITY, COMMUNITY, AND HUMAN RIGHTS

In Abdullahi An-Na'im (ed.), Human Rights in Cross-Cultural Perspectives 81 (1992).

. . .

. . . [Most] known human societies did not and do not have conceptions of human rights. Human rights are a moral good that one can accept—on an ethical basis—and that everyone ought to have in the modern state-centric world. To seek an anthropologically based consensus on rights by surveying all known human cultures, however, is to confuse the concepts of rights, dignity, and justice. One can find affinities, analogues, and precedents for the actual content of internationally accepted human rights in many religious and cultural (geographic and national) traditions; but the actual concept of *human* rights, as will be seen, is particular and modern, representing a radical rupture from the many status-based, nonegalitarian, and hierarchical societies of the past and present. . . .

Human rights are a modern concept now universally applicable in principle because of the social evolution of the entire world toward state societies. The concept of human rights springs from modern human thought about the nature of justice; it does not spring from an anthropologically based consensus about the values, needs, or desires of human beings. As Jack Donnelly puts it, the concept of human rights is best interpreted by constructivist theory:

> Human rights aim to establish and guarantee the conditions necessary for the development of the human person envisioned in . . . [one particular] underlying moral theory of human nature, thereby bringing into being that type of person. . . . The evolution of particular conceptions or lists of human rights is seen in the constructivist theory as the result of the *reciprocal interactions of moral conceptions and material conditions of life*, mediated through social institutions such as rights.

Human rights tend to be particularly characteristic of liberal and/or social democratic societies. . . .

Human rights adhere to the human being *by virtue of being human, and for no other reason*. . . .

This means that the human being who holds rights holds them not only against the state, but also against 'society,' that is, against his or her community or even family. This orientation is a radical departure from the way most human societies in the past—and many in the present—have been or are

organized. For most human societies, insofar as 'rights' might be considered to be applicable at all, collective or communal rights would be preferred to individual human rights. . . . Collective or community rights imply permissible inegalitarian ranking of members in the interests of preservation of 'tradition.'

I define human dignity as *the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society.* Dignity is not a claim that an individual asserts against a society; it is not, for example, the claim that one is worthy of respect merely because one is a human being. Rather, dignity is something that is granted at birth or on incorporation into the community as a concomitant of one's particular ascribed status, or that accumulates and is earned during the life of an adult who adheres to his or her society's values, customs, and norms: the adult, that is, who accepts normative cultural constraints on his or her particular behavior. . . .

Many indigenous groups (that is, the remnants of precapitalist societies destroyed—physically, culturally, or both—during the process of European conquest and/or settlement) now make claims for the recognition of their collective or communal rights. When they do so they are not primarily interested in the human rights of the individual members of their collectivities. Rather, they are interested in the recognition of their *collective dignity,* in the acknowledgment of the value of their collective way of life as opposed to the way of life of the dominant society into which they are unequally 'integrated.' . . .

. . .

Thus in most known past or present societies, human dignity is not private, individual, or autonomous. It is public, collective, and prescribed by social norms. The idea that an individual can enhance his or her 'dignity' by asserting his or her human rights violates many societies' most fundamental beliefs about the way social life should be ordered. Part of the dignity of a human being consists of the quiet endurance and acceptance of what a human rights approach to the world would consider injustice or inequality. . . .

. . .

What then is a human being? For many societies, the human being is the person who has learned and obeys the community's rules. A nonsocial atomized individual is not human; he or she is a species of 'other'—perhaps equivalent to a (presocialized) child, a stranger, a slave, or even an animal. There is very little room in most societies for Mead's 'I'—the individual, self-reflective being—to emerge over the 'me,' that part of a being that absorbs his or her community's culture and faithfully follows the rules and customs expected of a person of his or her station. The human group takes precedence over the human person.

. . .

This does not mean that human rights are not relevant, in the late twentieth century, to those societies in the world that retain precapitalist, nonindividualist notions of human dignity, honor, and the social order. The rise of the centralized state makes human rights relevant the world over. It does mean that to look for universalistic 'roots' of human rights in different social areas of the world . . . or in different religious traditions, is to abstract those societies and religions from culture and history. One can find, in Judaism and Christianity for example, strong moral analogues to the content—although not the concept—of contemporary human rights. But one can also find moral precepts justifying inequality and denial of what are now considered fundamental human rights. . . .

. . .

. . . All societies do have underlying conceptions of human dignity and social justice. These conceptions can be identified; and certain commonalities of belief, for example, in the social value of work, can also be located on a transcultural basis. But in most known human societies, dignity and justice are not based on any idea of the *inalienable right* of the *physical,* socially *equal* human being against the claims of family, community, or the state. They are based on just the opposite, that is, the *alienable privileges* of *socially unequal* beings, considered to embody gradations of humanness according to socially defined status categories entitled to different degrees of respect.

While all societies have underlying concepts of dignity and justice, few have concepts of rights. Human rights, then, are a particular expression of human dignity. In most societies, dignity does not imply human rights. There is very little cultural—let alone universal—foundation for the concept, as opposed to the content, of human rights. The society that actively protects rights both in law and in practice is a radical departure for most known human societies. . . .

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OSCAR SCHACHTER, HUMAN DIGNITY AS A NORMATIVE CONCEPT

77 Am. J. Int. L. 848 (1983).

The 'dignity of the human person' and 'human dignity' are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples.

Human dignity appears in the Preamble of the Charter of the United Nations as an ideal that 'we the peoples of the United Nations' are 'determined' to achieve. . . .

The term dignity is also included in Article 1 of the Universal Declaration of Human Rights. . . .

. . .

The Helsinki Accords in Principle VII affirm that the participating states will promote the effective exercise of human rights and freedoms, 'all of which derive from the inherent dignity of the human person.'

References to human dignity are to be found in various resolutions and declarations of international bodies. National constitutions and proclamations, especially those recently adopted, include the ideal or goal of human dignity in their references to human rights. Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person. . . . No other ideal seems so clearly accepted as a universal social good.

We do not find an explicit definition of the expression 'dignity of the human person' in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. . . .

. . .

An analysis of dignity may begin with its etymological root, the Latin 'dignitas' translated as worth (in French, 'valeur'). One lexical meaning of dignity is 'intrinsic worth.' Thus, when the UN Charter refers to the 'dignity and worth' of the human person, it uses two synonyms for the same concept. The other instruments speak of 'inherent dignity,' an expression that is close to 'intrinsic worth.'

What is meant by 'respect' for 'intrinsic worth' or 'inherent dignity' of a person? 'Respect' has several nuanced meanings: 'esteem,' 'deference,' 'a proper regard for,' 'recognition of.' These terms have both a subjective aspect (how one feels or thinks about another) and an objective aspect (how one treats another). Both are relevant to our question, but it seems more useful to focus on the latter aspect for purposes of practical measures.

One general answer to our question is suggested by the Kantian injunction to treat every human being as an end, not as a means. Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others. This proposition will probably be generally acceptable as an ideal. There may be more question about its implications. I shall suggest such implications as corollaries of the general proposition.

The first is that a high priority should be accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and the conduct of public affairs. Note that this is stated as a 'high priority,' not an absolute rule. We may give it more specific content by applying it to political and psychological situations. In the political context, respect for the dignity and worth of all persons, and for their individual choices, leads, broadly speaking, to a strong emphasis on the will and consent of the governed. . . .

. . .

. . . [W]e believe that the idea of human dignity involves a complex notion of the individual. It includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility. It also embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person. . . .

We are led more deeply into the analysis of human dignity when we consider its relation to the material needs of human beings and to the ideal of distributive justice. Few will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognition of a minimal concept of distributive justice that would require satisfaction of the essential needs of everyone.

. . .

. . . The general idea that human rights are derived from the dignity of the person is neither truistic nor neutral. It has two corollaries that challenge conceptions prevalent in some societies and ideologies. The first corollary is the idea that basic rights are not given by authority and therefore may not be taken away; the second is that they are rights of the person, every person. It is not unrealistic to assume that ideas of this kind will have a role in challenging existing attitudes. When they are found in official declarations, they become part of the instruments of change, sometimes loudly proclaimed, at other times almost imperceptibly affecting ideas of legitimacy.

. . .

. . . Respect for human dignity may be realized in other ways than by asserting claims of right. In many cases, the application of a 'rights approach' to affronts to dignity would raise questions involving existing basic rights such as free speech. In other cases, respect for dignity may be more appropriately and effectively attained through social processes such as education, material benefits, political leadership and the like. . . .

These observations indicate that the central idea of human dignity has a wide range of applications outside of the sphere of human rights. It is therefore of some importance to treat it as a distinct subject and to consider ways that respect for dignity can be fostered through public and private agencies.

QUESTION

Is the view of Howard or of Schachter about human dignity more sympathetic to cultural relativism? Do you find it helpful to consider the issue of relativism and rights from the perspective of this more fundamental notion of human dignity?

C. CONTEMPORARY DEBATE BETWEEN THE WEST AND SOME ASIAN STATES

During the Cold War, the primary context for argument over universalism and relativism was the conflict between the West and Communist states, particularly between the U.S. and the U.S.S.R. Apart from the important issue of indigenous peoples (see p. 1006, *infra*), the primary context today would be the argument between the West and (a) Islamic states and (b) a number of East Asian states intent on economic development. We concentrate here on this second category, involving particularly arguments between the U.S. and the People's Republic of China. The Government of Singapore and various spokespersons for it have made a sustained and serious contribution to the debate.

BILHARI KAUSIKAN, ASIA'S DIFFERENT STANDARD

92 Foreign Policy 24 (1993).

East and Southeast Asia must respond to a new phenomenon: Human rights have become a legitimate issue in interstate relations. How a country treats its citizens is no longer a matter for its own exclusive determination. Others can and do legitimately claim a concern. There is an emerging global culture of human rights. . . .

In response, East and Southeast Asia are reexamining their own human rights standards.

. . . But there is a more general acceptance of many international human rights norms, even among states that have not acceded to the two covenants or are accused by the West of human rights abuses.

The human rights situation in the region, whether measured by the standard of civil and political rights or by social, cultural, and economic rights, has improved greatly over the last 20 years. As countries in the region become more prosperous, secure, and self-confident, they are moving beyond a purely defensive attitude to a more active approach to human rights. All the countries of the region are party to the U.N. Charter. None has rejected the Universal Declaration. There are references to human rights in the constitutions of many of the countries in the region. Countries like China, Indonesia, and even Burma have not just brushed aside Western criticism of their human rights records but have tried to respond seriously, asserting or trying to demonstrate that they too adhere to international human rights norms. They tend to interpret rather than reject such norms when there are disagreements. They discuss human rights with Western delegations. They have released political prisoners; and Indonesia, for instance, has even held commissions of inquiry on alleged abuses and punished some officials found guilty.

Abuses and inconsistencies continue. But it is too simplistic to dismiss what has been achieved as mere gestures intended to appease Western critics. Such inclinations may well be an element in the overall calculation of interests. And Western pressure undeniably plays a role. But in themselves, self-interest and pressure are insufficient and condescendingly ethnocentric Western explanations. They do less than justice to the states concerned, most of which have their own traditions in which the rulers have a duty to govern in a way consonant with the human dignity of their subjects, even if there is no clear concept of 'rights' as has evolved in the West. China today, for all its imperfections, is a vast improvement over the China of the Cultural Revolution. So too has the situation in Taiwan, South Korea, and the Association of Southeast Asian Nations (ASEAN) improved. Western critics who deny the improvements lose credibility.

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The diversity of cultural traditions, political structures, and levels of development will make it difficult, if not impossible, to define a single distinctive and coherent human rights regime that can encompass the vast region from Japan to Burma, with its Confucianist, Buddhist, Islamic, and Hindu traditions. Nonetheless, the movement toward such a goal is likely to continue. What is clear is that there is a general discontent throughout the region with a purely Western interpretation of human rights. The further development of human rights there will be shaped primarily by internal developments, but pressure will continue to come from the United States and Europe.

Human rights did not evolve in a vacuum. During the Cold War, the Western promotion of human rights was shaped by and deployed as an ideological instrument of the East-West struggle. The post-Cold War human rights dialogue between the West and Asia will be influenced by the power structure and dynamics of a more regionalized world, built around the United States, Europe, and Asia, which is replacing Cold War alliances and superpower competition. Trade and security will, as always, be foremost on the international agenda, and human rights will not be an issue of the first order. But human rights touch upon extraordinarily delicate matters of culture and values. And human rights issues are likely to become more prominent.

. . .

Meanwhile, relations among the United States, Europe, and Asia may lead the West to use human rights as an instrument of economic competition. . . . The lengthening catalogue of rights and freedoms in international human rights law now encompasses such matters as pay, work conditions, trade unions, standard of living, rest and leisure, welfare and social security, women's and children's rights, and the environment. The pressures and temptation to link economic concerns with human rights will certainly rise if economic strains increase. That is not to say that the West is insincere in its commitment to human rights. But policy motivations are rarely simple; and it

is difficult to believe that economic considerations do not to some degree influence Western attitudes toward such issues as, say, the prison labor component of Chinese exports, child labor in Thailand, or some of the AFL-CIO complaints against Malaysian labor practices. President Bill Clinton's declared intention to press for human rights in China in return for continuing to grant most-favored-nation trading status to Beijing makes the linkage explicit.

But efforts to promote human rights in Asia must also reckon with the altered distribution of power in the post-Cold War world. Power, especially economic power, has been diffused. For the last two decades, most of East and Southeast Asia has experienced strong economic growth and will probably keep growing faster than other regions well into the next century. . . .

Of course, the economic growth has not been even. The United States and Europe are still major markets for almost all East and Southeast Asian countries, many of whom remain aid recipients. But Western leverage over East and Southeast Asia has been greatly reduced. The countries in the region are reacting accordingly. . . .

East and Southeast Asia are now significant actors in the world economy. There is far less scope for conditionality and sanctions to force compliance with human rights. The region is an expanding market for the West. . . .

. . .

. . . [T]he trend, already evident under Reagan and Bush in the attendant strains between the United States and many Asian countries, is away from rights as relatively precisely defined in international law, toward the promotion of hazier notions of 'freedom' and 'democracy.' The human rights apparatus is now even more open to manipulation by competing legislative, executive, judicial, media, and special interests devoted to such transcendent American values.

. . .

. . . Distance makes it easier to be virtuous; proximity makes for prudence. If, for instance, tough sanctions break the grip of the State Law and Order Restoration Council in Burma or the Communist party in China, the results could be violent. If disorder breaks out in Burma or China, it is not the United States or Europe that will pay the immediate price. Is the West prepared to intervene and remain engaged, perhaps for decades, to restore order? China will be a formidable political and economic force by the turn of the century. That does not mean human rights abuses in China must be overlooked. But if the promotion of human rights ignores Chinese realities and interests, expect China to find ways to exert countervailing pressures. And it will have the wherewithal to try to reshape any international order it sees as threatening.

For the first time since the Universal Declaration was adopted in 1948, countries not thoroughly steeped in the Judeo-Christian and natural law traditions are in the first rank: That unprecedented situation will define the new international politics of human rights. It will also multiply the occasions for

conflict. In the process, will the human rights dialogue between the West and East and Southeast Asia become a dialogue of the deaf, with each side proclaiming its superior virtue without advancing the common interests of humanity? Or can it be a genuine and fruitful dialogue, expanding and deepening consensus? The latter outcome will require finding a balance between a pretentious and unrealistic universalism and a paralyzing cultural relativism. The myth of the universality of all human rights is harmful if it masks the real gap that exists between Asian and Western perceptions of human rights. The gap will not be bridged if it is denied.

The June 1993 Vienna U.N. conference on human rights did not even attempt to do so. The West went to Vienna accusing Asia of trying to undermine the ideal of universality, and determined to blame Asia if the conference failed. Inevitably, Asia resisted. The result after weeks of wrangling was a predictable diplomatic compromise ambiguous enough so all could live with it, but that settled very few things. There was no real dialogue between Asia and the West, no genuine attempt to address the issues or forge a meeting of the minds. If anything, the Vienna conference may only have hardened attitudes on both sides and increased the deep skepticism with which many Asian countries regard Western posturing on human rights.

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For many in the West, the end of the Cold War was not just the defeat or collapse of communist regimes, but the supreme triumph and vindication of Western systems and values. It has become the lens through which they view developments in other regions. There has been a tendency since 1989 to draw parallels between developments in the Third World and those in Eastern Europe and the former USSR, measuring all states by the advance of what the West regards as 'democracy.' That is a value-laden term, itself susceptible to multiple interpretations, but usually understood by Western human rights activists and the media as the establishment of political institutions and practices akin to those existing in the United States and Europe.

There is good reason to doubt whether the countries of the former USSR and Eastern Europe will really evolve into 'democracies' anytime soon, however this term is defined, or even whether such a transformation would necessarily always be for the better, given the ethnic hatreds in the region. But the Western approach is ideological, not empirical. The West needs its myths; missionary zeal to whip the heathen along the path of righteousness and remake the world in its own image is deeply ingrained in Western (especially American) political culture. It is entirely understandable that Western human rights advocates choose to interpret reality in the way they believe helps their cause most.

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The hard core of rights that are truly universal is smaller than many in the West are wont to pretend. Forty-five years after the Universal Declaration was

adopted, many of its 30 articles are still subject to debate over interpretation and application—not just between Asia and the West, but within the West itself. Not every one of the 50 states of the United States would apply the provisions of the Universal Declaration in the same way. It is not only pretentious but wrong to insist that everything has been settled once and forever. The Universal Declaration is not a tablet Moses brought down from the mountain. It was drafted by mortals. All international norms must evolve through continuing debate among different points of view if consensus is to be maintained.

Most East and Southeast Asian governments are uneasy with the propensity of many American and some European human rights activists to place more emphasis on civil and political rights than on economic, social, and cultural rights. They would probably not be convinced, for instance, by a September 1992 report issued by Human Rights Watch entitled *Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty*. They would find the report's argument that 'political and civil rights, especially those related to democratic accountability,' are basic to survival and 'not luxuries to be enjoyed only after a certain level of economic development has been reached' to be grossly overstated. Such an argument does not accord with their own historical experience. That experience sees order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity.

The Asian record of economic success is a powerful claim that cannot be easily dismissed. Both the West and Asia can agree that values and institutions are important determinants of development. But what institutions and which values? The individualistic ethos of the West or the communitarian traditions of Asia? The consensus-seeking approach of East and Southeast Asia or the adversarial institutions of the West? . . .

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One explanation of the contradictions in Asian attitudes is that popular pressures against East and Southeast Asian governments may not be so much for 'human rights' or 'democracy' but for good government: effective, efficient, and honest administrations able to provide security and basic needs with good opportunities for an improved standard of living. To be sure, good government, human rights, and democracy are overlapping concepts. Good government requires the protection of human dignity and accountability through periodic fair and free elections. But they are not always the same thing; it cannot be blithely assumed, as many in the West have, that more democracy and human rights will inevitably lead to good government, as the many lost opportunities of the Aquino government demonstrated. The apparent contradictions mirror a complex reality: Good government may well require, among other things, detention without trial to deal with military rebels or religious and other extremists; curbs on press freedoms to avoid fan-

ning racial tensions or exacerbating social divisions; and draconian laws to break the power of entrenched interests in order to, for instance, establish land reforms.

Those are the realities of exercising authority in heterogeneous, unevenly modernized, and imperfectly integrated societies with large rural populations and shallow Western-style civic traditions. . . .

. . .

Future Western approaches on human rights will have to be formulated with greater nuance and precision. It makes a great deal of difference if the West insists on humane standards of behavior by vigorously protesting genocide, murder, torture, or slavery. Here there is a clear consensus on a core of international law that does not admit of derogation on any grounds. The West has a legitimate right and moral duty to promote those core human rights, even if it is tempered by limited influence. But if the West objects to, say, capital punishment, detention without trial, or curbs on press freedoms, it should recognize that it does so in a context where the international law is less definitive and more open to interpretation and where there is room for further elaboration through debate. The West will have to accept that no universal consensus may be possible and that states can legitimately agree to disagree without being guilty of sinister designs or bad faith. Trying to impose pet Western definitions of 'freedom' and 'democracy' is an incitement to destructive conflict, best foregone in the interest of promoting real human rights.

The international law on human rights provides a useful, relatively precise, and common framework for the human rights dialogue between West and East. It helps prevent 'human rights' from becoming a mere catchphrase for whatever actions the West finds contrary to its preferences or too alien to comprehend. But the implementation, interpretation, and elaboration of the international law on human rights is unavoidably political. It must reflect changing global power structures and political circumstances. It will require the West to make complex political distinctions, perhaps refraining from taking a position on some human rights issues, irrespective of their merits, in order to press others where the prospects for consensus are better.

. . .

Yet it is only through such thickets of compromise, contradiction, and ambiguity that further progress on human rights can be made. Those in the West concerned about human rights in East and Southeast Asia, therefore, must be asked a simple question: Do you ultimately want to do good, or merely posture to make yourselves feel good?

NOTE

Consider the relevance to Kausikan's remarks of the following information:

(1) In 1987 the Singapore Government detained various social workers and activists. Several U.S. Congressmen wrote to complain about the detentions. A statement (in reply) of the Minister for Home Affairs stressed the fragility and heterogeneity of Singapore.

> We are vulnerable to powerful centrifugal forces and volatile emotional tides. Like many other developing countries, Singapore's major problem of nationhood is simply to stay united as one viable nation. . . . Singapore has repeatedly encountered subversive threats from within and without. . . . The very secrecy of covert operations precludes garnering evidence to meet the standards of the criminal law for conviction. In many cases of racial agitation, the process of trial itself will provide further opportunity for inflammatory rabble rousing. . . . Preventive detention is not a blemish marring our record; it is a necessary power underpinning our freedom.[12]

(2) The *New York Times*, Jan. 18, 1995, p. A6, reported that a Singapore court found a U.S. scholar and U.S.-owned newspaper (the *International Herald Tribune*) guilty of contempt of court over a published opinion article that was critical of what it called 'intolerant regimes' in Asia that use 'a compliant' judiciary to drive opposition politicians into bankruptcy through defamation and other suits. Heavy fines were imposed. The Justice noted that the article's clear reference was to Singapore, and that the description of compliant courts had 'scandalized the Singapore judiciary.' The U.S. State Department had protested this contempt proceeding, noting that 'people have a right to freedom of expression.'

Responding to similar critical allegations in the past about suits brought by members of the governing party, the Singapore government had insisted that the cases were decided on the merits without pressure on the judiciary. A few months earlier, a judicial decision found that the same newspaper had defamed the former Prime Minister (Lee Kuan Yew) through its reference to 'dynastic politics' in Singapore and other Asian states. It was public knowledge that Lee desired to see his son eventually become Prime Minister, but Lee claimed that the article amounted to an accusation of nepotism.

(3) A speech by Prime Minister Goh in which he 'delivered a wide-ranging denunciation of liberal ideas' was reported in *The Australian*, Aug. 23, 1994, p. 10. Stating that Singapore could not accept unmarried single-parent families, Goh noted that 'unmarried mothers would no longer be allowed to buy

[12] Quoted in Yash Ghai, Human Rights and Governance: The Asia Debate. 15 Aust. Y..B. Int. L. 1, 9 (1994). Ghai comments on another aspect of bypassing the formal legal system not discussed in the Minister's statement: coerced and doctored 'confessions' extracted from detainees and shown on national television.

government-subsidised flats direct from the Housing Development Board.' Goh also reaffirmed the Government's refusal to allow female civil servants the same medical benefits as their male counterparts, explaining that 'changing the rule would alter the balance of responsibility between men and women.' He further said that

> the government policy of stopping aid to families when they broke up was harsh but right. It was the Government's underlying philosophy to 'channel rights, benefits and privileges through the head of the family so that he can enforce the obligations and responsibilities of family members.' . . . To promote family togetherness, Mr. Goh announced a government grant of S$30,000 ($27,000) for people who want to buy a flat near their parents.

The Prime Minister acknowledged some problems, noting that Singaporeans were 'more preoccupied with materialism and individual rewards,' and that divorce rates were rising.

HUMAN RIGHTS IN CHINA

Information Office of the State Council, Beijing, 1991.

[This White Paper represents the most important official statement made by the government of the Peoples' Republic of China on human rights issues. The excerpts are taken from Section X, 'Active Participation in International Human Rights Activities.']

China pays close attention to the issue of the right to development. China believes that as history develops, the concept and connotation of human rights also develop constantly. . . . To the people in the developing countries, the most urgent human rights are still the right to subsistence and the right to economic, social and cultural development. Therefore, attention should first be given to the right to development. . . .

Over a long period in the UN activities in the human rights field, China has firmly opposed to any country making use of the issue of human rights to sell its own values, ideology, political standards and mode of development, and to any country interfering in the internal affairs of other countries on the pretext of human rights, the internal affairs of developing countries in particular, and so hurting the sovereignty and dignity of many developing countries. Together with other developing countries, China has waged a resolute struggle against all such acts of interference, and upheld justice by speaking out from a sense of fairness. China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country. Respect for each country's sovereignty and non-interference in internal affairs are universally recognized principles of international law, which are applicable to all fields of international relations, and of course applicable to the field of human rights

as well. Section 7 of Article 2 of the Charter of the United Nations stipulates that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. . . These provisions of international instruments reflect the will of the overwhelming majority of countries to safeguard the fundamental principles of international law and maintain a normal relationship between states. They are basic principles that must be followed in international human rights activities. The argument that the principle of non-interference in internal affairs does not apply to the issue of human rights is, in essence, a demand that sovereign states give up their state sovereignty in the field of human rights, a demand that is contrary to international law. Using the human rights issue for the political purpose of imposing the ideology of one country on another is no longer a question of human rights, but a manifestation of power politics in the form of interference in the internal affairs of other countries. Such abnormal practice in international human rights activities must be eliminated.

China is in favor of strengthening international cooperation in the realm of human rights on the basis of mutual understanding and seeking a common ground while reserving differences. However, no country in its effort to realize and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities. . . . It is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to impose its own mode on others. Therefore, the purpose of international protection of human rights and related activities should be to promote normal cooperation in the international field of human rights and international harmony, mutual understanding and mutual respect. Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and the promotion of understanding and cooperation.

China has always held that to effect international protection of human rights, the international community should interfere with and stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation, as well as apartheid, racial discrimination, genocide, slave trade and serious violation of human rights by international terrorist organizations. . . .

. . . Interference in other countries' internal affairs and the pushing of power politics on the pretext of human rights are obstructing the realization of human rights and fundamental freedoms. . . .

NOTE

The Second World Conference on Human Rights, held in Vienna in June 1993, was preceded by regional preparatory meetings in four parts of the world. A group of Asian countries held such a regional meeting in Bangkok earlier that year. It culminated in the Bangkok Governmental Declaration.[13]

In that Declaration, the participating states emphasized (para. 5) 'principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.' Although para. 7 stressed the universality of human rights and that no violation could be justified, para. 8 asserted that human rights 'must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.'

Human rights non-governmental organizations (NGOs) from the Asia-Pacific region also gathered at Bangkok to transact their business immediately before the intergovernmental meeting began: The Bangkok NGO Declaration on Human Rights provided in para. 1:

> *Universality*. We can learn from different cultures in a pluralistic perspective . . . . Universal human rights are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity. . . . While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's right, must not be tolerated. *As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.*

The Vienna Declaration[14] adopted by states at the Second World Conference on Human Rights, provides in Sec. I, para. 5 that

> [a]ll human rights are universal, indivisible, and interdependent and interrelated. . . . While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

QUESTIONS

1. 'It is the last resort of a state labelled a violator of human rights to contend (as does Kausikan, a governmental official in Singapore) that Western advocacy of international human rights . . . to some important degree a guise for supporting

[13] Set forth in 14 Hum. Rts. L. J. 370 (1993). [14] Set forth in 14 Hum. Rts. L. J. 352 (1993).

the material interests of Western states in protecting their own markets, in opening foreign markets to Western goods. and generally in spreading market economics.' Comment.

2. 'Kausikan's article is not about cultural relativism at all. It never refers to the culture of the people in Singapore that the West is allegedly threatening. It is about the power of a one-party government, and the effort to insulate that government and its conduct from international human rights scrutiny. What do Kausikan's general arguments, or his precise examples of where Singapore justifiably deviates from human rights norms, have to do with popular, religious or other culture in Singapore? I thought that international human rights were meant to benefit individuals, not governmental elites.' Comment. How would you distinguish between a 'genuine' resort to cultural relativism and argument based on a one-party government's effort to blunt international criticism of its rule?

3. Are Kausikan's article and the P.R.C. White Paper both open to the interpretation that states making economic progress believe human rights to endanger that process? How would you best state that argument? What responses would you make to it?

4. In its White Paper, the P.R.C. invokes the traditional rhetoric of domestic jurisdiction. What relationship do you see between cultural relativism and domestic jurisdiction?

5. The White Paper gives several illustrations at the end of these excerpts of situations where the P.R.C. believes in international enforcement of human rights, even to the point of accepting enforcement that would interfere with and arrest a state's acts. How would you characterize those situations? Do they have any common themes? Do any of them, from a Western perspective, implicate the P.R.C.?

NOTE

The two following writings by Ghai and Donnelly consider cultural relativism in general, but bear on the preceding questions.

YASH GHAI, HUMAN RIGHTS AND GOVERNANCE: THE ASIA DEBATE

15 Austral. Y. Bk. Int. L. 1 (1994), at 5.

. . . It is easy to believe that there is a distinct Asian approach to human rights because some government leaders speak as if they represent the whole conti-

nent when they make their pronouncements on human rights. This view is reinforced because they claim that their views are based on perspectives which emerge from the Asian culture or religion or Asian realities. The gist of their position is that human rights as propounded in the West are founded on individualism and therefore have no relevance to Asia which is based on the primacy of the community. It is also sometimes argued that economic underdevelopment renders most of the political and civil rights (emphasised in the West) irrelevant in Asia. Indeed, it is sometimes alleged that such rights are dangerous in view of fragmented nationalism and fragile Statehood.

It would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent. All the world's major religions are represented in Asia, and are in one place or another State religions (or enjoy a comparable status: Christianity in the Philippines, Islam in Malaysia, Hinduism in Nepal and Buddhism in Sri Lanka and Thailand). To this list we may add political ideologies like socialism, democracy or feudalism which animate peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures. A culture, moreover, is not static and many accounts given of Asian culture are probably true of an age long ago. Nor are the economic circumstances of all the Asian countries similar. Japan, Singapore and Hong Kong are among the world's most prosperous countries, while there is grinding poverty in Bangladesh, India and the Philippines. The economic and political systems in Asia likewise show a remarkable diversity, ranging from semi-feudal kingdoms in Kuwait and Saudi Arabia, through military dictatorships in Burma and formerly Cambodia, effectively one party regimes in Singapore and Indonesia, communist regimes in China and Vietnam, ambiguous democracies in Malaysia and Sri Lanka, to well established democracies like India. There are similarly differences in their economic systems, ranging from tribal subsistence economies in parts of Indonesia through highly developed market economies of Singapore, Hong Kong and Taiwan and the mixed economy model of India to the planned economies of China and Vietnam. Perceptions of human rights are undoubtedly reflective of these conditions, and suggest that they would vary from country to country.

Perceptions of human rights are reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites, which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part, the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression. It is their views which are given wide publicity domestically and internationally.

...

. . . [S]ome Asian governments claim that their societies place a higher value on the community than in the West, that individuals find fulfilment in their participation in communal life and community tasks, and that this factor constitutes a primary distinction in the approach to human rights. . . . This argument is advanced as an instance of the general proposition that rights are culture specific.

The 'communitarian' argument is Janus-faced. It is used against the claim of universal human rights to distinguish the allegedly Western, individual-oriented approaches to rights from the community centred values of the East. Yet it is also used to deny the claims and assertions of communities in the name of 'national unity and stability'. It suffers from at least two further weaknesses. First, it overstates the 'individualism' of Western society and traditions of thought. . . .

Secondly, Asian governments (notwithstanding the attempt in the Singapore Paper to distinguish the 'nation' and the community) fall into the easy but wrong assumption that they or the State are the 'community'. . . . Nothing can be more destructive of the community than this conflation. The community and State are different institutions and to some extent in a contrary juxtaposition. The community, for the most part, depends on popular norms developed through forms of consensus and enforced through mediation and persuasion. The State is an imposition on society, and unless humanised and democratised (as it has not been in most of Asia), it relies on edicts, the military, coercion and sanctions. It is the tension between them which has elsewhere underpinned human rights. In the name of the community, most Asian governments have stifled social and political initiatives of private groups. . . . Governments have destroyed many communities in the name of development or State stability. . . .

Another attack on the community comes from the economic, market oriented policies of the governments. Although Asian capitalism appears to rely on the family and clan associations, there is little doubt that it weakens the community and its cohesion. The organising matrix of the market is not the same as that of the community. Nor are its values or methods particularly 'communitarian'. The moving frontier of the market, seeking new resources, has been particularly disruptive of communities which have managed to preserve intact a great deal of their culture and organisation during the colonial and post-colonial periods. The emphasis on the market, and with it individual rights of property are also at odds with communal organisation and enjoyment of property. . . .

A final point is the contradiction between claims of a consensus and harmonious society, and the extensive arming of the state apparatus. The pervasive use of draconian legislation like administrative detention, disestablishment of societies, press censorship, and sedition, belies claims to respect alternative views, promote a dialogue, and seek consensus. The contemporary State intolerance of opposition is inconsistent with traditional communal values and processes. . . .

JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE

(1989), at 118.

. . .

4. CULTURE AND RELATIVISM

The cultural basis of cultural relativism must be considered too, especially because numerous contemporary arguments against universal human rights standards strive for the cachet of cultural relativism but actually are entirely without cultural basis.

Standard arguments for cultural relativism rely on such examples as the pre-colonial African village, Native American tribes, and traditional Islamic social systems, but we have seen that human rights are foreign to such communities, which employed other mechanisms to protect and realize human dignity. . . . [W]here there is a thriving indigenous cultural tradition and community, arguments of cultural relativism offer a strong defense against outside interference—including disruptions that might be caused by introducing 'universal' human rights.

Such communities, however, are increasingly the exception rather than the rule. They are not, for example, the communities of the teeming slums that hold an ever-growing proportion of the population of most Third World states. Even most rural areas of the Third World have been substantially penetrated, and the local culture 'corrupted,' by foreign practices and institutions, including the modern state, the money economy, and 'Western' values, products, and practices. In the Third World today we see most often not the persistence of traditional culture in the face of modern intrusions, or even the development of syncretic cultures and values, but rather a disruptive 'Westernization,' cultural confusion, or the enthusiastic embrace of 'modern' practices and values. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists. But communitarian defenses of traditional practices usually cannot be extended to modern nation-states and contemporary nationalist regimes.

Therefore, while recognizing the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical cultural past. We must not be misled by complaints of the inappropriateness of 'Western' human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture; communitarian rhetoric too often cloaks the depredations of corrupt and often Westernized or deracinated elites.

Arguments of cultural relativism are far too often made by economic and political elites that have long since left traditional culture behind. While this may represent a fundamentally admirable effort to retain or recapture cher-

ished traditional values, it is at least ironic to see largely Westernized elites warning against the values and practices they have adopted.

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. . . Leaders sing the praises of traditional communities—while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere.

. . .

The cynicism of many claims of cultural relativism can also be seen in the fact that far too often they are for foreign consumption only. The same elites that raise culture as a defense against external criticisms based on universal human rights often ruthlessly suppress inconvenient local customs, whether of the majority or of a minority. National unification certainly will require substantial sacrifices of local customs, but the lack of *local* cultural sensitivity shown by many national elites that strongly advocate an international cultural relativism suggests a very high degree of self-interest.

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D. ILLUSTRATION: THE DEBATE OVER FEMALE CIRCUMCISION

Readings in Sections B and C suggested the important degree to which human rights debates over universalism and cultural relativism had as a subject a related set of issues deeply imbedded in most cultures: gender discrimination, sexuality and family. From the perspective of the human rights movement, those issues raise particularly acute problems in many developing countries. In recent decades, those countries experienced strong external and internal pressures to rethink and revise, sometimes radically, their traditional beliefs and practices. The relentless assault of the developed world on other cultures, the penetration of those cultures by trade, investment, tourism and media, the universalization of ideas and values like human rights, have inevitably launched transformative processes that are often referred to as modernization.

This Section D presents a case study involving two of these issues, sexuality and family, and implicitly involving gender discrimination as well. The focus is on practices that are variously referred to in the following readings as (with strikingly different political and moral innuendos and sometimes agendas) female circumcision *or* female genital mutilation. The issue of the consistency of this culturally imbedded practice with human rights norms has

become a matter of intense, often angry public debate, both in the West and in the portions of Africa where the practice is now centered. Women's groups and health institutions around the world have become parties to that debate.

It is not only the currency and importance of these issues that justify their selection for this case study. The questions posed by challenges to this cultural practice and the responses by Africans and others raise troubling issues about cultural relativism, as well as about the reach of human rights norms to non-governmental practices. We can here examine in a concrete setting some of the broad concepts in Section B's readings.

The following readings draw on the views of a number of organizations and individual commentators. When reading them, consider (a) what the main lines of argument in the discussion (or debate, or campaign) are, and how that discussion is understood from the different perspectives presented; (b) what provisions in the UDHR or ICCPR are most relevant to a criticism of this practice; (c) what changes those criticisms point towards; and (d) the degree to which differences in views are explainable as fundamentally different (cultural, historical) perceptions of the practice *or* as questions of strategy about how to address and change the practice.

VIEWS OF COMMENTATORS ABOUT FEMALE CIRCUMCISION

A Traditional Practice that Threatens Health—Female Circumcision

40 World Health Organization Chronicle 31 (1986).

. . .

The traditional practices of a society are closely linked with the living conditions of the people and with their beliefs and priorities. In societies where women's needs have been subordinated to those of men, traditional practices often serve to reinforce their disadvantage, with direct and indirect effects on their health.

Traditionally, the reproductive role of women is surrounded by myths and taboos that underpin practices pertaining to menstruation, pregnancy and childbirth. Some of these practices are health-promoting but many are dangerous, even life-threatening. . . .

. . .

One traditional practice that has attracted much attention in the last decade is female circumcision. Although not the most lethal of the practices affecting women's health, its adverse effects are undeniable. Seventy million women are estimated to be circumcised, with several thousand new operations performed each day. It is a custom that is still widespread only in Africa north of the equator, though mild forms of female circumcision are reported from some

countries in Asia too. However, history reveals that female circumcision of some kind has been practised at one time or another on every continent. . . .

. . .

There are three main types of female circumcision.

1. *Circumcision proper*, known in Muslim countries as *sunna* (which means 'traditional'), is the mildest but also the rarest form. It involves the removal only of the clitoral prepuce.
2. *Excision* involves the amputation of the whole of the clitoris and all or part of the labia minora.
3. *Infibulation*, also known as *Pharaonic circumcision*, involves the amputation of the clitoris, the whole of the labia minora, and at least the anterior two-thirds and often the whole of the medial part of the labia majora. The two sides of the vulva are then stitched together with silk, catgut or thorns, and a tiny sliver of wood or a reed is inserted to preserve an opening for urine and menstrual blood. The girl's legs are usually bound together from ankle to knee until the wound has healed, which may take anything up to 40 days.

Initial circumcision is carried out before a girl reaches puberty, the age range being anywhere from one week to 14 years. The operation is generally the responsibility of the traditional midwife, who rarely uses even a local anaesthetic. She is assisted by a number of women to hold the child down, and these frequently include the child's own relatives. . . .

. . .

Most of the adverse health consequences are associated with Pharaonic circumcision. Haemorrhage and shock from the acute pain are immediate dangers of the operation, and, because it is usually performed in unhygienic circumstances, the risks of infection and tetanus are considerable. . . .

Implantation dermoid cysts are a very common complication; these often grow to the size of a grapefruit. . . .

Infections of the vagina, urinary tract and pelvis occur frequently. Pelvic infection can result in sterility. Between 20% and 25% of infertility in Sudan has been attributed to Pharaonic circumcision.

Not surprisingly, a woman who has been infibulated suffers great difficulty and pain during sexual intercourse, which can be excruciating if a neuroma has formed at the point of section of the dorsal nerve of the clitoris. Consummation of marriage often necessitates the opening up of the scar by the husband using his fingers, a razor or a knife. Very little research has been done on the sexual experience of circumcised women, a subject surrounded by taboos and personal inhibition in most societies. However, the operation is known to destroy much or all of the vulval nerve and pressure endings, and

seems likely to delay arousal and impair orgasm. One study among infibulated women found that few even knew of the existence of orgasm.

During childbirth infibulation causes a variety of serious problems including prolonged labour and obstructed delivery, with increased risk of fetal brain damage and fetal loss. . . .

Though some observers believe female circumcision was originally a means of suppressing female sexuality and attempting to ensure chaste or monogamous behaviour, others believe that it was started long ago among herders as a protection against rape for the young girls who took the animals out to pasture. In fact its origins have proved impossible to trace. Not surprisingly, a variety of reasons are advanced by its adherents for continuing to support the practice today. As the word 'sunna' suggests, some Muslim people believe it is religiously ordained. However, there is no support for female circumcision in the Koran, nor is it practised in Saudi Arabia, the cradle of Islam. Other adherents believe that intact female genitalia are 'unclean'; that an uncircumcised woman is likely to be promiscuous; even that the operation improves the life chances of a woman's offspring. Some say it is a ritual initiation into womanhood.

None of the reasons given bears close scrutiny. They are, in fact, rationalizations for a practice that has woven itself into the fabric of some societies so completely that 'reasons' are no longer particularly relevant, since invalidating them does not stop the practice.

Significantly, female circumcision is usually associated with poverty, illiteracy and low status of women—with communities in which people face hunger, ill-health, overwork, lack of clean water. In such settings an uncircumcised woman is stigmatized and not sought in marriage, which helps explain the paradox that the victims of the practice are also its strongest proponents. They can scarcely afford not to be. In the best of circumstances, people are reluctant to question tradition or take an independent line lest they lose social approval. In poverty-stricken communities struggling to survive, social acceptance and support may mean the difference between life and death.

However, the signs are that education and a widening range of choices for women are slowly but surely undermining the practice. And men, too, from societies that customarily circumcise their women are beginning to express their own ambivalence or outright dislike of the custom. . . .

. . .

Wherever a colonial administration of the past or a government of today has tried to ban it outright, it has simply been practised with greater secrecy, and those suffering health complications have been inhibited from seeking professional help. Such an approach ignores the fact that those practising female circumcision believe in it, and that deeply entrenched attitudes of and towards circumcised women cannot be changed overnight. It ignores the need to *replace* the practice and not merely repress it: girls and women need to find other forms and types of social status, approval, and respectability. It ignores.

too, the fact that the operation is a principal source of income to traditional birth attendants and even midwives, who cannot afford to relinquish it unless an alternative living is available.

Roman Catholic missionaries in Ethiopia in the sixteenth century tried to stop the practice among their converts, but when men refused to marry the girls a reversal of the policy had to be demanded urgently from Rome. Today abolitionists who attempt to move fast similarly come up against the brick wall of a conservative society feeling itself threatened, or, if the campaigners are outsiders, against suspicion that they are meddling in cultural affairs that are none of their business. Many of these lessons have been learned, and the present approach is through national or local organizations, using as far as possible the skills and experience of those whose work is among villagers normally, such as teachers, social workers and health personnel.

. . .

In August 1982 WHO made a formal statement of its position to the United Nations Commission on Human Rights. This statement endorsed the recommendations of the Khartoum seminar, namely:

— that governments should adopt clear national policies to abolish the practice, and to inform and educate the public about its harmfulness;
— that programmes to combat it should recognize its association with extremely adverse social and economic conditions, and should respond sensitively to women's needs and problems;
— that the involvement of women's organizations at the local level should be encouraged, since it is with them that awareness and commitment to change must begin.

In the same statement the Organization expressed its unequivocal opposition to any medicalization of the operation, advising that under no circumstances should it ever be performed by health professionals or in health establishments.

. . .

Female Genital Mutiliation: Proposals for Change

Minority Rights Group International, Report 92/3 (1992) at 11.

. . .

Female genital mutilation is a complex issue, for it involves deep-seated cultural practices which affect millions of people. However, it can be divided into (at least) four distinct issues.

1 *Rights of women.* Female genital mutilation is an extreme example of the general subjugation of women, sufficiently extreme and horrifying to make

women and men question the basis of what is done to women, what women have accepted and why, in the name of society and tradition.

The burning of Indian widows and the binding of the feet of Chinese girl children are other striking examples, sharp enough and strange enough to throw a spotlight on other less obvious ways in which women the world over submit to oppression. . . .

. . .

2 *Rights of children.* An adult is quite free to submit her or himself to a ritual or tradition, but a child, having no formed judgement, does not consent but simply undergoes the operation (which in this case is irrevocable) while she is totally vulnerable. The descriptions available of the reactions of children—panic and shock from extreme pain, biting through the tongue, convulsions, necessity for six adults to hold down an eight-year-old, and death—indicate a practice comparable to torture.

Many countries signatory to Article 5 of the Universal Declaration of Human Rights (which provides that no one shall be subjected to torture, or to cruel, inhuman or degrading treatment) violate that clause. Those violations are discussed and sometimes condemned by various UN commissions. . . .

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In September 1990, the United Nations Convention on the Rights of the Child went into force. It became part of International Human Rights Law. Under Article 24(3) it states that:

> States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

. . .

3 *The right to good health.* There is no medical reputable practitioner who insists that mutilation is good for the physical or mental health of girls and women. . . .

. . .

LEGISLATION

In Africa

Formal legislation forbidding genital mutilation, or more precisely infibulation, exists in the **Sudan**. A law first enacted in 1946 allows for a term of imprisonment up to five years and/or a fine. However, it is not an offence (under Article 284 of the Sudan Penal Code for 1974) 'merely to remove the free and projecting part of the clitoris'.

. . .

In September 1982, President Arap Moi took steps to ban the practices in Kenya, following reports of the deaths of 14 children after excision. A traditional practitioner found to be carrying out this operation can be arrested by the Chiefs Act and brought before the law.

. . .

In Western countries

A law prohibiting female excision, whether consent has been given or not, came into force in Sweden [illegible] 1982, carrying a two-year [illegible]e. In Norw[illegible]'85, all h[illegible] were alerted to the practice. Belgium has incorporated a ban on the practice. Several s[illegible]s in the USA have incorporated female genital mutilation into their criminal code.

In the UK, specific legislation prohibiting female circumcision came into fo[illegible]at the end of 1985. A person found guilty of an offence is liable to up to f[illegible]ears' imprisonment or to a fine. . . .

. . .

Kay [illegible]re-Miller, [illegible]l Circumcision: Challenges to the Practice as a Human Rights Violation

8 Harv. Womens L. J. 155 (1985), at 165.

. . .

A. The Rights of the Child

[illegible] of the Child, adopted by the UN General Assembly in 1959, asserts that c[illegible]ren must be guaranteed the opportunity to deve[illegible]in a healthy a[illegible] normal way.

. . .

Fir[illegible]ge female circumcision as a violation of the rights of the ch[illegible] gests that women who permit the operation are incompetent and abusive mothers who, in some ways, do not love their children. The success of this approach the[illegible]e depends in part on how it is implemented; if African w[illegible]en are offended by the implication that they are poor mothers, they will lik[illegible] hildren's r[illegible]hts argument altogether.

The second problem with the rights of the child approach is that it conflicts with parents' desires to rear children independently and their notions of what is in their children's best i[illegible]s. While women may not wish to see their daughters harmed, they may also feel strongly that they should be able to rear their children according t[illegible]ir own cultural norms and traditions. Besides, if mothers value the economic, social, and cultural benefits of the operation, they are unlikely to be persuaded that it should not be performed on their daughters. Moreover, the strong social and cultural pressures to continue the

practice work against parents who would prefer not to submit their daughters to the operation. . . .

The third problem with this approach is that it almost exclusively focuses on the physical harm done to a child when she is circumcised and does not address the positive feelings she may have as a circumcised woman. In African communities with strong cultural and traditional ties, the perceived need to be circumcised mitigates the hellish remembrances of the event. Little girls who are initially hurt, betrayed, and degraded by the operation later come to feel socially and morally acceptable because they have been circumcised. As the girls grow into women they may forget the pain and argue that the practice need not be banned. Furthermore, it is difficult to attack a practice as harmful to children when it later gives them both social and economic benefits.

A final problem with approaching this issue from the rights of the child perspective is that many young girls believe that they want to be circumcised. The stigma associated with not being circumcised attaches early, virtually compelling a choice to undergo the operation. . . .

To argue that the girls themselves are opposed to the operation is therefore difficult; indeed, recent studies indicate that adolescent girls 'voluntarily' undergo the operation.

In some cases, however, African girls recognize how horrifying the practice can be. One reason given for the large number of Ethiopian girls in the Eritrean People's Liberation Front Army is that they were running away from forced marriages and the 'knife.' Others who have been circumcised feel outraged and betrayed by the *excieuse* (the man or woman who circumcised them), their fathers, their aunts, but most of all by their mothers.

. . .

C. The Right to Health

The right to health argument, which attacks female circumcision for producing menacing health problems, is likely to be successful. Women and governments in Africa accept this approach because it can be integrated into preexisting values and social and economic priorities, and does not require a reformulation of rights and policies. Combatting female circumcision as a violation of the right to health may therefore help unify the campaign to eradicate it.

African women accept the right to health argument for a number of reasons. First, as sexuality is not an openly discussed topic among most African women, they can more easily discuss the operation in terms of health effects. Further, since African countries face numerous health problems that demand immediate attention, framing the issue in terms of a right to health is seen as more legitimate than arguing for sexual or corporal integrity.

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Sabelle Gunning, Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries
23 Colum. Hum. Rts. L. Rev. 189 (1991–92), at 238.

. . .

Arguably, most of the activity reviewed and criticized by the human rights system is not culturally based. In cases of torture or forced disappearances, accused governments generally deny the fact or any knowledge thereof. With a cultural practice, the condemned act is acknowledged and defended: the practice is viewed 'as conduct which has evolved for a specific purpose within a culture and is endorsed as a legitimate expression of that purpose.' However governments may not be actually involved in the practice, because private citizens willingly nurture their cultural norms.

One problem therefore is whether human rights which, like the rest of international law, is aimed at public or government actions can be used to alter the behavior of private parties. Feminists have argued persuasively that the public-private distinction is a false one and that the real question is not whether law, in this case human rights law, should apply to the private as well as the public, but rather 'what types of private acts are and are not protected.' If one can decide that a particular act is a violation, even if performed by private citizens, one can hold governments responsible. For example, when one reviews the international definition of torture one sees that it is not only active or direct government participation which is prohibited, but also government 'consent or acquiescence.'

It may be argued that that language is designed to hold accountable governments that are believed to be responsible for torturous acts but who have created sufficient 'plausible deniability' to make it difficult to prove complicity. Still, it reflects a willingness to pressure governments to do something about 'private' acts. The practical problem is that if governments really do not have control over private actions, then the primary tool of human rights enforcement, governmental embarrassment, will not be nearly as effective. This is particularly true with a practice like female genital surgeries, where the governments involved may either refuse to be embarrassed or become angry at the attack on the culture; thus they reject the interference. Moreover, even if a government is embarrassed, the cost of implementing an eradication law, as has been explained, could be enormously socially disruptive and ineffective.

. . .

. . . One is not stuck between choosing 'universal standards' and 'everything is relative.' It is not that there are 'universals' out there waiting to be discovered. But through dialogue, shared values can become universal and be safeguarded. The process by which these universal standards are created is important. A dialogue, with a tone that respects cultural diversity, is essential.

From that dialogue a consensus may be reached, understanding that as people and cultures interact they do change and learn from each other.

CEDAW, Female Circumcision

General Recommendation. No. 14, 9th Sess., 1990
UN Doc. A/45/38, 1 Int. Hum. Rts. Rep. 21 (No. 1, 1994)

[The Committee on the Elimination of Discrimination against Women is created by the Convention to Eliminate all Forms of Discrimination against Women, examined in Chapter 13, *infra*, and is charged with specified tasks in the implementation of that Convention. The Committee is authorized to make general recommendations based on reports that it receives from the states parties.]

Recommends that States parties:

(a) Take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include:

(i) The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices;

(ii) The support of women's organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;

(iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to cooperate in influencing attitudes towards the eradication of female circumcision;

(iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;

(b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision;

(c) Invite assistance, information and advice from the appropriate organizations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices;

(d) Include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision.

K. Hayter, Female Circumcision—Is There a Legal Solution?
J. of Soc. Welf. L. (U.K.) 323 (Nov. 1984), at 325.

[These remarks concerned a pending bill in Parliament to prohibit female circumcision in the U.K.]

Clearly the effects of female circumcision and the enforced suppression of female sexuality is to be abhorred. The overall response of members of the House of Lords reflects this view, as summarised in the speech of Baroness Gaitskell's where she states, 'The primitive attitude to female circumcision rests not only on tradition, but on the male desire for the female to be pure for him . . . That is not only the most cruel, but also . . . the most primitive, and the most important aspect of the matter which we should reject.' But is this moral indignation sufficient to justify legal intervention to prohibit consensual acts performed on women over 16 in accordance with the cultural requirements of a minority group? Support for the view that it is can be seen in the statement of Lord Devlin, in his Maccabean Lecture in 1959 entitled *The Enforcement of Morals*. Here it is argued that legal intervention is justified where in the collective moral judgment of a society a practice cannot be tolerated. But unless moral repugnance can be founded on the broader principle that all acts amounting to sexual oppression of women are not to be tolerated, legislation on this issue could be interpreted as purely discriminatory against the minority groups concerned. It is interesting to note here that clitoradectomies were openly performed on children and women in England and the United States as late as 1945 as a 'cure' for masturbation and 'promiscuity.' The demise of this practice in recent years may indicate a general change in attitudes towards female sexuality. If this is correct then, it is suggested, the legality of certain western practices will also require review. Purely elective cosmetic surgery is an obvious case where the right of the individual to consent to treatment is not seriously questioned. Breast reduction, for example, is an unnecessary and mutilating operation involving considerable pain and scarring to the patient. If justification for its performance were called for, medical evidence of anxiety and depression brought on by the woman's dissatisfaction with her body would undoubtedly be sufficient to outweigh the injury inherent in the treatment. Indeed, the Government's proposed amendment to the Bill which would safeguard the right of western women to undergo surgery on mental health grounds reinforces this view. Precisely the same justification would be pleaded in support of the legality of female circumcision and should, by analogy, in the absence of further justification for its prohibition, be sufficient. In both cases the women's perception of themselves reflects the demands of the social group to which they belong. This justification is the greater in the case of female circumcision where its necessity extends beyond mere aesthetic appeal, being crucial to the women's status within the group.

Additionally, the imposition of the moral values of the majority onto

minority groups would seem inappropriate in a multiracial society in which the current trend is towards tolerance of others' cultural practices. An analogy can be drawn here between female circumcision and the circumcision of Jewish males, which does receive social and legal tolerance. Clearly nice distinctions can be drawn between a mere custom in the case of female circumcision and a strict religious requirement in the latter case. But is this really the criteria to be used to limit the bounds of toleration? The essential element in both appears to be the unquestioned and entrenched nature of the practices which are part of the social fabric of the groups concerned. Arguably both should, prima facie, be tolerated on this basis alone. A valid distinction between the two practices, however, is the degree of injury involved in female circumcision which is not associated with male circumcision.

. . . Legal intervention is, however, justified to protect persons from what is offensive or injurious, particularly where the individual is young, weak in body or mind or in a state of particular physical or economic dependence. Arguably the practice of female circumcision bears characteristics which bring it within these exceptions thus justifying legal intervention, which are not present in other forms of elective surgery. Clearly it is applicable to the circumcision of female children and this approach has been taken to prohibit indigenous practices, notably the tattooing of minors. To subject women over 16 to the same degree of legal paternalism appears, prima facie, to be a denial of their right to self-determination and a slight on the intellectual capacity of the women members of these groups. This issue underlies objections to legal limitations on a woman's right to elect for abortion. It is possible, however, that the cloistered lifestyle and acute state of economic dependence in which the women practising female circumcision find themselves may provide some justification for a paternalistic approach here. Access to research findings and wider views which refute the necessity for female circumcision are denied to them and the traditional view of the practice is enforced within the closed environment. They are not, therefore, in a position to form a balanced judgment in their own best interests. By criminalising female circumcision the law may assist in freeing women who are powerless to help themselves by reducing the social pressure to conform.

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AAWORD, A Statement on Genital Mutilation

in Miranda Davies (ed.), *Third World—Second Sex: Women's Struggles and National Liberation* (1983), at 217.

The Association of African Women for Research and Development (AAWORD) is a group of African women researchers dedicated to doing women's research from an African perspective. They are based in Dakar, Senegal where their first official meeting was held in December 1977.

. . .

This new crusade of the West has been led out of the moral and cultural prejudices of Judaeo-Christian Western society: aggressiveness, ignorance or even contempt, paternalism and activism are the elements which have infuriated and then shocked many people of good will. In trying to reach their own public, the new crusaders have fallen back on sensationalism, and have become insensitive to the dignity of the very women they want to 'save'. They are totally unconscious of the latent racism which such a campaign evokes in countries where ethnocentric prejudice is so deep-rooted. And in their conviction that this is a 'just cause', they have forgotten that these women from a different race and a different culture are also *human beings*, and that solidarity can only exist alongside self-affirmation and mutual respect.

. . .

AAWORD, whose aim is to carry out research which leads to the liberation of African people and women in particular, *firmly condemns* genital mutilation and all other practices—traditional or modern—which oppress women and justify exploiting them economically or socially, as a serious violation of the fundamental rights of women.

. . .

However, as far as AAWORD is concerned, the fight against genital mutilation, although necessary, should not take on such proportions that the wood cannot be seen for the trees. . . .

. . . [T]o fight against genital mutiliation without placing it in the context of ignorance, obscurantism, exploitation, poverty, etc., without questioning the structures and social relations which perpetuate this situation, is like 'refusing to see the sun in the middle of the day'. This, however, is precisely the approach taken by many Westerners, and is highly suspect, especially since Westerners necessarily profit from the exploitation of the peoples and women of Africa, whether directly or indirectly.

Feminists from developed countries—at least those who are sincerely concerned about this situation rather than those who use it only for their personal prestige—should understand this other aspect of the problem. They must accept that it is a problem for *African women*, and that no change is possible without the conscious participation of African women. . . .

. . .

Hope Lewis, Between 'Irua' and 'Female Genital Mutilation'
8 Harv. Hum. Rts. J. 1 (1995), at 31.

A primary concern expressed in African feminist texts is the tendency among Western human rights activists to essentialize the motivations for practicing FGS [Female Genital Surgery] as rooted either in superstition or in the pas-

sive acceptance of patriarchal domination. In rejecting these characterizations, African feminists seek to recapture and control the representation of their own cultural heritage.

. . .

The African feminist literature on FGS emphasizes the importance of the cultural context in which FGS occurs and the complexity of the justifications for its continued practice. It contends that western feminist discourse fails to ask the questions that would help place its patriarchal aspects in a broader context: Are boys initiated at the same time as girls? Are the risk and consequences of initiation rituals for boys as life-threatening and long-lasting as they are for girls? What socioeconomic purposes does FGS serve for a particular group? Are there alternative ways of fulfilling those purposes or challenging their necessity? If so, how should domestic and international actors identify and support those alternatives? Finally, do domestic and international actors contribute to the continuation of harmful traditional practices?

Merwine, Letter to Editor

New York Times, Nov. 24, 1993, at A24

To the Editor:

A. M. Rosenthal condemns female circumcision, a traditional practice common to many African and Arabic peoples, as 'female mutilation' . . . From the Western liberal tradition, and certainly from a feminist perspective, Mr. Rosenthal is correct.

However, from the African viewpoint the practice can serve as an affirmation of the value of woman in traditional society.

This tradition has long been a source of conflict between Western and African values.

. . .

The operation completed, a fee was provided by the young women, usually in the form of a cooked meal, to their moruithia. At this point, they became full members of the Kikuyu and were no longer considered girls.

The importance of the ceremony among traditional Kikuyu cannot be understated, for each girl showed by her act of courage that she was ready to be married. Of equal importance, she now became a member of an age-set. An age-set is a group of people of similar age who tend to act together in their society for the rest of their lives. To the Kikuyu, female circumcision is much more than a mere physical act.

. . .

The sentiments expressed long ago in Kenya are almost certainly shared by the peoples who practice the custom today. To demand, as Mr. Rosenthal

does, that economic aid be used to force a change in a tradition central to many Africans and Arabs is the height of ethnocentrism.

A better approach would be for Western peoples to try to understand the importance of these traditions to those who practice them. The West could encourage Africans to have the surgical part of the ceremony performed by competent medical practitioners. That would eliminate potential infection and restrict the extent of excision. This is being done in many African states. Such a policy would allow the West to uphold its values while avoiding the appearance of arrogance.

NOTE

As the comments of Gunning in the preceding readings make clear, the practice of female circumcision raises the distinctive question of who (if anyone), which party or actor, is violating international human rights. We have several times observed that the human rights movement was primarily intended to prohibit or require conduct of states. They are the ratifiers of the instruments, the makers of customary law, the defenders of the rights declared in the different instruments. Here lies the problem. Apparently no state enforces the practice of female circumcision, or instructs or advocates through its affiliated religious or educational institutions that the practice be continued.

Female circumcision therefore introduces a theme that runs through this book, the degree to which the human rights movement regulates directly or indirectly the conduct of non-governmental--and in this sense, private—actors. What mandate does one find in the basic texts, the UDHR and ICCPR, or in related customary law (say, as summarized by Restatement §702, p. 145, *supra*) to bring such actors, directly or indirectly, within the prohibitions of human rights law? We have thus far seen one instance, the dramatic instance of the Nuremberg trials, p. 102, *supra*, in which norms of international law were applied to, indeed used to impose *criminal* punishment on, individuals who included both government officials and (in the above sense) 'private' persons.

The broad problem here presented is then the reach of the human rights movement to 'private' actors and actions that cannot be attributed directly to the 'public' state. This theme, the public–private divide and its implications for the character and growth of international human rights, recurs in different forms in later chapters. Some questions that follow explore it now with respect to the practice of female circumcision.

QUESTIONS

1. African state X is a party to the ICCPR. Its government takes no formal, legal position on female circumcision, which is undergone by a substantial number of girls in X in the different forms described in the readings. No law, no subsidy, no official policy, requires or facilitates or prohibits the practice. Suppose that you are a member of a non-governmental human rights organization within X challenging this widespread practice on the ground that it violates the ICCPR. Of course you must anticipate the defenses to your charge.

a. Whom would you charge with committing the violation?

b. On what provisions of the Covenant would you rely for that charge, and what arguments would you make based on those provisions' text?

c. What provisions of the Covenant could be drawn on to refute your charge—say, provisions allegedly protecting the practice? For example, do you find among the rights declared by the ICCPR some that are relevant to challenging the practice and some relevant to defending it? In your answer, would you distinguish between circumcision at age three and age sixteen?

2. Does the practice of female circumcision raise issues of cultural relativism? That is, do you believe that the practice should be permitted in some states and prohibited in others? Or do you believe that it should be permitted or prohibited equally everywhere? If the first, what are the distinctions that lead you to defend the practice in, say, state X but not state Y?

3. 'It is no wonder that challenges to female circumcision have generated so much controversy in states where it is practiced. Could the line-up be worse from the perspective of getting things done? It's West vs. the rest, the uneducated and backward rest. It's whites vs. non-whites. It's science vs. culture.' Comment.

4. Given the resentment indicated by the prior readings against Western criticism of female circumcision, what strategy should an opponent of the practice develop to lessen or eliminate it? With whom would she work, what message would she deliver, what goals would she establish?

5. What do you view as the strongest justifications of the practice, and how as a critic of the practice would you respond to them?