CHAPTER 1

THE IDEA OF INTERNATIONAL HUMAN RIGHTS LAW

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"ALL HUMAN BEINGS ARE BORN FREE AND EQUAL IN DIGNITY AND RIGHTS."
THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, ARTICLE 1
(1948)

"Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

Eleanor Roosevelt

A. ORIENTATION

The focus and the inspiration of this course is a single, radical, and complicated idea: human beings have rights simply by virtue of being human. They have these rights not as a matter of grace from governments or generosity or public relations or luck. To be human is to be assured a certain minimum level of respect and dignity that limits what governments can do, or allow others to do, to people. The trick for lawyers—and the purpose of this casebook—is finding effective techniques for enforcing what law exists, developing law when it is needed, and maintaining a sense of engagement and hope in the face of human rights violations around the world.

The idea that human beings have rights simply by virtue of being human is an idea with considerable power, although high-profile ac-

counts of continuing human rights abuses give it a utopian reputation. Certainly profound issues of compliance and enforcement remain on every continent, but the human rights idea has proven over the decades to be capable of overcoming the strongest bases for discrimination, like race, gender, and class. It is an idea that has proven on occasion to be stronger than tyrants, sometimes even fatal to tyrants. The nascent corporate responsibility movement suggests that the human rights idea can be stronger than the *laissez faire* marketplace and offers companies a new way to compete with one another. The human rights idea has sometimes proven to be stronger than some of the strongest armies on the planet and the empires they serve: whatever else contributed to the demise of the Soviet Union, for example, the Helsinki Accords of 1976 planted certain human rights ideals that gave rise to the Solidarity Movement in Poland, Vaclav Havel in Czechoslovakia, and Mikhail Gorbachev's restructuring ideals of *glasnost* and *perestroika*.

The idea that human beings have rights simply by virtue of being human is in some ways an ancient idea, although the notion that it has a *legal* dimension—and especially an *international legal* dimension—is of considerably more recent vintage. For most of human history, one state's treatment of its own citizens was its own business, a matter of legitimate political diversity and beyond the scrutiny of other nations. Human rights issues were said to lie within each state's exclusive domestic jurisdiction, and considerations of sovereignty would have prevented the government of France for example from complaining about the treatment of Japanese citizens by the Japanese government and *vice versa*. With very limited exceptions, human rights issues were matters of domestic affairs, in which no other state had the right to interfere. International law protected those domestic prerogatives, and thereby preserved more state power than it constrained.

But something fundamental changed at the end of World War II—a "constitutional moment"—when the preservation of international peace and security became intrinsically and pragmatically linked to the protection of human rights. The generation that survived World War II understood in the most immediate way that international peace and security are linked to the protection of human rights. They had seen that genocide could be both the cause and the consequence of war. They realized that civil and revolutionary wars are common symptoms of a human rights crisis in its late stages. They had seen that human rights abuses tend to escalate if they are tolerated by the world community. In our own time, we can think of Rwanda and Iraq as examples of human rights crises at an early stage that later devolved into international military and political crises. Similarly, the failure of the United States to assure that detainees at Abu Ghraib and Guantanamo Bay were well-treated has provided al Qaeda a wealth of recruitment material. In short, we should avoid thinking of human rights protection as only some soft-headed, more or less altruistic utopianism, but also see it as a kind of long-term pragmatic self-interest.

The Role of the United Nations and the International Bill of Rights

The framers of the United Nations Charter explicitly linked respect for and observance of human rights with the "stability and well-being which are necessary for peaceful and friendly relations among nations." U.N. Charter, art. 55. Article 1(3) of the Charter proclaims that one of the organization's central purposes is "to the achieve international co-operation* * * in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." A lawyer might consider that language—"promote and encourage respect"—and conclude that it is remarkably soft and unambitious, especially when the framers of the United Nations might have used language like "enforce human rights" or "compel compliance with human rights norms." The human rights language of the Charter fell far short of the Allies' rhetoric during the war, and the "promote and encourage respect" phrasing lacked the crystalline clarity of Franklin Roosevelt's Four Freedoms speech of 1941, in which he envisioned a world founded upon four essential human freedoms: freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want, and freedom from fear.

Of course, a fully-formed and autonomous system for the compulsory protection of these human rights was not a realistic possibility in 1945, because—among other things—each of the dominant victorious powers had profound human rights problems of its own. The Soviet Union had its gulag, the United States its *de jure* and *de facto* racial discrimination, France and Great Britain had colonial empires. But the framers of the Charter were first and foremost master politicians, acutely conscious of what was possible and how to achieve it, and they knew on the basis of their experience with the League of Nations that aggressive assertions of international power—without some sensitivity to political realities and the continuing power of sovereignty—were doomed to failure. They understood that a power grab by the United Nations was neither realistic nor in the end necessary: empowering the United Nations to take cognizance of human rights issues, even if only "to promote and encourage respect" for human rights, would make those issues a proper matter of international concern. It would be a chink in the armor of state sovereignty and potentially lead to the emergence of an entire body of articulated human rights standards with various means of enforcement.

Whether intended or not, that is what happened. The United Nations offered an institutional framework and a conceptual foundation for a variety of subsequent instruments that defined human rights and offered a partial system of enforcement. In fact, the 1948 Universal Declaration of Human Rights ("UDHR" or "Universal Declaration") in the Documents Supplement, was the first comprehensive catalogue of human rights by a global international organization. Human rights and fundamental freedoms had never before been articulated in such detail, and there was broad-based international support for the Universal

Declaration when it was adopted. Of course, at the time, the UN had only 58 members, compared to nearly 200 today, and many countries now recognized as independent sovereigns in Africa, the Middle East, and Asia were then territories within colonial empires. As a consequence, some governments have asserted that the Universal Declaration adopted a western version of rights and have called for its renegotiation.

But to dismiss the Universal Declaration as a western construct requires a certain revisionism: the declaration was supported by Asian and south Asian states like Pakistan, India, China, Japan, Thailand, and the Philippines; Middle Eastern states like Egypt, Syria, Morocco, Turkey, Iran, Iraq, Lebanon, and Afghanistan; African states like Ethiopia and Liberia. As Michael Ignatieff has observed,

> Many traditions, not just Western ones, were represented at the drafting of the Universal Declaration of Human Rights—for example, the Chinese, Middle Eastern, Christian, Marxist, Hindu, Latin American, and Islamic. The members of the drafting committee saw their task not as a simple ratification of Western convictions but as an attempt to delimit a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds. This fact helps to explain why the document makes no reference to God in its preamble. The communist delegations would have vetoed any such reference, and the competing religious traditions could not have agreed on words that would make human rights derive from human beings' common existence as God's creatures. Hence the secular ground of the document is not a sign of European cultural domination so much as a pragmatic common denominator designed to make agreement possible across the range of divergent cultural and political viewpoints.

Michael Ignatieff, *The Attack on Human Rights*, 80 FOREIGN AFFAIRS (Nov.-Dec. 2001) at 102. The states that abstained but did not vote against the declaration were the Soviet Union and its client states, Poland and Czechoslovakia, as well as South Africa and Saudi Arabia. This is not a particularly monolithic group in ideology, or political system, or religious and cultural composition, or socio-economic development, or geographic location. And after 1948, the Universal Declaration was generally considered a common statement of goals and aspirations—a vision of the world as the international community would want it to become. In fact, at the World Conference on Human Rights held in Vienna in 1993, 171 countries reiterated the universality, indivisibility, and interdependence of human rights, and reaffirmed their commitment to the UDHR.

The principles in the Universal Declaration have also been incorporated into national legislation and the constitutions of many newly independent states. References to the UDHR have been made in charters and resolutions of regional intergovernmental organizations, as well as in treaties and resolutions adopted by the United Nations system. To

some extent, the Universal Declaration echoes the U.S. Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, and consists of thirty articles grounded in the bedrock provision of Article 1 that "all human beings are born free and equal in dignity and rights." There follow provisions on the right to life, liberty and security of person; the right to an adequate standard of living; the right to seek and to enjoy asylum from persecution; the right to own property; the right to freedom of opinion and expression; the right to education, freedom of thought, conscience and religion; and the right to freedom from torture and degrading treatment, among many others. Many of these provisions became the basis of the two international covenants on human rights, *infra*, as well as the more specialized treaties like a refugee convention in 1951, a convention on the elimination of all forms of racial discrimination in 1969, a convention on the elimination of all forms of discrimination against women in 1981, and a convention prohibiting torture in 1984.

The Universal Declaration was understood to be non-binding at the time of its adoption, which may account for why no state voted against it. In a sense, the stakes couldn't have been lower, because voting "yes" cost the states nothing as a matter of law, and voting "yes" looked good in the hometown newspapers. But the Universal Declaration has had a remarkable trajectory towards normativity: it may have begun life as a purely aspirational or voluntary document, but it has gradually ratcheted towards something considerably more law-like, to the point now that governments, courts, advocates, and international bodies routinely consider the Universal Declaration an authoritative articulation of the human rights provisions of the UN Charter. In the words of Professor Sohn,

> 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 Member States agreed in the Charter to promote and observe. The Universal Declaration has joined the Charter of the United Nations 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 customary law, binding on all states, not only on members of the United Nations.

Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 16–17 (1982).

What this means for human rights lawyers is that they must break out of the traditional distinction between binding law and irrelevant aspiration. They need some third category between the obligatory and the aspirational. Even before some provisions of the Universal Declaration were incorporated into treaties or domestic law or UN resolutions, those provisions laid out non-binding norms that were nonetheless

authoritative. International lawyers refer to this as "soft law." It isn't binding but it isn't irrelevant either, especially to the extent that it defines an issue of international importance and exerts a gravitational force on the evolution of law.

Linked to the Universal Declaration are the two international human rights covenants of 1966, namely the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR"). Together, the Universal Declaration and these two covenants make up what is generally called the *International Bill of Rights*. The ideological and political conflict of the Cold War caused the treaties to be split between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, when the UDHR itself made no such distinction. There is however one important textual difference between these two covenants, going to the immediacy with which these rights must be respected or implemented. Consider article 2(1) of the ICCPR:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Compare that with article 2(1) of the ICESCR:

> Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Whatever other substantive differences there may be between these two covenants, at a minimum one seems to require immediate implementation and the other refers to taking steps to the maximum of a state's available resources, with an eye towards progressive realization using all appropriate means. Many observers have suggested that this textual difference has undermined the effort to enforce economic, social and cultural rights and required the international community to develop a jurisprudence for considering all rights interdependent.

LOUIS B. SOHN, THE NEW INTERNATIONAL LAW: PROTECTION OF THE RIGHTS OF INDIVIDUALS RATHER THAN STATES

32 AM. U. L. REV. 1–62 (1982)

The modern rules of international law concerning human rights are the result of a silent revolution of the 1940's, a revolution that was

almost unnoticed at the time. Its effects have now spread around the world, destroying idols to which humanity paid obeisance for centuries. Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states. * * *

[In the aftermath of World War II,] individuals gained rights under international law and, to some extent, means for vindication of those rights on the international plane. This development entailed four different law-building stages: assertion of international concern about human rights in the U.N. Charter;[1] listing of those rights in the Universal Declaration of Human Rights;[2] elaboration of the rights in the International Covenant on Civil and Political Rights[3] and in the International Covenant on Economic, Social and Cultural Rights;[4] and the adoption of some fifty additional declarations and conventions concerning issues of special importance, such as discrimination against women, racial discrimination and religious intolerance. The pyramid of documents, with the Charter at its apex, has become a veritable internationalization and codification of human rights law, an international bill of human rights much more detailed than its French and American counterparts. * * *

Even if governments and scholars were originally in disagreement regarding the importance, status, and effect of the Universal Declaration, practice in the United Nations soon confounded the doubters. Several of the governments that originally were skeptical about the value of the Declaration did not hesitate to invoke it against other countries. Thus, the United States invoked it in the so-called *Russian Wives Case*, and the General Assembly declared that Soviet measures preventing Russian wives from leaving the Soviet Union in order to join their foreign husbands were "not in conformity with the Charter," citing articles 13 and 16 of the Declaration in support of its conclusion.[5] The Soviet Union, which originally claimed that the Declaration violated the

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1. *See, e.g.*, U.N. CHARTER art. 1, para. 3; *id.* art. 55. The U.N. Charter gives to the Economic and Social Council the responsibility for making "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." *Id.* art. 62, para. 2. *See also id.* art. 13, para. 1(b).

2. *Approved* Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 at 56 (1948) [hereinafter cited as Universal Declaration]. Among the rights included in the Universal Declaration are the following: the right to life, liberty, and security of person (art. 3); the right to be free from arbitrary arrest, detention, or exile (art. 9); the right to marry and found a family (art. 16); the right to freedom of thought, conscience, and religion (art. 18); and the right to education (art. 26).

3. *Entered into force* Mar. 23, 1976, G.A. Res. 2200A, 21, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Civil and Political Rights].

4. *Entered into force* Jan. 3, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc.A/6316 (1966) [hereinafter cited as Covenant on Economic, Social and Cultural Rights].

5. G.A. Res. 285(III), U.N. Doc. A/900 (1949).

Charter's prohibition against interference in a state's internal affairs, later voted for many resolutions charging South Africa with violations of the Universal Declaration.[6] * * *

When the Commission on Human Rights finished the Universal Declaration, it began preparing the other part of the International Bill of Rights, a convention containing precise obligations that would be binding on the States Parties. There were initial fears that the various rights would drown in a sea of limitations and exceptions, but this danger was avoided by careful delineation of the conditions under which rights could be limited, and identification of those rights that could not be limited under any circumstances. Another difficulty did, however, arise. It proved impossible to formulate in a parallel manner all the rights listed in the Universal Declaration; it became necessary to divide the materials into two categories: civil and political rights; and economic, social, and cultural rights. These two categories were embodied in two separate Covenants—a name that was preferred to the less solemn "convention"—each differing from the other in several respects. The main difference was in their treatment after coming into force. States Parties were to give the Covenant on Civil and Political Rights immediate effect through appropriate legislative or other measures and by making available an effective remedy to any person whose rights have been violated. In contrast, each State Party to the Covenant on Economic, Social and Cultural Rights agreed only to take steps, to the maximum of its available resources, toward a progressive realization of the rights recognized in that Covenant. The Covenant thus contained a loophole: because a state's obligation was limited to the resources available to it, a poor state could proceed slowly, progressing only as fast as its resources permitted. If its resources should diminish, for example, during an economic crisis, its progress could wane. In contrast, the Covenant on Civil and Political Rights permits no such excuses; a state must guarantee civil and political rights fully on ratification, subject only to [certain] limitations* * *[7]

6. *See, e.g.*, S.C. Res. 182, 18 U.N. SCOR Supp. (Oct.-Dec. 1963) at 103, U.N. Doc. S/5471 (1963).

7. [Editors' Note: Professor Sohn here references his prior discussion of limitations on rights, which includes this analysis: * * * There are two other categories of rights: first, those which a state can limit in times of emergency, such as freedom from compulsory labor, right to liberty and security of person, right to humane treatment in prison, right to certain minimum guarantees in criminal proceedings, and freedom from interference with privacy, family, home, or correspondence, and, second, those which the state can limit in order to protect national security, public order (*ordre public*), and public health or morals. The second category includes the following rights listed in the Covenant on Civil and Political Rights: the right to liberty of movement; the freedom to choose one's residence; the right to a public hearing; freedom to manifest one's religion or beliefs in public; freedom of expression and to seek, receive, and impart information and ideas, orally or in print; right of peaceful assembly; and freedom of association. *Id.*, at arts. 12, 14, 17, 18(33), 19, 21, 22. Of the rights listed in the International Covenant on Economic, Social and Cultural Rights, only the rights relating to trade unions are subject to similar restrictions. [*Id.*, at art. 8(1).] Other rights arising under that Covenant can be limited solely "for the purpose of promoting the general welfare in a democratic society." [*Id.*, art. 4.]]

[II. THE FIRST GENERATION OF RIGHTS: CIVIL AND POLITICAL RIGHTS]

C. The International Covenant on Civil and Political Rights

1. Implementation of the Covenant on Civil and Political Rights

The Covenant on Civil and Political Rights is to be implemented through a combination of international and domestic law. Its enforcement relies in the first place on national institutions, as each State Party has the duty to ensure that any person whose rights under the Covenant have been violated has an effective remedy against the violator and the access for that purpose to appropriate judicial, administrative, or legislative authorities.[8]

The Covenant on Civil and Political Rights also provides for international implementation measures. The Covenant not only requires States Parties to present periodic reports on the progress made in enjoyment of the rights recognized in the Covenant,[9] but also provides for a Human Rights Committee with jurisdiction over complaints by one state that another state has not fulfilled its obligations under the Covenant.[10] This jurisdiction can, however, be exercised only if both states previously have accepted the competence of the Committee to receive such complaints.[11] [As of 2008, 48] countries have accepted this jurisdiction * * * [As of 2008, over 120] states * * * have accepted another implementation measure, an optional protocol allowing individuals claiming to be victims of a violation of the Covenant to present to the Human Rights Committee communications against the state responsible.[12] Both of these new international remedies are subject to one of the oldest rules in the area of state responsibility: a complaint or communication can be presented only when all available domestic remedies have been exhausted and redress has not been obtained.

The guarantees in the Covenant on Civil and Political Rights are designed primarily to protect individuals against arbitrary government action and to ensure individuals the opportunity to participate in government and other common activities. Promotion and protection of human rights not only leads to good government, but is "the foundation of freedom, justice and peace in the world."[13] To ensure these common ideals, the Covenant was designed to help states improve their domestic laws and institutions so that human rights would be protected throughout the world. Although the Covenant relies primarily on domestic remedies, it also recognizes the new international status of individuals and gives them access to an international committee, at least against those states that have accepted the optional protocol. As noted earlier,

8. Covenant on Civil and Political Rights, *supra*, art. 2(3).

9. Covenant on Civil and Political Rights, *supra*, art. 40.

10. *Id.* art. 41(1).

11. *Id.*

12. Optional Protocol to the International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Optional Protocol].

13. Covenant on Civil and Political Rights, *supra*, preamble.

[over half] of all the states in the world have accepted this direct method of international vindication of individual rights. In addition, almost half of the members of the world community have, by becoming parties to the Covenant, accepted the new international rule that individuals are not mere objects of the provisions of the Covenant but have direct rights under that instrument and ultimately may be able to enforce these rights.* * *

3. The first generation of human rights: conclusions.

The Covenant on Civil and Political Rights is the least novel of human rights instruments. It reflects human rights values that have been developing in many countries of the world since the signing of the Magna Carta. Both old and new national constitutions contain similar principles. * * * The law of human rights as embodied in the international instruments is not merely treaty law, but rather has become a part of international customary law of general application, except in areas in which important reservations have been made. These documents do not create new rights; they recognize them. Although the line between codification and development of international law is a thin one, the consensus on virtually all provisions of the Covenant on Civil and Political Rights is so widespread that they can be considered part of the law of mankind, a *jus cogens*[14] for all. Thus, an important step has been taken in enlarging the scope of international law and in providing international protection to many important individual rights. * * *

III. THE SECOND GENERATION OF RIGHTS: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

A. Development of the Concept of Economic, Social, and Cultural Rights

Civil and political rights are usually traced to the pronouncements of the American and French Revolutions; the concept of economic and social rights, in comparison, is generally assumed to have originated in the Russian Revolution of 1917. * * *[I]t was in response to the Nazi tyranny * * * that President Roosevelt conceived the idea of an instrument dealing with economic and social rights. In his "Four Freedoms" message to the U.S. Congress in 1941,[15] President Roosevelt mentioned not only freedom of speech and expression, freedom of religion, and freedom from fear (including freedom from wars of aggression), but also "freedom from want." The latter requires "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world."[16] In his 1944 Message to Congress,[17] President Roosevelt spelled out in more detail the rights that were embraced in his concept of "freedom from want." He pointed out

14. [Editors' note: The concept of *jus cogens* is described and analyzed at p. 22, *infra*.]

15. Eighth Annual Message to Congress, Jan. 6, 1941 reprinted in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2855 (1966).

16. *Id.* at 2860.

17. Eleventh Annual Message to Congress, Jan. 11, 1944, reprinted in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790–1966, at 2875 (1966).

that "true individual freedom cannot exist without economic security and independence"; that "[p]eople who are hungry and out of a job are the stuff of which dictatorships are made"; and that "[i]n our day these economic truths have become accepted as self-evident."[18] He knew well that in the United States in the 1930's it was the New Deal, with its economic, social, and labor reforms, that prevented economic and social chaos. He felt that, similarly, global chaos and totalitarianism could be stopped only by drastic economic and social reforms throughout the world. Although his two messages were directed primarily to a domestic audience, his words had a worldwide impact, and were not forgotten when the United Nations began to address human rights issues.

In the Four Freedoms speech, President Roosevelt had emphasized "the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world."[19] He noted that there is nothing mysterious about the foundations of a healthy and strong democracy, and listed expressly "the simple and basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world." They were:

> Equality of opportunity for youth and for others.
> Jobs for those who can work.
> Security for those who need it.
> The ending of special privilege for the few.
> The preservation of civil liberties for all.
> The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.

* * * President Roosevelt's idea of freedom from want, announced to the world in 1941, was reflected in an international bill of rights drafted by the United States in 1942.* * *

B. The International Covenant on Economic, Social, and Cultural Rights

* * * Some states announced that they were unwilling to become parties to a binding instrument such as the Covenant if they would thereby have to commit themselves to clauses concerning economic, social, and cultural rights. * * * The basic civil and political rights were described by some as traditional, subjective, and negative; the economic, social, and cultural rights were characterized as new, objective, and positive. Others considered these latter rights to be indefinite, promotional, and programmatic. * * *

1. Implementation of the Covenant on Economic, Social and Cultural Rights

i. *The progressive nature of the Covenant's implementation*

The drafters had to solve several other general problems in connection with the introductory clauses to the Covenant on Economic, Social

18. *Id.* at 2881.

19. Eighth Annual Message to Congress, *supra*, at 2859.

and Cultural Rights. It was agreed first that each State Party should undertake "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[20] This was an "umbrella" provision covering all the rights in the Covenant, replacing an unsuccessful attempt to incorporate detailed restrictions and exceptions into each article. Traces of the abandoned approach to exceptions still may be found in some articles of the Covenant, especially in the fine print of articles 13 and 14, which deal with the right to education.[21]

The main emphasis in the text of article 2 is on the "progressive" nature of the obligation to achieve economic, social, and cultural rights.[22] The drafters recognized in particular that many countries do not yet have the necessary resources, and that time would be needed to develop them. To speed up this development, the text included a gentle hint that states endowed with better resources and technological know-how should help their less fortunate brethren. This should be accomplished "through international assistance and co-operation, especially economic and technical."[23] Although the Covenant allows states some latitude regarding the "appropriate means" required for the full realization of economic, social, and cultural rights, the drafters felt that "legislative measures" should not be neglected, because such measures could help establish the policies to be pursued and could provide the necessary legal and administrative framework for the implementation of these policies. * * *

ii. *Guarantees against discriminatory implementation*

A general provision imposes on States Parties the obligation "to guarantee that the rights enunciated in the ... Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[24] Thus, whatever level a country reaches in the realization of economic, social, and cultural rights at any given time, the benefits thereof would have to be accorded equally to all persons. This anti-discrimination provision was adopted despite some opposition, which was based to a certain extent on the ground that some countries might be unable to provide immediately for equality of pay

20. Covenant on Economic, Social and Cultural Rights, *supra*, art. 2, para. 1.

21. *See id.* arts. 13, 14. Article 14, for example, provides that each State Party, which was not able to provide free, compulsory education when it became a Party, "undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of [free] compulsory education." *See also id.* arts. 6(2), 12(2), 15(2).

22. "Each State Party ... undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant.... " *Id.* art. 2(1).

23. *Id.*

24. [Covenant on Economic, Social and Cultural Rights, *supra*,] art. 2(2).

between the sexes. Unlike most of the other provisions of the Covenant, the anti-discrimination provision is not "progressive"; it applies as soon as a state ratifies the Covenant.[25] * * *

2. *Substantive provisions of the Covenant on Economic, Social and Cultural Rights*

Among the rights listed in the Covenant on Economic, Social and Cultural Rights, the right to work has been considered basic. Effective implementation of this right would presumably eliminate unemployment, thereby banishing poverty and its attendant evils. This in turn would create an atmosphere in which other rights, particularly civil and political rights, could be enjoyed by all. In addition, useful work would benefit both society, through the production of needed goods and services, and the individual, through the feeling of satisfaction that accompanies the use of one's talents and the opportunity to contribute both to individual well-being and the common good.

The Covenant specifies that the right to work means primarily that everyone should have an "opportunity to gain his living by work."[26] The idea that a person has an obligation to work was clearly rejected; such a duty might have led to forced labor, reminiscent of the Nazis' and certain countries' abuse of such labor. The right to work includes the concept of free choice of an occupation; the work must be one that a person "freely chooses or accepts."[27] The scope of this choice is not clear; no determination has been made about how long an individual can refuse offers of employment and still claim the opportunity to work. * * *

The Covenant's provision on social security[28] is the most succinct of all the provisions. * * * It speaks of social security in the broadest terms, to embrace not only social insurance but also other methods of social and economic assistance for the benefit of insecure members of the community. It provides social security to "everyone," not just workers. Attempts to narrow the application of the principle to workers only were unsuccessful. Similarly rejected were special financing schemes restricted to contributions by workers, or by workers and employers. Instead, each state was allowed to select any financing method it deemed appropriate.

To offer another example of the Covenant's breadth and flexibility, the Covenant recognizes the right to education and carefully sets out obligations relating to different stages of education: primary, secondary,

25. *Compare* Covenant on Economic, Social and Cultural Rights, *supra*, art. 2(1) (states may achieve progressively the rights recognized in the Covenant) with *id.* art. 2(2) (states undertake to guarantee that the rights recognized in the Covenant will be exercised without discrimination).

26. *Id.* [art. 6(1)].

27. *Id.*

28. Article 9 of the Covenant of Economic, Social and Cultural Rights, *supra*, provides in full: "The States Parties to the present Covenant recognize the right of everyone to social security including social insurance."

higher, and fundamental.[29] To avoid rigidity, the Covenant does not define these categories of education, thus allowing States Parties flexibility in implementing the provisions. It provides expressly for prompt implementation of "the principle of compulsory primary education free of charge for all," and for progressive achievement of free education at higher levels.[30] * * *

IV. THE THIRD GENERATION OF RIGHTS: COLLECTIVE RIGHTS

* * *[I]nternational law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.

A. Recognized Third–Generation Rights

1. The right of self-determination.

International law has long been concerned with one of the most basic of collective rights: the right of self-determination.* * *

The Covenants clearly endorse not only the right of external self-determination [decolonization/independence], but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution. A people that cannot freely determine its political status can hardly determine its economic, social, and cultural status. A people should be free both from interference by other peoples or states and from deprivation of its right to self-determination by a tyrant or dictator. The right of self-determination could be construed to assure the right to exercise freely all other rights, particularly the Covenants' political and economic rights. * * *

This special problem aside, the principle or right of self-determination clearly has been one of the most influential legal and political doctrines of this century and had led to a revolutionary transformation of political relationships throughout the world, including the emergence of more than a hundred new states.

* * *

4. Other third-generation rights.

* * *

One may also note that the Universal Declaration of Human Rights, in a similar spirit, but without express mention of the environment, proclaimed that everyone "has the right to a standard of living adequate for the health and well-being of himself and of his family, including

29. International Covenant on Economic, Social and Cultural Rights, *supra*, arts. 13, 14.

30. *Id.*

food, clothing [and] housing." There is a similar provision in the Covenant on Economic, Social and Cultural Rights* * *

B. Issues Raised by the Recognition of Collective Rights

Taken together, the third generation of human rights raises difficult issues. In the 1950's, the concept of and need for economic, social, and cultural rights were heatedly debated; today, the opponents of the new rights contend in a similar manner that the third-generation rights are not really legal rights but are either political or social principles, or, at best, "moral" rights, without any legal force. * * *

[T]he author of the phrase "third generation of human rights," Karel Vasak of UNESCO, views these rights as "infusing the human dimension into areas where it has all too often been missing having been left to the State or States." Such rights can be realized only "through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies, and the international community." Vasak also has pointed out that the first two generations of human rights were designed to achieve the first two of the three guiding principles of the French Revolution—*liberté* and *égalité*—while the third generation is predicated on brotherhood—*fraternité*. According to Vasak, the new rights, even more than the rights belonging to the first two categories, are based on the sense of solidarity, without which the chief concerns of the world community, such as peace, development and environment, cannot be realized* * *.

Precursors to Contemporary Human Rights Law

As Professor Sohn suggests, international human rights law had its critical "constitutional moment" in the aftermath of World War II, but it requires a revisionist (and somewhat narcissistic) view of the world to suggest that human rights law is a product of the late 20th century, only now moving out of its infancy. To the contrary: contemporary human rights doctrine has evolved from historical "pockets" of discrete concerns that we can in retrospect classify as early human rights law:

The law of war/international humanitarian law. The proposition that some conduct even in wartime is unacceptable goes back to the ancients, notably Lao Tzu and Thucydides. Medieval notions of chivalry suggested that certain conduct in war, certain targets, certain weaponry, were unacceptable, at least in principle. In the middle of the 19th century, these standards began to be codified, which culminated in major treaties governing the conduct of hostilities in 1899, 1907, and 1929, and ultimately in the Geneva Conventions of 1949 and their subsequent Protocols. Today, literally scores of treaties and military codes of conduct have been adopted protecting certain non-combatant populations at risk in armed conflict, like the sick and wounded in the battlefield, or medical personnel, or civilians caught in the cross-fire, or prisoners of

war who are no longer capable of fighting. It is no accident that the modern law of war emerged as the international community became conscious of the enormous destructive potential of modern warfare: the people who survived thought it morally imperative and deeply pragmatic to articulate standards which might protect innocents even if those standards were obviously imperfect in conception and enforcement. But it is not just people on the periphery of the conflict who have been protected. A number of treaties concluded before World War II prohibited certain weapons altogether, banning poison gas or other biological and chemical agents and most recently cluster bombs, which protect combatants and non-combatants alike.

Nuremberg and the emergence of international criminal responsibility. In the aftermath of World War II, the disconnect between the humanitarian goals of the law of war and the reality on the ground led to the development of a new conception of international humanitarian law, grounded in individual rights and responsibilities, and enforced through the instrument of international criminal law. The Nuremberg Tribunal, and its counterpart in Tokyo, refined and applied the laws of war, but new crimes were also recognized, specifically crimes against the peace and crimes against humanity. The innovative leap, with consequences to this day in the Rome Statute that established the International Criminal Court, was the notion of individual criminal responsibility under international law. The war crimes tribunals reasoned that violations are committed by people, not by abstractions like the state, and it is therefore proper to impose individualized punishment on people for violations of international standards. That approach was not only morally better, because criminals could not then hide behind abstractions, but it was also politically better for the process of reconciliation. Why? Because individualizing criminal responsibility can reduce (without eliminating) the kind of revenge group-think that can sustain cycles of ethnic or sectarian violence for generations.

There is the well-worn charge that Nuremberg was "victor's justice," that it was law in the service of vengeance, that it imposed *ex post facto* laws. The genetic marker of its inadequacy is the post-war conduct of the Allies themselves: Great Britain in Northern Ireland, the Soviet Union in Afghanistan, France in Algeria, the United States in Vietnam. Critics argue that the Allies were not willing to bind themselves to the Nuremberg principles in their own post-Nuremberg conflicts. There is also the irony of August 8, 1945, which arises out of the fact that on that date, the Allies were proclaiming the London Charter establishing the Nuremberg Tribunal, with its commitment to humanitarian law. At virtually the same hour, the United States was preparing to drop the atomic bomb on Nagasaki. And that raises this question: if the Axis powers had developed the atomic bomb and used it on New York but had still gone on to lose the war, is there any doubt that the indiscriminate destruction of New York would have been included as a war crime or worse? The concern is that because nuclear weapons were used by

the winners, they have been exempt from serious legal scrutiny for decades, at least until the ICJ's advisory opinion on the use of nuclear weapons, *infra*.

Ritualized as the critique of Nuremberg has become, the reality is that the *ad hoc* tribunals for Yugoslavia and Rwanda and similar courts have built on the Nuremberg principle and avoided the victor's justice taint. If anything, the *ad hoc* tribunals have also enhanced their own credibility and the legitimacy of the enterprise by protecting the rights of defendants, even as they vindicate the rights of victims by prosecuting the guilty.

State responsibility to aliens. Traditionally, a state is answerable in international law for the treatment of aliens and their investments within that state's territory. For example, if the Guatemalan government abused a visiting Mexican citizen, Mexico would have the right to call the Guatemalan government to account, to exercise the right of *diplomatic protection*, and to seek remedies for the injury to its citizen. Typically, the state responsibility doctrine was enforced through bilateral diplomatic relations or arbitrations between the states; indeed, although the individual was the actual victim, the law effectively made him or her the representative of the home state, as though his or her government were the rights-bearer and had the presumptive right to compensation. Individuals had no standing in the traditional conception of international law, and the obligations collected under the rubric of state responsibility to aliens ran state-to-state. It was only the victim's nationality and alienage that triggered international standards. One success of the contemporary human rights movement over the last fifty years is the steady erosion of that nationality fixation and an understanding that people have rights by virtue of being human, not by virtue of their alienage. A government that tortures its own citizens is as much in breach of international law as a government that tortures an alien, and the individual survivor is the rights-bearer, not his or her state of nationality.

Labor rights and the development of the International Labour Organisation ("ILO"). The ILO was founded in 1919 and became the first specialized agency of the UN in 1946. The ILO formulates international labor standards in the form of Conventions and Recommendations setting minimum standards of basic workers' rights, like freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment, and other standards regulating conditions across the spectrum of work-related issues. The organization was created in a moment of reciprocal self-interest when governments and labor unions and employers realized that a completely unregulated international labor market would give every state an economic incentive to impoverish its own workers. As the power of international capital took hold, the economic incentives seemed irresistible to suppress wage rates, spend nothing on occupational health and safety standards, and do nothing in short that might cost employers money and therefore scare

investment away. So, fearful of the race to the bottom but thinking themselves unable to act unilaterally, states along with employers and labor unions, created the ILO, with a unique tripartite governing structure that empowered each of these three stake-holders. The relative success of that structure, combined with the fact that labor law often overlaps other major human rights concerns—like employment discrimination or the exploitation of women or indigenous peoples—has meant that the ILO has been able to expand its agenda steadily, to the point that it is now one of the leading sources of standards for defining and protecting indigenous peoples or defining slavery and slave-like practices, including forced labor.

The minority rights treaty regime under the League of Nations. "Minority treaties" were drawn up primarily in Europe after World War I, when national borders were redrawn, inevitably breaking up national and ethnic groups and subjecting discrete minorities to repression. These minorities were not necessarily aliens, so the traditional doctrine of state responsibility could not apply, but, because of their minority status and their history of isolation or abuse, they were the object of concern by other states and to some extent by the international community at large. Essentially, the minority treaties allowed certain named states to invoke the jurisdiction of the Permanent Court of International Justice, the precursor of the International Court of Justice, in the interest of these special groups, even if there were no direct or tangible damage to that state and even if the victims were not nationals of that state. The practical and analytical significance of that move is not to be minimized. It marked the beginning of the end of a legal system tied to nationality and alienage and began the move toward a contemporary system of human rights protections, which has largely dispensed with such notions, recognizing rights simply by virtue of being human and not by virtue of being an alien, or a citizen, or a prisoner of war or even an "unlawful combatant." These 20th–century provisions had their own precursors, notably the protection of religious minorities in the Treaty of Westphalia (1648).

The anti-slavery campaigns. In the 19th century, in a demonstration of bottom-up, values-driven reform, a critical shift occurred in which governments and corporations not only gave up a lucrative economic practice, but even began to view the practice as criminal. Eventually, just as the pirate had been considered the enemy of all mankind in the 18th century, subject to prosecution wherever he or she could be found, the slave trader eventually came to be viewed in the same light, and today slavery and its correlatives are considered universally criminal.

The protection of refugees. The 1951 Convention relating to the Status of Refugees and the creation of the UN High Commissioner for Refugees reflected an awareness of the radical vulnerability of people displaced from their homelands by a well-founded fear of persecution. Although there were important limits on the scope of the Convention, at a minimum, it clearly protected certain free speech values and non-

discrimination norms by assuring that those who fled persecution on those grounds would not be returned forcibly to any place where the persecution might occur. There had been earlier treaties that recognized the plight of refugees—also based on bitter experience—and they began the creation of an international regime to solve an international political problem, as well as a profound human problem.

Regional integration. Contemporary human rights law builds on a number of regional platforms created many decades ago. In the middle of the 20th century, countries in the Americas and in Europe became aware of the practical advantages of integration, and so emerged the Organization of American States, or in Europe the Council of Europe and the European Union, or ultimately in Africa, the African Union. With the exception of the Council of Europe, none of these organizations started out concerned primarily with human rights. Typically they came into being as economic or security or political institutions, but at some point they morphed into vehicles for the promotion of human rights institutions. The European Union is a decent example. As noted in Module 7A, *infra*, the EU began as the European Coal and Steel Community, which then began to find continent-wide common ground on a range of economic issues, to the point now that the EU's Court of Justice routinely turns to the human rights conventions to inform the interpretation of European administrative law. And admission to the EU is conditioned on a state's accession to—and compliance with—human rights treaties. Ultimately, human rights law offered the only ideology of continental unification to survive the violence and hostility of the 20th century.

The Problem of Enforcement

If international human rights law has a utopian reputation, it is presumably because the norms apparently exist on paper but are routinely violated. Cases of impunity—violations without accountability—seem notorious and routine. Lawyers and law students tend to suffer from "Langdell's Disease," which suggests that something is not really law unless some court says it is or someone goes to jail or pays damages. This course requires an expanded notion of enforcement—one that includes the payment of damages, as in *Filartiga*, *infra*, and incarceration, but which also includes "softer" forms of compelling compliance.

It is certainly true that violations of international human rights law are an everyday occurrence. Of course, murder, domestic violence, and antitrust violations occur daily as well, but we do not assume that these violations prove that criminal law or antitrust law are not really law after all. No law can prevent its own violation. We assume that this conduct is wrongful and that in principle whoever commits these wrongs will be liable for damages or will face some legitimate sanction. And if the murderer were caught, he wouldn't be released on the ground that other murderers remained at large. The law may be lumpy in the way it

gets enforced, but we don't generally treat the underlying body of law as not really law.

In many respects, the most important way that international human rights law gets enforced is the least understood and appreciated: *internalization*. It is possible to identify a *culture of compliance* in which public and private actors routinely conform their behavior to international standards, as for example when human rights norms are incorporated into the training and disciplinary regimes of government officers, agents, the military, police officers, and the like. In Chapter 6, *infra*, you will encounter several examples of enforcement through internalization by governments themselves, completely outside of the Langdellian courtroom. In recent years, the role of *national human rights institutions* ("NHRI")—like human rights ombudsmen—has been especially prominent.

At the other end of the enforcement spectrum lies *internationalization*. As Professor Sohn suggested in his analysis of the two human rights Covenants, *supra*, there are many international institutions with various human rights mandates and powers. The two Covenants establish separate Committees, which review the periodic reports of governments and which can on occasion receive state-to-state or individual complaints. These institutions offer advocates clear pressure points in the enforcement of human rights standards, sometimes for the advancement of an individual case and sometimes for the mobilization of political will to address and resolve a global human rights issue. But the Covenants' Committees are just the tip of the iceberg: as shown in Chapter 3, *infra*, the international mechanisms for enforcing human rights standards against governments and individuals have proliferated over the last two decades, both inside and outside the United Nations and now include a range of international tribunals, human rights commissions, treaty-specific committees, and special offices and mechanisms.

Lying intermediate between internalization and internationalization is *judicial domestication*, *i.e.*, the use of domestic courts to enforce international human rights law locally when the culture of compliance fails. As shown in Chapter 2, *infra*, the domestic courts—civil and criminal, military and civilian, in common law and civil law jurisdictions—can be the workhorses of this particular legal order, even if the doctrinal and logistical obstacles to litigation can be daunting. The human rights project depends on continuing judicial oversight at the domestic level: no international institution has the resources (or the authority) to identify and redress human rights violations around the world.

At each of these levels will be found human rights *non-governmental organizations* (NGO's), whose legal work has had a demonstrable effect on the development and enforcement of human rights norms. As shown in Chapter 5, *infra*, human rights lawyers within these organizations can play multiple enforcement roles, from *mobilizing shame* about particular cases to commenting on the periodic reports of governments under the

human rights treaties, to advocating legislative and cultural strategies for bringing international standards home. They demonstrate that these three levels of enforcement are not hermetically separate from one another and that developments in one setting tend to affect developments in another.

Finally on the issue of enforcement, it is important to avoid pathological thinking, to conclude on the basis of high-profile violations that there is something congenitally anti-law about international human rights norms or international law generally. Virtually every international border remained stable last night, and yet there are no headlines about it. Somehow, for yet another day, international organizations did their work within a framework of law for the protection of the people's health or the delivery of international mail or economic development. By historical standards, human rights received unprecedented protection yesterday, but the headlines focus on what violations there were, suggesting just how much we have come to expect in our dealings with governments. In short, you might look at the inkblot of state practices with respect to human rights and say with the skeptic that it only confirms your worst suspicions. Or you might consider the dog that didn't bark, and find it remarkable that human rights law received as much respect as it did yesterday. As Professor Louis Henkin famously observed, most states obey most international law most of the time,[1] suggesting that there is something naïve and somewhat distracting about our skeptic's hip dismissal of international law.

The Layered Critique of the Human Rights Project

We close this initial orientation recognizing the contemporary critique of the human rights project, because every advocate has to contend with certain recurrent forms of resistance to the argument that human rights law provides the rule of decision in a case or justifies activism in some other forum. These are arguments you will encounter many times and in many versions in this course, and it is important to acknowledge them early, even if only in outline form.

There is the argument for example that the strongest states ignore human rights routinely. Whether it's labeled *American exceptionalism or unilateralism*, the fact is that there are persistent human rights problems in the United States (the death penalty, police brutality, gender and race discrimination, violations of the laws of war and human rights in Afghanistan, Iraq, and Guantanamo Bay). From this perspective, enforcement is either too random or too hypocritical to qualify as law. At a minimum, runs this critique, the human rights movement has been better at articulating standards than it has been at enforcing them.

Second, there is the critique of *cultural relativism*. In this view, the human rights project rests on intrinsically western values and therefore reflects a kind of cultural imperialism. The relativist challenge also rests

1. LOUIS HENKIN, HOW NATIONS BEHAVE 320–21 (2d ed. 1979).

on the perceived tensions or contradictions within human rights law itself, like the rights of women versus the rights of religious practice.

There is also the argument that the rhetoric of law and rights is simply too blunt an instrument to handle the delicacy of most serious political conflict. From that perspective, rights talk impoverishes political talk. To frame something as a right is generally to try to remove an entire class of questions from the ordeal of politics. Rights talk is first and foremost about the community's most serious commitments, and it trumps the normal range of choices available to the government and to the people. To use the language of rights is to acknowledge that it won't really matter if the costs of compliance exceed the economic benefits. Rights-talk inevitably leads to adversarial rather than negotiated solutions to daily problems, and that effects a massive transfer of power to the courts. Rights by their very nature are typically enforced by the judiciary. According to this line of argument, that leads inexorably to government by injunction of the sort that has torn at the social fabric of the United States and threatens the credibility and legitimacy of the courts.

Or consider this objection: the expression of some rights may be perceived as the exclusion of others. The most trenchant objection to the American Bill of Rights came not from the Tories (or their post-revolutionary equivalent), but from the democrats and libertarians, who were concerned about being limited to the ten rights in the Bill of Rights.

None of these objections is trivial, but none of them necessarily derails the human rights project either, and the trick is understanding what that project needs now: it might be new or improved enforcement techniques (including using market forces or the internet to improve human rights protections or opening more of the enforcement institutions to individual petitions); it might mean raising new issues or generating new attention to old issues through a human rights lens (e.g. corruption, environmental protection, terrorism, AIDS); or it might mean bringing new actors into the human rights project (*e.g.* multinational corporations, public-private partnerships).

B. A SURVIVAL GUIDE TO INTERNATIONAL LAW

Contemporary human rights law blurs the received distinction between domestic and international law, but in order to understand the source, the content, and the status of human rights law—as well as the means of its enforcement—we must begin with the recognition that it is a species of international law. We cannot assess the legal consequences of a human rights treaty without a more general understanding of the international law governing treaties and their interpretation. To the extent that there is an unwritten or customary component to interna-