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# Universal Human Rights and Threat to International Peace and Security: The United Nations' Obligation to Intervene

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UNIVERSAL HUMAN RIGHTS AND THREAT TO INTERNATIONAL PEACE AND  
SECURITY: THE UNITED NATIONS' OBLIGATION TO INTERVENE.

by

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LL.B. The University of Zimbabwe, Zimbabwe, 1992

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MASTER OF LAWS

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by

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**Dedication**

*To my grandmother Florence Mhlanga, to my wife Nesta and to my children, Faith,  
Goodwell, Godfrey and Nicole*

*and*

*For all the victims of Human Rights violations.*

### **Acknowledgments**

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SECURITY: THE UNITED NATIONS' OBLIGATION TO INTERVENE.

by

GODFREY MHLANGA

(Under the direction of Professor Gabriel Wilner)

ABSTRACT

The thesis seeks to establish the following:

- The nexus between the origins of the state and the universality of Human Rights,
- That abuse of Human Rights is a threat to international peace and security and
- It is an obligation for the international community under the auspices of the United Nations (UN) to intervene in the 'internal affairs' of a state which violates Human Rights.

The paper focuses on the paramountcy of Human Rights and argues that the doctrine of state sovereignty and cultural relativism undercut the essence and universality of Human Rights. The paper puts into perspective the interpretation of the United Nations Charter, cultural relativism and Human Rights. Necessarily the essay analyzes the historical and legal obligations of a state. The thesis asserts that abuse of Human Rights is a threat to international peace and security and the international community is legally obligated to enforce the observance of Human Rights.

INDEX WORDS: Universal Human Rights and the United Nation's Right to Intervene, Threat to International Peace and Security, School of Law, Godfrey Mhlanga, LL.M, The University of Georgia.

## Table of Contents

	Page
ACKNOWLEDGEMENTS .....	v
Chapter 1 .....	1
Introduction.....	1
Chapter 2.....	4
The Universality of Human Rights.....	4
Background.....	4
The Primacy of Human Rights .....	10
Human Rights and Cultural Relativism .....	14
Chapter 3.....	25
State Sovereignty and Human Rights .....	25
The origins of the state and its obligations to Human Rights.....	25
Human Rights and the United Nations Charter .....	37
Human Rights Covenants .....	56
The Commission on Human Rights/Human Rights Council.....	66
Chapter 4.....	71
Conclusion .....	71
BIBLIOGRAPHY.....	76



## Chapter 1

### Introduction

This thesis asserts that:

- Human Rights are universal,
- States are obligated to observe Human Rights,
- The abuse of Human Rights is a threat to international peace and security and
- The United Nations Charter empowers the international community to enforce the observance of Human Rights.

Human Rights violations negate the principles of self-determination and state sovereignty. A state that violates Human Rights forfeits its power to internalize Human Rights issues.<sup>1</sup> In cases where states violate Universal Human Rights state sovereignty, as envisaged by U.N art. 2, para.1, becomes irrelevant. Therefore, the international community has a right to intervene.<sup>2</sup> International Human Rights law precedes state sovereignty. To assert universality of Human Rights this paper briefly discusses the state and analyses ‘cultural relativism’ *vis-à-vis* Human Rights. It argues that the state is

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<sup>1</sup> See, Albrecht Schnabel, International Efforts to Protect Human Rights in Transition Societies: Right, Duty, or Politics, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES, 141, 154, (Shale Horowitz and Albrecht Schnabel, eds., 2004). “Recent debates focus on the fact that many states are abusing and neglecting their authority and responsibility and thus should be deprived of their own privileges, including that of full sovereignty.”

<sup>2</sup> Schnabel, International Efforts to Protect Human Rights in Transition Societies: Right, Duty, or Politics, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES, *supra* note 1 at 141, 154, “As Hugo Grotius already argued in the seventeenth century, ‘where [tyrants] provoke their own people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the laws of nations.’”

inherently obligated to protect its citizens and this protection includes the observance and promotion of Human Rights.

The primacy of Human Rights over state sovereignty puts the provisions of the United Nations Charter (the Charter) into perspective. Human Rights violations are a threat to international peace and security as envisaged by Article 1 (1) of the UN Charter.<sup>3</sup> Therefore, the United Nations is obligated to universally preserve and enforce the observance of Human Rights among its member and non-member states.<sup>4</sup> Any other interpretation to the Charter provisions will render the United Nations irrelevant.<sup>5</sup>

Despite the ongoing debate about the origins of Human Rights this thesis is predicated on the fact that Human Rights are an inalienable reality.<sup>6</sup> The concept of Universal Human Rights theorized in this paper amounts to “some conception of a human or...a person as being with needs and interests that must be met if he or she is to live a

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<sup>3</sup>John P. Humprey, *The International Law of Human Rights in the Middle Twentieth Century*, in *INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE*, (Richard Lillich *et al.* eds. 2006) “[I]t should be said that Article One [of the UN Charter] puts the promotion of respect for human rights on the same level as the maintenance of international peace.” *See also*, Nina Graeger, *Human rights and Multi-functional Peace Operations*, in *UNIVERSAL HUMAN RIGHTS?* 175, 182 (Robert G. Patman ed., Macmillan Press Ltd. Great Britain, St Martins Press, Inc. United States of America 2000), “Human rights violations is not only a consequence but also a cause of insecurity and instability, and of complex emergencies...If not stopped systematic human rights violations can easily develop into armed conflict. Taking action against human rights violations may also de-escalate a conflict that has broken out.”

<sup>4</sup>*See*, Louis Henkin, *THE RIGHTS OF MAN TODAY*, 94 (1978). “Despite resistance, it was established that UN preoccupation with human rights was not intervention in matters that are essentially within the domestic jurisdiction of a state, in part because UN consideration was not intervention, even more because human rights were not a domestic, but an international, concern.”

<sup>5</sup>*See*, below, the discussion on Human Rights and the United Nations.

<sup>6</sup>*See*, Louis Henkin, *THE AGE OF RIGHTS*, 31 (1990). “The individual had human rights before the international system took notice of them and would continue to have them if the international law of human rights were repealed and the international system turned its back on them.” *See also* Fernando R. Teson, *International Human Rights and Cultural Relativism*, in *HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory*, 117, 133, (Philip Alston, ed., 1996). “Despite serious problems of enforcement, the dynamism of human rights groups throughout the world and the pressure exerted on delinquent governments by democratic nations has achieved remarkable results, demonstrating that the belief in human rights is not a mere illusion created by scholars, but an effective and living tool for political reform.”

fully human life.”<sup>7</sup> Therefore, Human Rights are universally inalienable. At the 1993 Vienna Conference Boutros Boutros-Ghali, the former UN Secretary-General, explained that “human rights...are not the lowest common denominator among all nations but rather what I should describe as the ‘irreducible human element,’ in other words, the quintessential values through which we affirm together that we are a single human community.”<sup>8</sup> Throughout the thesis, I consciously capitalize Universal Human Rights to emphasize their fundamentality. Universal Human Rights, Human Rights and Rights are used interchangeably unless stated otherwise. It should also be noted that I use the term humanitarian intervention to encompass intervention on the grounds of Human Rights law. It is not necessarily confined to international humanitarian law or the law of war.

This paper is divided into three chapters which cover this introduction, the background on Universal Human Rights, Cultural Relativism, the Primacy of Universal Human Rights, State Sovereignty, the United Nation and Human Rights, the Commission on Human Rights, the two Covenants and the conclusion.

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<sup>7</sup> JACK MAHONEY, THE CHALLENGE OF HUMAN RIGHTS ORIGINS, DEVELOPMENTS AND SIGNIFICANCE, 81, (2007). Mahoney quoted Stirk.

<sup>8</sup> *See id.* at 56.

## Chapter 2

### The Universality of Human Rights

#### Background

Universal Human Rights defy precise definition. They are an expansive collection of rights. Human Rights include, but are not limited to civil, political, economic, social, cultural and religious rights. In 1995 the United Nations Commission of Global Governance identified a non-exhaustive list of values which fall within the rubric of Universal Human Rights. It identified the following universal rights:

1. Right to life,
2. Right to liberty,
3. Right to justice and equity,
4. Right to mutual respect, caring and integrity.<sup>9</sup>

Civil liberties and political rights are generally universal.<sup>10</sup> Richard Lillich *et al*, wrote, “the concept of human rights embraces a certain universe of values having to do with human dignity.”<sup>11</sup> Even though Universal Human Rights are generally categorized as first, second or third generation there are times when classification is done so as to deny

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<sup>9</sup> *Id.* at 166.

<sup>10</sup> Rex Honey, Human Rights and Foreign Policy *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 226, 227. He noted that “Certainly, much of the world has accepted the justice of first-generation rights, those guaranteeing civil and political rights.”

<sup>11</sup> Richard Lillich *et al*, The Concept of Human Rights, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3 at 2.

“the status of ‘rights’ to one or more of them, rather than to expand international domestic protections.”<sup>12</sup>

Universal Human Rights are interdependent.<sup>13</sup> A stable state observes and promotes Human Rights and it progresses politically, economically, socially and culturally.<sup>14</sup> The 1968 International Conference on Human Rights which was held in Teheran established that “since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”<sup>15</sup> Violation of political rights negatively impacts the economic, social or cultural rights of any given people and vice versa.

To support the universality of Human Rights, Richard Lillich, discussed the American Declaration of independence, the French revolution, the Navajo culture and the Code of Hammurabi.<sup>16</sup> Common among these disparate peoples is the equality of man and treatment of everyone with dignity and respect. Africans, Asians and Latin Americans share a common Human Rights culture in their struggle for self-determination. They all attained their self-determination and independence through the

<sup>12</sup> AUTONOMY, SOVEREIGNTY, AND SELF DETERMINATION. THE ACCOMODATION OF CONFLICTING RIGHTS (Revised by Hurst Hunnun) 108 (1996). As such this paper sparingly categorizes Human Rights.

<sup>13</sup> See, U.N. General Assembly Resolution A/RES/32/130. The General Assembly is “*Profoundly Convinced* that all human rights and fundamental freedoms are interrelated and indivisible.”

<sup>14</sup> See, Albrecht Schnabel and Shale Horowitz, Protecting Human Rights in Transition Societies: Lessons and Recommendations, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES, *supra* note 1, at 415, 420. “Human rights violations have strong negative effects on a society’s capacity to manage conflict, to develop economically, and to democratize, whereas protecting and promoting human rights has the opposite effect.”

<sup>15</sup> See MAHONEY, *supra* note 7, at 55. Quotation is an excerpt from *The United Nations and Human Rights 1945-1995* (1995) intro. by Boutros-Ghali, Secretary-General of the United Nations, New York: Department of Public Information, United Nations. 1968 was declared the International Year of Human Rights.

<sup>16</sup> Lillich, The Concept of Human Rights, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 2-3

banner of Universal Human Rights.<sup>17</sup> Cultural relativism was neither an issue nor a justification for denying them their Human Rights.<sup>18</sup>

Recorded history is awash with abuses of Human Rights. Killings, mistreatment, discrimination, injury of another and any or all human inflicted suffering are paradigmatic of the ‘evolution’ of humans.<sup>19</sup> Nonetheless, it is fair to assert that through all this dark history, Human Rights and human civility has steadily, albeit painstakingly, improved.<sup>20</sup> International law establishes the foundation of state to state international relations.<sup>21</sup> In so doing international law fosters common Human Rights values that states

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<sup>17</sup> W. Ofuatey-Kodjoe, The United Nations and human rights, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, 103 at 103. “[T]he revolutions and ideologies on the basis of which they [transitional societies] gained their independence and statehood were framed in terms of the human rights of their inhabitants...” For example in South Africa’s transition from apartheid to pro-democracy was because Human Rights were an integral part of the campaign for self-determination.

<sup>18</sup> See, Nina Graeger, Human rights and Multi-functional Peace Operations in UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 175, 179. “Human rights are by definition universal, whereas the framework of protecting them is based on particular values, represented in the nation-state. What may be defined as an issue of international concern is becoming an increasingly important question...[C]ollective political authority can become a necessity rather than an infringement.”

<sup>19</sup> See, Lillich, The Concept of Human Rights, in INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 3. “Abuses of human rights have abounded over time and space”. For example, just in the last century, the Turks in 1915 abused and slaughtered the Armenians. From 1934 to 1945 Hitler and his Nazi bandwagon violated and killed the Jews and the gypsies. From 1929 to 1933 Stalin had a reign of terror in Russia (USSR). In 1975 to 1979 Pol Pot and Khmer Rouge abused and murdered millions in Cambodia, in the 1994 Rwandese genocides and from 1992-99 the Yugoslavian genocides. Human Rights abuses in Darfur are swept under the rug of state sovereignty. The list goes on and on.

<sup>20</sup> See, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 28. “International concern with human rights has required redefinition of what lies within each state’s domestic jurisdiction and what is of international concern.” The Divine Right of Kings used to justify the monarchs absolute power over their domain. They ruled by decree. Any individual rights were an internal. Only the king could grant them. The British led the universal enforcement of abolition of slave trade in the Atlantic Ocean. Abolition of slave trade led to a gradual abolition of slavery and piecemeal observance of Human Rights. The end of WWII led to the Universal Declaration of Human Rights. The Universal Declaration established universal standard of Human Rights thereby making inroads to state sovereignty. The international community started taking action in situations which were historically considered to be internal state affairs. For example, the United Nations imposed sanctions on Southern Rhodesia and on apartheid South Africa because of their abuse of Human Rights. It also intervened militarily in Somalia, Haiti and belatedly and Rwanda on humanitarian grounds. Thus, despite some setbacks the Human Rights regime continues to evolve.

<sup>21</sup> See Excerpt by Henkin, Why States Observe International Law in LORIF. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, 30, (4<sup>th</sup> ed., 2001). “Like such domestic law, international law too has authority recognized by all. No nation considers international law as “voluntary”.”

should follow.<sup>22</sup> Arguments and counter arguments about the contextual applicability of Human Rights may be proffered but it is disingenuous and unconvincing to argue that these counter-arguments negate the universality of Human Rights. Universalism of Human Rights is entrenched in the human makeup of mankind.<sup>23</sup> William Shakespeare dramatized the notion of universal Human Rights when Shylock posed questions illustrating the equality of Jews to the rest of human kind.<sup>24</sup>

Prior to the formation of the United Nations state sovereignty was elevated to the level of sacrosanctity and the international community did not concern itself with Human Rights violations.<sup>25</sup> In the process ordinary people suffered.<sup>26</sup> However, since the end of WWII, the drumbeat of Universal Human Rights has been louder. Hence, “[a]s a blanket objections to international concern with human rights, the claims of domestic jurisdiction

<sup>22</sup> See, Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, in HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory *supra* note 6 at 3, 28. “International law has grown to encompass the protection of human person spontaneously rather than out of a habit; in the development of human rights law principles have always preceded practice.” See also, below discussion on Human Rights and Cultural Relativism.

<sup>23</sup> See, Maria Michela Marzano, Universalism and Cultural Specificity: Female Circumcision, Intrinsic Dignity and Human Rights in HUMAN RIGHTS AND MILITARY INTERVENTION 50, 54 (Alexander Moseley and Richard Norman eds., 2002) “[U]niversal human rights commonly imply that there is a single human nature common to all people and that human nature may serve as the basis for a political theory which dictates what is right or wrong.”

<sup>24</sup> See MERCHANT OF VENICE, 89, Scene 3:1 (David Bevington and David Scott Kastan, eds.). Shylock asked, ‘Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same means, subject to the same diseases, healed by the same means, warmed by and cooled by the same winter and summer, as Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that.’

<sup>25</sup> See, Louis Henkin, THE RIGHTS OF MAN TODAY, 94 (1978). “The UN Charter... ushered in new international law of human rights. The new law buried the old dogma that the individual is not “subject” of international politics and law and that a government’s behavior toward its own nationals is a matter of domestic, not international, concern.”

<sup>26</sup> For example, WWII did not spread because of Hitler’s heinous Human Rights record (undoubtedly one of the darkest moments in history). Hitler’s cardinal sin was his invasion of Poland, a sovereign state, and not the brutalization of German citizens, particularly Jews. The final solution may have been implemented after 1942 but the persecution of Jews started in 1933. WWII broke out in 1939. Thus, violation of the rights of the Jewish people went on for six years before the outbreak of WWII and it continued throughout the duration of the war.

and nonintervention have been long dead.”<sup>27</sup> The international community explicitly or implicitly acknowledges the universality of Human Rights. “[E]ven those who ‘officially’ reject the whole idea of human rights will, when convenient, quite happily rely on it for rhetorical purposes.”<sup>28</sup>

Michael Freeman identified two realist arguments which contend that universalism is futile because realism counters universalism and that universalism is dangerous because it leaves states vulnerable to ruthless aggression due to interstate competition.<sup>29</sup> This argument ignores historical facts. History has seen more and more international cooperation rather than aggressive interstate competition. There was a time when state interests legitimized aggression and expansionism.<sup>30</sup> Although state interests may still be the driving force behind states’ policies its practical impact has been greatly curtailed by international co-operation. The guiding principle now is the maintenance of “international peace and security”.<sup>31</sup> The international community tries hard, maybe not hard enough, to stop any state from pursuing state interest which threaten international

<sup>27</sup> Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 53.

<sup>28</sup> Gideon Calder, *Grounding Human Rights: What Difference Does it Make?*, in *HUMAN RIGHTS AND MILITARY INTERVENTION*, *supra* note 23 at 15, 15. Such rhetoric is very common among leaders of former colonized states. The so called “founding fathers” of formerly colonized states rode on the back of Human Rights to justify their fight for self-determination, but as soon as they got into power they suppress(ed) the very people they purportedly fought to liberate. They dismiss intervention by the international community on the pretext of state sovereignty.

<sup>29</sup> Michael Freeman, *Universalism, Particularism and Cosmopolitan*, in *INTERNATIONAL JUSTICE*, 65, 65 (Tony Coates, ed., 2000).

<sup>30</sup> Examples range from the Spanish conquest of the Yucatan to Conquests of North and South America and the British and French empires in Asia and Africa.

<sup>31</sup> See UN Charter art., 1. It reads in relevant part:

The purpose of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace



peace and security. The creation of the League of Nations<sup>32</sup> and subsequently the United Nations supports this notion.<sup>33</sup>

The universality of Human Rights can be deduced from the fact that Human Rights discourse is widespread. As a result, “not only have diplomatic exchanges between states come to incorporate human rights considerations...even among those states which have not explicitly adopted a rights-based foreign policy but also popular thought about international relations has characteristically adopted the language of universal human rights.”<sup>34</sup> Accordingly, “words have consequences, and the rhetoric people and states employ shapes the world they construct together.”<sup>35</sup> Even the worst human rights violators try to hide their Human Rights abuses from international scrutiny.<sup>36</sup> “No doubt the commitment of many countries to human right is less than

<sup>32</sup> The preamble to the Covenant of the League of Nations proposes international co-operation.

<sup>33</sup> Chapter I of the UN Charter spells out the purposes and principles of the organization. Among the purposes is the maintenance of international peace by taking collective measures as a prevention and removal of threats to peace. *See* Article 1 (1).

<sup>34</sup> Chris Brown, *Universal Human Rights? An Analysis of ‘Human Rights Culture and its Critics*, *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 31, 31-32.

<sup>35</sup> *See* Chris Brown, *Universal Human Rights? An Analysis of ‘Human Rights Culture and its Critics*, *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 31, 32

<sup>36</sup> *See*, Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 29. “There is some deterrent influence in the very idea of rights, in fact of making a commitment in a constitution or in an international instrument, in continuing participation in human rights discussions. The existence of commitments and institutions renders violations illegitimate, requiring concealment or false denials. It provides basis for protest both within countries and from outside, by international organizations, nongovernmental organizations, the press, and individuals whose voices are heard.” For example Burma, Zimbabwe, North Korea, Iran to name a few; have very strict media laws that forbid journalists from broadcasting their anti Human Rights policies and practices. If the governments of these states were genuinely convinced that Human Rights are not universal they would not mind having their policies and practices reported or published. Zimbabwe has the Access to Information and Protection of Privacy Act which requires journalist to be licensed by the government and the Public Order and Security Act which makes it an offence to publish anything that is “likely to cause alarm or despondency”. One can guess the reasons behind the enactment of these statutes given the recent developments in Zimbabwe where political persecution and denial of all civil rights is the norm. As recent as October 2007, the Burmese government managed to block internet publication of the demonstrations led by monks demanding better governance. Almost all media outlets in these states are controlled by the government.

authentic and whole-hearted. Yet...even hypocrisy may sometimes deserve one cheer for it confirms the value of the idea, and limits the scope and blatancy of violations.”<sup>37</sup>

### The Primacy of Human Rights

Primacy in the context of Universal Human Rights is not limited to the durational precedence of Human Rights but extends to the important or principal role Universal Human Rights play in national and international relations. The 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights declared the primacy of Universal Human Rights.<sup>38</sup>

The modern day concept of Human Rights may have evolved from the abolition of slave trade and slavery<sup>39</sup>, but Human Rights discourse predates the abolition movement.<sup>40</sup> In 1806 President Thomas Jefferson, in his message to Congress, explicitly used the language of human rights and urged the lawmakers “to withdraw the citizens of the United States from all further participation in those *violation of human right*.”<sup>41</sup> In the same year, across the Atlantic, the British parliament confronted the problem of slave

<sup>37</sup> MAHONEY, *supra* note 7, at ix.

<sup>38</sup> A/CONF.157/23, 12 July 1993. Paragraph 5 reads, “All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, 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.” *See also* Vivit Muntarbhorn, Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist? *in* UNIVERSAL HUMAN RIGHTS ?, *supra* note 3, at 81, 84. “The final text adopted by the World Conference itself advocated the universality of human rights and the primacy of international standards over national and regional practices or particularities.”

<sup>39</sup> Lillich, *et al*, The Concept of Human Rights, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE *supra* note 3, 3 “The process by which the concept of human rights is harnessed to generate legal obligation and change is illustrated by the attack and eventual official demise of slavery.” *See also*, MAHONEY, *supra* note 7, at 171. “[A]bolition of slavery is probably the most telling example of cultures being painfully challenged by the emergence of new ethical insights”.

<sup>40</sup> *See* Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY at 143, 143 (Robert Blackburn and James J. Busuttill eds., 1997). Mullerson argues that historically it is the religious persecutions that brought human rights on the international agenda.

<sup>41</sup> PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS, VISION, SEEN, 39 (1998).

trade so as to defend “justice in the name of ‘*common rights of humanity*’”.<sup>42</sup> Actually, “[t]he historical evolution of visions of international human rights that continues to this day started centuries ago...It began as soon as men and women abandoned nomadic existence and settled in organized societies, long before anyone had ever heard of the more recent expression “human rights,” or before nation-states negotiated specific international treaties.”<sup>43</sup>

Notwithstanding the above, Human Rights are primary because they are “regarded as the sum total of values without which the human personality cannot be conceived.”<sup>44</sup> The sudden surge of Human Rights law, Human Rights treaties and Human Rights conferences after WWII resulted from the realization that Human Rights violations pose a threat to international peace and security.<sup>45</sup> More than sixty years after WWII, international peace and security is still threatened because states which violate Universal Human Rights have mushroomed and they are scattered all over the world<sup>46</sup> and mostly it is the weak states which are the worst perpetrators of Human Rights abuse.<sup>47</sup> These states occasionally implode and in the process threaten international peace

<sup>42</sup> *Id.* at 39.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> Zoran Pajic, Crimes Against Humanity: A Problem of International Responsibility, *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, *supra* note 52, at 133, 135.

<sup>45</sup> Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, *supra* note 40, at 143, 144. “The most important motivation for the post Second World War rapid development of international human rights law was the link, real or perceived, between massive human rights violations and threats to international peace and security”

<sup>46</sup> In Asia we have North Korea, Uzbekistan, Turkmenistan, Laos, Belarus and Burma. In the Middle East Saudi Arabia, Syria, Pakistan and Iran. In Africa Zimbabwe, Equatorial Guinea, Egypt, Cameroon, Libya, Swaziland, Eritrea and Sudan top the list. In the Americas Cuba, and lately Venezuela are Human Rights abusing states. In the Russian province of Chechnya Human Rights abuses are prevalent. Even though some of these states are not militarily weak the potential for an implosion due to Human Rights abuses cannot be overlooked.

<sup>47</sup> Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, *supra* note 40, at 143, 144

and stability. The threat posed by multiple weak states is more dangerous<sup>48</sup> and difficult to contain. For example, when the Soviet Union with its Human Rights abusive record collapsed the Balkans, which was the former Soviet sphere of influence, was engulfed in wars. The historic Balkan Human Rights abuses were brought to the surface.<sup>49</sup>

The primacy of Human Rights withstands the criticisms that have been leveled against their universality. According to Jack Mahoney there is a school of thought that argues that the promotion of Human Rights will lead to proliferation or more demand for Human Rights and therefore debases the essence of Universal Human Rights.<sup>50</sup> This fear is unwarranted. In 1986, the General Assembly passed Resolution 41/120 on Setting International Standard in the Field of Human Rights. Briefly, this resolution sets the parameter of Universal Human Rights in that it, “[i]nvites Member States and United Nations bodies to bear in mind the following guidelines in developing international instruments in the field of human rights; such instruments should, inter alia:

- (a) Be consistent with the existing body of international human rights law;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) Be sufficiently precise to give rise to identifiable and practical implementation machinery, including reporting systems
- (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
- (e) Attract broad international support;<sup>51</sup>

These guidelines are a starting point. Therefore, any Human Rights demand that falls outside these guidelines *may* not be recognized. Even though there may be an increase in

<sup>48</sup> W. Ofuatey-Kodjoe, The United Nations and Human Rights, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 103,103.

<sup>49</sup> The long standing ethnic and religious tensions among the Serbs, the Croats, the Albanians and the Bosniacs spilled over into political, economic and cultural structure of the former Yugoslavia. Human Rights violations received muted criticism from the League of Nations. After WWII the occupying forces in the Balkans installed their own puppets. For example the Soviet Union supported Josip Broz Tito and his successors who suppressed ethnic Albanians in Yugoslavia. It culminated in the Balkan wars of the 1990s.

<sup>50</sup> MAHONEY, *supra* note 7, 71

<sup>51</sup> See A/RES/41/120

the demand for individual rights the increased demand will not debase the currency of Human Rights if the above guidelines are followed. In any case “if assertions of rights represent the leading edge of moral insight, then proliferation is inevitable.”<sup>52</sup> The resolution emphasizes the primacy of the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

Another misplaced argument is that Human Rights are “individualistic and as expressive of a concern for self which disregards one’s duties to others and interests of the wider community”.<sup>53</sup> This argument does not hold because “promotion and protection of individual rights is a public good.”<sup>54</sup> Every right has an accompanying obligation. For example, a right to life obliges the possessor of that right to respect the life of another. Outside the legally recognized defenses, possessor of a right to life may not kill. Right to liberty, justice, mutual respect and caring also carry with them respective obligations not to offend the same guaranteed rights of another. This symbiotic relationship among individuals makes Human Rights not ‘individualistic’ but societal.

Other “opponents...of human rights justify their opposition by maintaining that rights theory and language are actually unnecessary...since moral claims which they purport to make can be expressed in other moral terms and can be established at least as validly in other ways.”<sup>55</sup> Human Rights are a cluster of rights which can be distinguished

<sup>52</sup> Mahoney *supra* note 7, at 95. Mahoney quotes Habgood.

<sup>53</sup> *Id.*, at 71

<sup>54</sup> Louis Henkin, Introduction, *in* THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, 1, 13 (Louis Henkin ed., 1981). “International human rights imply rights for individual against society, but they are not seen as against the interests of society. Rather, it is believed, a good society is one in which individual rights flourish...Any apparent conflict between the individual and society, between individual rights and a more general public good, is only temporary and superficial; in the longer, deeper view the society is better if the individual’s rights are respected.”

<sup>55</sup> See MAHONEY, *supra* note 7, at 72

from other rights that are derived from other moral consciousness. Even though Human Rights are arguably morally based, they have attained an enforceable legal status of international customary law.<sup>56</sup>

Mahoney, identifies some scholars who dismiss Human Rights as social terrorism or fictitious.<sup>57</sup> This criticism does not pass muster because Human rights are neither non-existent nor are they social terrorism. It is widely accepted that the Universal Declaration of Human Rights “states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.”<sup>58</sup> As such Human Rights cannot be non-existent and in an effort to defeat and thwart terrorism the international community passed resolutions which link terrorism to abuse of Human Rights.<sup>59</sup> It is the lack of Human Rights that leads to social terrorism and not vice versa.

### Human Rights and Cultural Relativism

Does cultural relativism denote different Human Rights entitlements and demands to different people? The unqualified answer is an emphatic *NO*, because “[e]ach person, even if she/he is part of a specific community and therefore also a ‘product, of this community’s particular culture, is in fact worthy of respect as a human being.”<sup>60</sup> Robert

<sup>56</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, 239, at 240 ( Gregory H. Fox and Brad R. Roth, eds., 2000).

<sup>57</sup> MAHONEY, *supra* note 7, at 71.

<sup>58</sup> Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968). *See also*, the discussion below on the United Nations and Human Rights.

<sup>59</sup> *See*, A/RES/49/60 and A/RES/56/160. Observance of international standards of Human Rights is considered to be part of eliminating terrorism.

<sup>60</sup> Maria Michela Marzano, Universalism and Cultural Specificity: Female Circumcision, Intrinsic Dignity and Human Rights in *HUMAN RIGHTS AND MILITARY INTERVENTION*, *supra* note 23, at 50, 53. *See also*, Fernando R. Teson, International Human Rights and Cultural Relativism, in *HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory*, *supra* note 6, at 117, 139. “The place of birth and cultural environment of an individual are not related to his moral worth or to his entitlement to human rights. An individual cannot be held responsible for being born in one society rather than in another, for one

Patman, points out that one cannot “blackbox” cultures because culture is both “complex and multi-faceted.”<sup>61</sup>

Given the diverse socio-economic cultures of the peoples of the world, it is unsurprising that there are differences in the interpretation or application of Human Rights. However, with these assumed differences there are some fundamental Human Rights similarities. Unfortunately, the differences are sometimes hyped and exaggerated. In the process the differences overshadow the similarities. The cultural context in which Human Rights are applied may be relevant but one must guard against an exaggerated and fatalistic approach of cultural relativism to Universal Human Rights.<sup>62</sup> There is no culture that can justifiably deny its own citizens the right to life, right to justice and equity, right to liberty or right not to be subjected to arbitrary arrest or imprisonment.<sup>63</sup> Violations of a citizen’s right to life, right to liberty, right not to be subjected to arbitrary

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‘deserves neither one’s cultural environment nor one’s place of birth.’ See also, David S. Koller, THE MORAL IMPERATIVE: TOWARD A HUMAN RIGHTS-BASED LAW OF WAR, 46 Harv. Int’l L.J. 231, at 244. “[T]he holders of human rights are individuals, not other actors such as states or corporations. Since human rights are enjoyed simply on the basis that individuals are human beings, these rights are enjoyed equally by all humans (universally) and without regard to their national legal systems (generally).”

<sup>61</sup> Robert G. Patman, International Human Rights After the Cold War in UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 1,15. See also Fernando R. Teson, International Human Rights and Cultural Relativism, in HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 140. “By claiming that moral judgments only have meaning within particular cultures, the relativist underestimates the ability of the human intellect to confront, in a moral sense, new situations.”

<sup>62</sup> See, Chris Brown, Universal Human Rights? An Analysis of ‘Human Rights Culture and its Critics, in UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 31, 43. “Even if we are critical of the project of imposing a Western notion of universal human rights on peoples who have developed their own distinctive ways of asserting their humanity, we will almost certainly not wish to argue that *any* long-standing cultural practice is to be accepted simply because it is long-standing, since there are too many examples of long-standing injustices in the world for this to be acceptable.”

<sup>63</sup> See, Louis Henkin, THE MAN RIGHT OF TODAY, *supra* note 25, at 130. “[H]ow many hungry are fed, how much industry is built, by massacre, torture, and detention, by unfair trials and other injustices, by abuse of minorities, by denials of freedoms of conscience by suppression of political association and expression?” Found on page 144 Fernando R. Teson, International Human Rights and Cultural Relativism, in HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory *supra*, note 6 at 117, 144.

arrest or imprisonment are universally wrong.<sup>64</sup> If one looks at Universal Human Rights through the prism of fundamental political, civil economic, and social rights one would be hard pressed to dismiss their universality because, “[t]he right to certain basic political freedoms, the right to favorable economic and social conditions, the right to self-determination and self-rule, known in current parlance, ‘first’, ‘second’, and ‘third generation’ rights are now widely regarded as ‘settled norms’ of contemporary international society, and it is rare to find outright opposition to them.”<sup>65</sup>

In any case cultural values which are considered ‘national’ are not necessarily common among all its citizens of any given state. Hurst Hannun dismisses the notion of mono-cultural nation states and argues that states are not homogenous. They are composed of different societies with different and sometimes conflicting norms even though they may claim to have a distinct culture.<sup>66</sup> Take India for example. It is a nation state with very diverse and sometimes conflicting cultural norms but the international community talks about the “Indian culture”. The same applies with Universal Human Rights. Despite the multiplicity of cultures Human Rights transcend cultural differences.<sup>67</sup> Broad dismissal of Universal Human Rights on the basis of cultural relativism is not sustainable.<sup>68</sup> One needs to address specific cultural norms that are

<sup>64</sup> Rex Honey, Human Rights and Foreign Policy *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 226, 226 “[P]eople now recognize the significance of human rights as something as state (or, for that matter, other people) must not be allowed to violate, if no other reason than such conduct is wrong.”

<sup>65</sup> Chris Brown, Universal Human Rights? An Analysis of ‘Human Rights Culture and its Critics’ *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 31, 32.

<sup>66</sup> Hurst Hannun, *supra* note 12, at 26. He writes, “There are a few, if any, nation-states in the world whose population reflects an entirely homogenous ethnic, cultural community to the exclusion of all others. It is perhaps no coincidence that many that might claim such status are islands...the search for homogeneity may, in fact, be more likely to lead to repression and human rights violations than to promote the tolerance and plurality which many would claim to be essential values in the twentieth century and beyond.”

<sup>67</sup> See Lillich, The Concept of Human Rights, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 3.

<sup>68</sup> See, Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 120-121. “[A]rguments



adversely impacted by Human Rights. Besides, the “very assertion of universal relativism is self-contradictory, not from the fact that it validates conflicting substantive moral judgments. If it is true that no universal moral principles exist, then the relativist engages in self-contradiction by stating universality of the relativist principle.”<sup>69</sup> There is an undercurrent of Human Rights demands in every state that violates Human Rights irrespective of the given state culture.<sup>70</sup>

Maria Marzano questions whether diversity counters universality or whether it is possible to reconcile universal rights and cultural specificity. She answers these questions affirmatively and gives a mundane yet very strong analogy to support her point. She makes a dichotomy between torture, starvation, infanticide and slavery on one hand and greeting customs on the other. These cannot be “treated at the same level... The question about cultural relativism is then where to draw the line and where not to, rather than whether a line is to be drawn at all.”<sup>71</sup> Despots and undemocratic Human Rights violating governments distort the principles of cultural relativism<sup>72</sup> and state sovereignty<sup>73</sup> in an

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premised upon the exclusively municipal nature of human rights law are inconsistent with present international law.”

<sup>69</sup> Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 136.

<sup>70</sup> Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 145. “[A] growing awareness exists in the Third World about the need for reinforcing the respect for human rights.”

<sup>71</sup> Marzano, Universalism and Cultural Specificity: Female Circumcision, Intrinsic Dignity and Human Rights *in* HUMAN RIGHTS AND MILITARY INTERVENTION, *supra* note 23, at 50, 50.

<sup>72</sup> See, Robert G. Patman, International Human Rights After the Cold War *in* UNIVERSAL HUMAN RIGHTS? *supra* note 5, at 1,15. He writes, “... the claims of cultural relativists, whether in the Middle East, Asia or elsewhere, may be no more than diversionary efforts by authoritarian regimes to evade fundamental responsibilities to their peoples and justify the continuation or repressive rule, free from outside interference.” See also, Chris Brown, Universal Human Rights? An Analysis of ‘Human Rights Culture and its Critics, *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 31, 35. “It is certainly convenient for the rulers of illiberal regimes to be able to dismiss criticisms of their rule as stimulated by alien values as will, of course, as being fomented by outside interests.”

<sup>73</sup> See, Mohammed Bedjaoui, On the Efficacy of International Organization: Some Variations on an Inexhaustible Theme, *in* TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATION, ESSAYS IN HONOUR OF G. SCHEMERS, 7, 11 (Niels Blokker & Sam Muller(eds., 1994) Vol. I. “[S]overeignty is generally invoked not so much for its own sake as to protect what the state views as

attempt to avoid international scrutiny and perpetuate their hold on power. A close study of different cultures shows that all cultures support the observance of Human Rights.<sup>74</sup>

The obligation to promote human responsibility to others is common in Hinduism, Buddhism, Confucianism, Judaism, Islam, Christianity, traditional African culture and among philosophers from different cultures.<sup>75</sup> In a nutshell the obligation is universal.<sup>76</sup>

Western influence on Human Rights is evident and Human Rights language is “doubtless due to the dominance of the Western legal tradition in the international area, *but the mutually agreed-upon judgment about the proscription of certain acts and the protection of certain values was not simply a Western moral judgment.*”<sup>77</sup> (Emphasis added). Unfortunately, some opponents to the universality of Human Rights describe them as “western imperialism.” This is a mischaracterization of Universal Human

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legitimate interests... [B]ehind the screen of sovereignty we may perceive the shadowy silhouette of interests which have become contradictory as between the international organization and the states which created it.” See also, Marti Koskenniemi, THE FUTURE OF STATEHOOD, 32 Harv. Int’l L.J. 397, at 397. “An international law of sovereign equality has always contained the unfortunate implication of providing legitimacy for the national repression of citizens, or at least impunity for tyrants.”

<sup>74</sup> See MAHONEY, *supra* note 7, at 169. “No one has yet improved on the answers of the UNESCO philosophers: Where basic human values are concerned, consulting with Confucian, Hindu, Muslim, and European thinkers, that a core of fundamental principles was widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language or rights. Their survey persuaded them that basic human rights rest on “common convictions” even though these convictions “are stated in terms of different philosophic principles and on the background of divergent political economic systems.” (Quotation from Mary Ann Glendon.) See also, DONAL O’ REARDON, Theorizing International Rights: Two Perspectives Considered, in HUMAN RIGHTS AND MILITARY INTERVENTION, *supra* note 23, at 34,35. According to Reardon “Universal claims are made on the basis of attributes that are common to all persons and deemed worthy of protection.”

<sup>75</sup> PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS, VISION, SEEN, 5-8 (1998).

<sup>76</sup> Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda in HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, 143, 144 (Robert Blackburn and James J. Busuttil eds., 1997). “Finally, international concern for human rights is legitimate...because there are common bonds between different peoples and there is a certain meaning in the word ‘mankind’ which induces states to take human rights into consideration in their foreign policy.” See also Yash Ghai, Human Rights and Governance: The Asia Debate, in HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, 219, 232. “An authoritative statement of the position of Asian NGOs was issued on 27 March 1993 on the occasion of the Asian intergovernmental conference on human rights...It endorsed the view that human rights are universal, and are equally rooted in different cultures. While it supported cultural pluralism, it condemned those cultural practices which derogate from universally accepted human rights.”

<sup>77</sup> MAHONEY, *supra* note 7, 106. Quotation is from Twiss.

Rights. Human Rights influence was not confined to the West but emanated from different global cultures. Paul Lauren noted that,

Early ideas about human rights...did not originate exclusively in one location like the West or even with any particular form of government like liberal democracy, but were shared throughout the ages by visionaries from many cultures in many lands who expressed themselves in different ways. What the west did provide, however, was not a monopoly of ideas on the subject but rather much greater opportunities for visions such as these to receive fuller consideration, articulation, and eventual implementation.<sup>78</sup>

One may be tempted to argue that the above assertion is wrong because some cultures like Hindi and Islamic cultures do not accept the equality of men or sexes. That may be so, but it should be noted that despite these practices both the Hindus and the Moslems used the universality of Human Rights to attain their self-determination. In any case some of these Hindi and Islamic cultural traits are slowly dying away.<sup>79</sup> For example, the Indian government outlawed the caste system decades ago. It legislated the “scheduled caste” system which is meant to assimilate the untouchables of India into the main stream.<sup>80</sup> In the Islamic world women are slowly being emancipated from their historically subservient role.<sup>81</sup> In fact Dr Chan, a Chinese delegate at the 1948 UN conference, argued that progressive Human Rights thinkers like Voltaire, Quesnay and

<sup>78</sup> PAUL GORDON LAUREN, *supra* note 75, at 11-12.

<sup>79</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE*, 119 (1989). Discussing Cultural Relativism he writes, “...while recognizing the legitimate claims of ...cultural relativism, we must be alert to cynical manipulations of a dying, lost or even mythical cultural past.”

<sup>80</sup> Article 17 of the Indian Constitution and the Protection of Civil Rights Act 1976 outlawed the caste system in India. It reads: “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law. of the Indian Constitution and the Protection of Civil Rights Act 1976 outlawed the caste system in India.

<sup>81</sup> For example: Recently, King Abdullah of Saudi Arabia pardoned a nineteen year old Saudi Arabian rape victim who had been sentenced to receive 200 lashes and six months in prison. The woman was gang raped after she and her male escort, who was not her relative, were abducted by seven men. According to strict Saudi Arabian Islamic law it is an offence for a woman to be in the company of a male who is not a relative without a male relative.. <http://www.cnn.com/2007/WORLD/meast/12/17/saudi.rape/index.html>. (Visited on December, 17 2007).

Diderot were influenced by Chinese Human Rights philosophers.<sup>82</sup> On the other hand, the West has not always promoted Human Rights.<sup>83</sup> Some of the most horrific Human Rights abuses were perpetrated by the West.<sup>84</sup>

Even if we were to concede that Human Rights originated from the West they have a “broader application to other cultures subject to the caveat that local mores and claims have an essential (albeit unspecified) role in establishing them and determining their range of application.”<sup>85</sup> For example, after WWII the increased regional and international Human Rights treaties positively influenced internal legislation of member states. By the 1990s all municipal policies on economic, political or cultural issues were “covered by some kind of international standard setting.”<sup>86</sup>

Regional Human Rights treaties are relevant to the universality of Human Rights because they are common to all the regions of the world, except the Asian block.<sup>87</sup> Therefore, all state parties to regional treaties subscribe to same Human Rights values. Even though the Asian block is known for its lack of regional Human Rights treaties

<sup>82</sup> MAHONEY, *supra* note 7, 107.

<sup>83</sup> *See*, Louis Henkin, THE RIGHTS OF MAN TODAY, *supra* note 25, at 129. “Respect for the individual is not a Western monopoly, and, moreover, it did not come naturally to the West. It had to be nurtured there; it has equally fertile soil elsewhere and can be nurtured there.”

<sup>84</sup> LAUREN, *supra* note 75, at 38 “[P]lantation owners in the West devised and practiced one of the most brutal and barbaric form of slavery ever known in the world, and it was widely accepted by the majority.

<sup>85</sup> O’Reardon, DONAL O’ REARDON, Theorizing International Rights: Two Perspectives Considered, *in* HUMAN RIGHTS AND MILITARY INTERVENTION, *supra* note 23, at 33, 41. *See also*, Jack Donnelly, Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, 145, 145 (Philip Alston, ed., 1996). Donnelly argues that the “concept of human rights is an artifact of modern Western civilization” and should not be confused with human dignity. He concedes, however that “[a]lthough the idea of human was first articulated in the West in modern times, it would appear to be an approach particularly suited to contemporary social, political, and economic conditions, and thus of widespread contemporary relevance in the West and the Third World.” He also realizes that Human Rights and human dignity are closely connected and many authors treat human rights and human dignity as essentially the same.

<sup>86</sup> CHRIS BROWN, Universal Human Rights? An analysis of Human Rights Culture and its Critics, *in* UNIVERSAL HUMAN RIGHTS?, *supra* note 3, at 31,39

<sup>87</sup> *See*, discussion below on Human Rights and the United Nations.

most Asian states are parties to international Human Rights treaties.<sup>88</sup> The Asian block issued the Asia-Pacific (Governmental) Human Rights Declaration in 1993. The declaration supports Human Rights in an ‘Asian context’, purportedly a context which proclaims the superiority of state sovereignty over Human Rights.<sup>89</sup> The 1993

Declaration reads, in part:

[The Asia-Pacific governments] emphasise the 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 ... While *human rights are universal* in nature, they 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. [Emphasis added.]

The portion of the Asian-Pacific Declaration which declares “non-interference in the internal affairs of States” is redundant because Universal Human Rights are not an exclusive internal affair of any state. They are a universal responsibility of the international community and the international community is mandated, in fact, obligated to intervene and redress Human Rights issues.<sup>90</sup>

Vivit Muntarbhorn, dismisses the so called ‘Asian values’ in five points:

First, the Asian region is too vast and eclectic for a homogenous position classifiable as ‘Asian values’. Second the ‘Asian values’ argument has been instrumentalised by undemocratic regimes as a premise for self-perpetuation. Third many of the components advocated under the rubric of ‘Asian values’ are actually found in all regions rather than in Asia alone... Fourth, there is no evidence that broad base of the population is well represented in the decision-

<sup>88</sup> For example, Cambodia, North Korea, South Korea, the Philippines, Thailand, Viet Nam etc are parties to the International Covenant on Civil and Political Rights; Cambodia, China and South Korea are parties to the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment.

<sup>89</sup> See VIVIT MUNTARBHORN, *Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist*, in UNIVERSAL HUMAN RIGHTS?, *supra* note 3, at 81, 83.

<sup>90</sup> Albrecht Schnabel, *International Efforts to Protect Human rights in transition societies: Right, duty, or politics?* in HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 141, 150. “States that cannot comply with... international standards must be –depending on the reasons for non-compliance –assisted, encouraged, or forced to fulfil their domestic responsibilities. In theory, the international community (preferably through the United Nations) has the legal (not only moral) duty to monitor and enforce state compliance with international standards.”

making process surrounding the claim of ‘Asian values’ expostulated by less-than-democratic governments. Fifth, the absolute subjection of the individual to community of family interests is highly questionable. For instance, in not-too-distant past, bride burning was justified by some communities as being acceptable. Yet, internationally and nationally, it is illegal.<sup>91</sup>

This is a correct analysis to all the geo-political regions of the world. All regions are too vast to claim cultural homogeneity and all the regions share some very common and similar values, particularly Human Rights values. For example, the right to life is common among all states of every region.<sup>92</sup> In keeping with the Human Rights culture the Asian block also accepted the 1948 Universal Declaration of Human Rights<sup>93</sup>, 1986 Declaration on Rights to Development<sup>94</sup> and the 1989 Convention on the Rights of the Child.<sup>95</sup> In fact the Asian delegation was, reportedly, very happy to participate in the formulation of the international Declaration of Human Rights.<sup>96</sup>

<sup>91</sup> VIVIT MUNTARBHORN, Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist, in UNIVERSAL HUMAN RIGHTS?, *supra* note 3, at 81, 84-85

<sup>92</sup> Yoram Dinstein, The Right to Life, Physical Integrity, and Liberty, in THE INTERNATIONAL BILL OF RIGHTS 114, 115 (Louis Henkin ed., 1981). Commenting on the International Covenant on Civil and Political Rights (ICCPR), he wrote, “If the right to life is guaranteed under general international law (and it is submitted that such is the case), obviously the right is guaranteed vis-à-vis all states (including those which are not parties to the Covenant.” *See also*, Article 6 of the ICCPR Covenant allows capital punishment only if it has been legally imposed by a competent court as final judgment for a serious offence, not contrary to the provisions of the Covenant and the convict should be more than 18 years of age. The Second Protocol to the ICCPR goes further and aims at the abolition of the death penalty. No state party to the second protocol shall have capital punishment and no reservation is allowed.

<sup>93</sup> VIVIT MUNTARBHORN, Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist, in UNIVERSAL HUMAN RIGHTS?, *supra* note 3, at 82. *See also*, Article 2 of the Universal Declaration. It reads: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdiction or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitations of sovereignty.” The rights listed in the Universal Declaration cannot be derogated from.

<sup>94</sup> VIVIT MUNTARBHORN, Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist, in UNIVERSAL HUMAN RIGHTS?, *supra* note 3, 82.

<sup>95</sup> VIVIT MUNTARBHORN, Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist, in UNIVERSAL HUMAN RIGHTS?, *supra* note 3, 82. *See*, Article 2.1 of the Convention on the Rights of the Child ensures that the rights listed in the convention are extended to all the children without discriminating them on account of their or their parent’s race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status. Although acceptance of a convention does not amount to being a party to that convention it indicates the recognition of the rights contained in the convention. In any case quite a number of Asian states are

‘Asian culture’ is not inimical to Universal Human Rights. What is perceived as Asian Human Rights culture or lack of it is in not necessarily the ideals of the Asian people but the “perspective of a particular group, that of the ruling elites, which gets international attention.”<sup>97</sup> The growing Asian middle class, Asian intellectuals, Asian minority ethnic groups and a mixture of ordinary Asians demand promotion and observance of their Human Rights.<sup>98</sup> The need for economic growth has been used by some Asian states to justify their neglect of Human Rights<sup>99</sup> but “human rights violations hamper economic development and encourage corruption and formal sector inefficiency (which are also causes of human rights violations).”<sup>100</sup> Human Rights Watch came to the same conclusion when it assessed the economic hardships in Asia.<sup>101</sup> The friendlier Asian states became to the dictates of Human Rights, the better their economies recovered.<sup>102</sup>

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parties to the convention. China, Cambodia, North and South Korea, Indonesia, Laos, Philippines, Singapore and Thailand are parties to the convention.

<sup>96</sup> See, MAHONEY, *supra* note 2, at 106

<sup>97</sup> Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 224- 225. The official position of some Asian states for example Singapore, China, Malaysia and Indonesia is that “the national treatment of human rights is no concern of other States or the international community. Self-determination, a concept which has been used to advance claims of human rights, is regarded as irrelevant to independent States.”

<sup>98</sup> See Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 231.

<sup>99</sup> Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 227. “The economic backwardness of Asia has been used to establish the primacy of economic development over human rights... Therefore the first priority of State policy must be to promote economic development.”

<sup>100</sup> Shale Horowitz and Albrecht Schnabel, Protecting Human Rights in Transition Societies: Lessons and Recommendations, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 415, 421.

<sup>101</sup> MAHONEY, *supra* note 7, at 108. “On the contrary HRW [Human Rights Watch] claimed, recent economic and environmental setbacks in various Asian countries were exacerbated by the suppression of freedoms of expression and association resulting in a lack of accountability of governments to their people.”

<sup>102</sup> Shale Horowitz and Albrecht Schnabel, Protecting Human Rights in Transition Societies: Lessons and Recommendations, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 415, 423. “In the people’s Republic of China opposition voices are suppressed... Democratization has been extremely slow, largely because of continued oppression of civil society. In the past 20 years, however, greater protection of civil and economic rights has facilitated economic development...”

Culture is not static.<sup>103</sup> It evolves. It may evolve slowly but the unavoidable effect of globalization has precipitated and catalyzed this metamorphosis. Cultural relativism and universal Human Rights are not mutually exclusive.<sup>104</sup> Every state is a member of the United Nations and therefore every state subscribes to Human Rights principles.<sup>105</sup> Thus, the impact of cultural relativism on the universality of Human Rights is increasingly dwindling.

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<sup>103</sup> Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 224. He adds that, “many accounts given of Asian culture are probably true of an age long ago.”

<sup>104</sup> See Marzano, Universalism and Cultural Specificity: Female Circumcision, Intrinsic Dignity and Human Rights *in* HUMAN RIGHTS AND MILITARY INTERVENTION, *supra* note 23, at 50, 53. “The universality of human rights is not a way of denying the different and the richness of local cultures and traditions, but rather it is a way of protecting persons: accepting that cultural specificity does not mean accepting that persons participant in specific traditions cannot be autonomous decision-makers, persons endowed with intrinsic dignity and value.”

<sup>105</sup> See *infra*, UN Charter art. 4 and the discussion, on Human Rights and the United Nations.



## Chapter 3

### State Sovereignty and Human Rights

#### The origins of the state and its obligations to Human Rights

To deal with the issue whether a state is obligated to observe the Human Rights of its citizens a brief history of the state is noteworthy. The state is a “comparatively recent phenomenon dating in the sixteenth century. No one state is identical with the next. Each state has its own history, experiences and culture(s).”<sup>106</sup> Culture preceded the formation of the state. Before states were formed people lived in loose and diverse communities which had different and distinct cultures. These communities did not necessarily volunteer to become part of a state. Different communities were forcibly incorporated into single states and a state imposed a dominant culture on otherwise culturally diverse people. States were therefore formed to bring about efficient governance and stability among culturally diverse citizens.<sup>107</sup>

The continued development and importance of Universal Human Rights is undeniably linked to the evolution of state sovereignty. There is a dichotomy between the monarchial and contemporary notions of state sovereignty. The modern day concept of state sovereignty can be traced to the 1648 treaty of Westphalia.<sup>108</sup> The pre-Westphalia

<sup>106</sup> ANDREW VINCENT, THEORIES OF THE STATES, 7 (1987)

<sup>107</sup> See Robert I. Rotberg, The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair, *in* WHEN STATES FAIL, 1, 3 (Robert I. Rotberg ed. 2004). “The state’s prime function is to provide the political good of security-prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security; and to enable citizens to resolve their differences with the state and with their fellow inhabitants without recourse to arms or other forms of physical coercion.

<sup>108</sup> Alexander Mosley & Richard Norman, Introduction, *in*, HUMAN RIGHTS AND MILITARY INTERVENTION, *supra* note 23, at 1, 8.

sovereignty was defined by Jean Bodin as the “supreme power over citizens and subjects unrestrained by law.’ It was seen as essential to any commonwealth and by nature absolute, perpetual, indivisible, imprescriptible and could not be restrained lawfully.”<sup>109</sup> The ‘sovereigns’ insulated themselves from any “legal scrutiny and competence [to] a broad category of events”<sup>110</sup> that were perceived to be internal. The insulation from outside scrutiny included Human Rights. Their authority could not be lawfully resisted. Therefore, the monarchial concept of state sovereignty did not guard against abuse of power by the sovereigns.<sup>111</sup> No modern state claims absolute power over its citizens but some governments still violate the rights of their citizens with monarchial zeal. Human Rights violating states jealously guard against ‘outside interference.’<sup>112</sup>

History, particularly the treaty of Westphalia, the French Revolution, American Revolution and decolonization shaped what sovereignty is today. The monarch had absolute power which was purportedly derived from God. This metaphysical concept of sovereignty was discredited when the ordinary people revolted against their monarchs in America, France, and Russia. Ironically, although modern day sovereignty is vested in a

<sup>109</sup> VINCENT, *supra*, note 106 at 34.

<sup>110</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, at 239, 239-240

<sup>111</sup> See LAUREN, *supra* note 75 at 34. He observed that “If enormous chasms thus often existed between vision and reality concerning human rights, the same cannot be said with reference to the doctrine of national sovereignty. Here theory and practice mutually reinforced each other as independent nation-states often behaved exactly as they wished toward those under their control and human rights simply were not regarded as a matter of legitimate international concern.” See also Michael W. Reisman, Sovereignty and human rights in contemporary international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, at 239, 239.

<sup>112</sup> Shale Horowitz and Albrecht Schnabel, Human Rights and Societies in Transition: International Context and Sources of Variation, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, 1, at 6-7. Horowitz and Schnabel argue that authoritarian regimes forestall challenges to their political power by controlling the political field and monopolizing the media. “At the same time, the regime will argue that local traditions and historical experiences justify its own practices and that they are threatened by the supposedly ‘alien’ demands of the opposition.” See also, JACK DONNELLY *supra* note 79, at 118 “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.”

state it is derived from the very people it governs.<sup>113</sup> These historical watersheds condemned Bodin's definition of state sovereignty to the monarchial era. Now, the state rather than the monarch is sovereign. The American and the French revolutions enshrined the phrase "We the people" in their constitutions giving the people "the theoretical and operational source of political authority."<sup>114</sup> (What Michael Reisman calls "popular sovereignty"<sup>115</sup> as opposed to monarchial or absolute sovereignty). The Bolshevik Constitution proclaimed that all central and local power belonged to the Soviets.<sup>116</sup> These revolutions were fundamental in that they changed the governmental and political landscape in very powerful states, consequently influencing international relations. Hence, when the United Nations was founded its purpose "to develop friendly relations between States [was] based on respect for the principles of equal rights and self-determination of peoples."<sup>117</sup> Equal rights and self-determination of peoples are part of the Universal Human Rights. They apply to all states and their citizens.

The Westphalia settlement established state sovereignty and non-intervention in what was perceived to be purely internal affairs of a sovereign state.<sup>118</sup> Looking at it from a historical perspective, where territorial aggrandizement and the wars were the order of the day, the treaty was a positive step in trying to combat outside aggression.

<sup>113</sup> VINCENT, *supra* note, 106 at 35. "With the increasingly abstract quality of the State sovereignty was used to express more collective notions. The critics of absolute sovereignty relied on the idea of the supremacy of the people and their ultimate power and authority. This idea can be found in the embryo in the Roman law doctrine of *lex regia*, which argued that power was conferred by the people or *populus*."

<sup>114</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239, at 240

<sup>115</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239, at 240

<sup>116</sup> See Article I of the Russian Soviet Federated Socialist Republic.

<sup>117</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239, at 240

<sup>118</sup> LAUREN, *supra* note 75, at 27. "The treaty of Westphalia signed in 1648 provided recognition, in law as well as in fact, of the power and authority of sovereign, independent states to be the only legitimate actors in a decentralized international system."

Even though it encouraged the rights of states it did not enhance the rights of individuals. However, state obligation in the post 1945 period differs from the Westphalia era. Now, the international community concerns itself with Human Rights issues in sovereign states.<sup>119</sup> Nevertheless, more needs to be done.

There has been an intellectual effort to define sovereignty but there is no political consensus to what it means.<sup>120</sup> Even though there may be disagreements to what state sovereignty entails it should be noted that:

[S]overeignty is not a metaphysical concept, nor is it part of the essence of statehood... To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law it is a false doctrine which the facts of international relations do not support.<sup>121</sup>

State sovereignty is no longer absolute.<sup>122</sup> The Universal Declaration of Human Rights (Universal Declaration) universalized popular sovereignty.<sup>123</sup> No contemporary philosopher, legal commentator or political leader argues or can argue that modern day state sovereignty gives the state absolute power over the Human Rights of its subjects.<sup>124</sup>

<sup>119</sup> See, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change, 17 (United Nations 2004) “Whatever perception may have prevailed when the Westphalia system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”

<sup>120</sup> Hunnun, *supra* note 12, at 14 “the content of the term ‘sovereignty’ is at best murky, whatever its emotional appeal.”

<sup>121</sup> *Id.*, at 14-15. Quotation from Brierly.

<sup>122</sup> See Michael W. Reisman, Sovereignty and human rights in contemporary international law, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239 at 243. He asserts that even though sovereignty is still protected it is now people’s sovereignty rather than “sovereign of the sovereignty” denoting unlimited supremacy.

<sup>123</sup> Article 21 (3) of Universal Declaration reads, “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

<sup>124</sup> Michael W. Reisman, Sovereignty and human rights in contemporary international law, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239, at 243. “The UN Charter replicates the “domestic jurisdiction-international concern” dichotomy, but no serious scholar still supports the contention that internal human rights are “essentially within domestic jurisdiction of any State” and hence insulated from international law.” See also, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 27. “The impression that the issue of human rights is essentially domestic, not international, is patently mistaken. That which is the subject of international law is ipso facto not domestic.” See also ANDREW VINCENT,

The first hurdle against absolute state sovereignty is international law.<sup>125</sup> International law prescribes state to act consistently with the interest of other states,<sup>126</sup> international customs, and fundamental human rights norms.<sup>127</sup> Hurst Hannun states that some of these customs “have achieved the status of customary international law or *jus cogens* ... It is clearly legitimate for international bodies to consider the human rights situation in any country, *as human rights cannot be said to fall “essentially within the domestic jurisdiction” of a state within meaning of article 2 (7) of the UN Charter*”<sup>128</sup> (Emphasis added)

State sovereignty takes its character from the definition of the state. Article I of the Montevideo Convention on the Rights and Duties of States establishes that, “the state as person of international laws should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government and (d) capacity to enter into relations with other states.”<sup>129</sup> Cumulatively, these elements shape up the state’s obligations and rights. Robert Rotberg asserted that:

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THEORIES OF THE STATES, *supra*, note 106 at 20, “Since the advent of international legal, political, economic, military and cultural organization...as well as multinational companies ... it is less easy to speak of the dominance of a State even within its own territory.”

<sup>125</sup> See, Louis Henkin, THE RIGHTS OF MAN TODAY, *supra* note 25, at 89. “In our time, human rights have become a principal activity of international governmental and non-governmental organizations and have led to an international law imposing human rights obligations on states.”

<sup>126</sup> Kelsen, Pure Theory of Law, in INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 21, at 20, 20. “[G]eneral international law is regarded as [a] set of objectively valid norms that regulate the mutual behavior of states. These norms are created by custom, constituted by the actual behavior of the “states.”

<sup>127</sup> See Louis Henkin, Introduction, in THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 92 at 1, 13. “Like the eighteenth century idea of rights, international human rights also, inevitably, implicate the purpose for which governments are created. Rights against government imply limitations on government...” See also, Richard Lillich *et al*, The Philosophical Underpinnings of Human Rights, in INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 31,31. The authors were commenting on the abolition of slave trade and slavery as a Human Right. “[H]uman right was asserted well before it became proscribed by treaties, international custom, or generally accepted international legal principles.”

<sup>128</sup> Hannun, *supra* note 12, at 20. He gives examples of diplomatic immunities and alien injuries as part of limitations to the reach of state sovereignty.

<sup>129</sup> Montevideo Convention on the Rights and Duties of States, December 26, 1933.

Nation-states exist to provide a decentralized method of delivering political (public) goods to persons living within designated parameters (borders). Having inherited, assume, or perhaps replaced the monarchs of yore, modern states focus and answer the concerns and demands of citizenries... There is a hierarchy of political goods. *None is as critical as the supply of security, especially human security.*<sup>130</sup> [Emphasis added]

With this purpose in mind it must be noted that it is the ‘demands of citizenries’ (i.e. “popular sovereignty”) and the fulfillments of these demands which map up ‘human security’. Among these demands, if not all, are Human Rights. Defined territory denotes the right of sovereign state to control what is within its borders and that includes the permanent population within its territory. Commensurate with this control is the state’s obligation to protect its permanent population from harm.<sup>131</sup> If a state violates the Human Rights of its citizens it fails to provide the required “human security” therefore, its sovereignty can be challenged on that basis.<sup>132</sup> Generally, state sovereignty entails that other states should not intervene in the internal affairs of self-governing state.

Unfortunately, threat to international peace usually arises as a result of the international community’s non-interference in a sovereign state’s Human Rights issues.<sup>133</sup> Fortunately,

<sup>130</sup> Robert I. Rotberg, *The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair*, in *WHEN STATES FAIL*, *supra* note 107, at 1, 2.

<sup>131</sup> Robert I. Rotberg, *The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair*, in *WHEN STATES FAIL*, *supra* note 107, at 1, 3. “The state’s prime function is to provide the political good of security—prevent cross-border invasions and infiltration, and loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security”

<sup>132</sup> See, Genevieve Souillac, *From Global Norms to Local Change: Theoretical Perspective on the Promotion of Human Rights in Societies in Transition*, in, *HUMAN RIGHTS AND SOCIETIES IN TRANSITION, CAUSES, CONSEQUENCES, RESPONSES*, *supra* note 1, at 77, 80. “Recent notions of human security based on the human right to life and integrity of the body may even override the principle of state sovereignty.” See also, Robert I. Rotberg, *The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair*, in *WHEN STATES FAIL*, *supra* note 107, at 1, 9. “Once the state’s capacity ... to perform in expected manner recedes, and once what little capacity remains is devoted almost exclusively to the fortunes of a few or to a favored ethnicity or community, then there is every reason to expect less and less loyalty to the state on the part of the excluded and disenfranchised.”

<sup>133</sup> For example, despite Human Rights abuses and sporadic mass killings in Rwanda and Burundi which date back to 1962 the international community failed to intervene in this region. Human Rights violations destabilized Central Africa region. Refugees from both Burundi and Rwanda populated neighboring countries. The killings culminated into the 1993-1994 genocides in both countries. To date peace and

“the principle of non-intervention, a core principle of a state’s national sovereignty (and security), seems to have become conditional on state’s ability to create an environment that protects minimum human rights standards promoted by international law.”<sup>134</sup>

State sovereignty encompasses self-determination and decolonization is part of the process to attain self-determination. The international community was heavily involved in this process.<sup>135</sup> Unfortunately, self-determination from external domination in almost all former colonized states did not always lead to internal self-determination. Internal self-determination “requires internal democracy and respect for the human rights of all peoples”<sup>136</sup> but proclaimed leaders of the newly independent states almost always perpetuate[d] and even worsen violation of Human Rights.<sup>137</sup> People, who are denied Human Rights, cannot be considered to have attained self-determination.<sup>138</sup> A permanent population which is abused by its own government is entitled to change its

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security within this region is threatened because the international community failed to intervene in time. The same can be said about the former Yugoslavia where ethnic Human Rights abuses have been a historic threat to international peace and security.

<sup>134</sup> Albrecht Schnabel, International Efforts to Protect Human Rights in Transition Societies: Rights, Duty, or Politics, *in*, HUMAN RIGHTS AND SOCIETIES IN TRANSITION, CAUSES, CONSEQUENCES, RESPONSES, *supra* note 1, at 141, 155.

<sup>135</sup> Article 22 of the Covenant of the League of Nations established a ‘Mandate’ system which was meant to prepare colonized people for self governance. This laid the ground for UN trusteeships and in 1960 the United Nations General Assembly passed Resolution 1514 (XV), The Declaration on the Granting of Independence to Colonial Countries and Peoples. The declaration proclaimed that the process of liberation is irreversible and that there is a need to speedily end colonialism.

<sup>136</sup> Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 128.

<sup>137</sup> Africa serves as a great example of this unfortunate but very common phenomenon among decolonized states. The latest example is Zimbabwe where Robert Mugabe is perpetrating the post independence African legacy of oppressing his own people.

<sup>138</sup> See Jamie Munn, Intervention and Collective Justice in the Post Westphalia System *in* HUMAN RIGHTS AND MILITARY INTERVENTION *supra*, note 23, at 185, 195 He quotes Walzer: ‘when violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination... seem cynical and irrelevant, that is, in cases of enslavement or massacre.’ (Later he adds mass expulsion to the list of grievous abuses that may justify humanitarian intervention.) This paper supports and subscribes to the notion of international intervention but argues that the abuse of Human Rights does not have to degenerate to a ‘terrible’ state of affairs for the international community to be involved. Mere evidence of systematic Human Rights violation should be a benchmark for international community’s right to intervene. Basing the international community’s right to intervene only when the abuse of Human Rights has reached a ‘terrible’ stage negates the very essence of Human Rights which is to protect people from being abused.

government.<sup>139</sup> Empirical evidence has shown that, without international intervention, it is very difficult and sometimes impossible for a systematically abused people to change their abusive governments on their own and establish a functional non- human rights abusive government.<sup>140</sup> Jamie Munn argues that the “[p]ost-Westphalia rationality implies that the state has lost its historical usefulness, and certain new solution to problems of security must increasingly be found in the form of multinational collective decision-making and action... We are firmly moving from the security of the sovereign state to the security of humanity.”<sup>141</sup>

Another twist to state sovereignty arises from the legacy of colonialism.<sup>142</sup> The colonial era irrevocably disrupted the socio-political and economic structures of indigenous peoples. At independence former colonized people inherited defined territories, which had their own permanent populations. They formed their own governments which had the ‘capacity’ to engage in formal relations. However, colonies were made of people who often had very different ethnic, cultural and/or religious

<sup>139</sup> See Gerard Chaliand, Historical Precedents in REVOLUTION & POLITICAL CHANGE IN THE THIRD WORLD, (Barry M. Shutz and Robert O. Slater eds.) 19, 20. Assessing the essence of a government he asserted that, “The idea that a people or nation has “natural rights” and that the nation legitimizes the state was first formulated as a proposition of universal validity at the end of the eighteenth century. This revolutionary idea implied that if the citizens... of a state no longer approve of the political organization of their society, they have the right to replace it with a better system. It was the assimilation of this concept that made it possible to achieve national liberation, recover a sense of identity, and begin nation building.”

<sup>140</sup> Afghanistan (under the Taliban), Burma (Myanmar), Cuba, Iraq, North Korea Zimbabwe, are a few examples. Citizens of these countries could not or cannot get rid of abusive governments without international intervention. It took the United States and its allies to get rid of the Taliban in Afghanistan. The junta in Burma has been in power since 1988. The citizens of Burmese have failed to change the oppressive government on their own. Fidel Castro has been the president of Cuba since 1959. Despite American sanctions and unofficial American attempts to topple him he has survived his presidency. Iraqi dictator Saddam Hussein survived all internal attempts to change his government since he got into power 1979. He was only toppled from power in 2003 with American, British and a number of few other countries’ assistance. North Korea’s family dictatorship of Kim II Sung and Kim Jong-il has been ruled the country since independence in 1948.

<sup>141</sup> Jamie Munn, Intervention and Collective Justice in the Post Westphalia System in HUMAN RIGHTS AND MILITARY INTERVENTION *supra*, note 23, at 185, 205.

<sup>142</sup> See, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 29. “Colonialism was once a “domestic affair”; now colonialism (at least in its traditional form) is in effect illegal and self determination is the first article in both international human rights covenants.”



beliefs. These culturally diverse people were bundled together for the economic or political convenience of the colonial masters. (The partitioning of Africa, did not consider the inherent ethnic differences of colonized people<sup>143</sup>). Most Human Rights violations are ethnicity based.<sup>144</sup> Almost always the ethnic majority or minority in power oppresses those of different ethnic persuasion.<sup>145</sup> The colonial legacy makes these Human Rights violations a problem of international proportion and not just an internal issue for a sovereign state.

Somalia is a good example why Human Rights are not an exclusive matter of a sovereign state. Before colonialism and the partition of Africa, Somalia had a functional political system of nomadic societies which was based on families.<sup>146</sup> These social groups had a code of conduct which prevented internecine wars and promoted security and social justice among themselves.<sup>147</sup> The scramble for Africa partitioned Somalia among the British, the Italians and the French. The colonialists established their own euro-centric capitalist structure. They imposed a colonial system whereby “all Somali social institutions and practices were either completely destroyed or weakened and subjugated

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<sup>143</sup> See Chaliand, Historical Precedents, *in* REVOLUTION & POLITICAL CHANGE IN THE THIRD WORLD, *supra* note 139, at 19, 23 He notes “...serious problems existed with the concept of the nation-state. First, the state frontiers marked out by the colonizer, especially in Africa, had marginal historical bases and coincided only accidentally with more or less homogenous ethnic groups. In Afro-Asiatic world, the creation of nation-states has almost universally led to minorities being discriminated against or oppressed.”

<sup>144</sup> Examples range from Burundi, Rwanda, Somalia and Sudan. Abuse of Human Rights in these states emanates from ethnic differences.

<sup>145</sup> See Gerard Chaliand, Historical Precedents, *in* REVOLUTION AND POLITICAL CHANGE IN THE THIRD WORLD, *supra* note 139, at 19, 23. “In the Afro-Asiatic world, the creation of nation-states has almost universally led to minorities being discriminated against or oppressed.”

<sup>146</sup> See Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291,297-298 (Shale Horowitz and Albrecht Schnabel, eds., 2004).

<sup>147</sup> Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291, 297-298

to serve the colonial interests.”<sup>148</sup> The disruption of Somali nomadic led to the Somalis competing for the same limited resources which led to internecine wars and resistance to colonial power. “The situation was exacerbated by the failure of the colonial states to govern effectively and justly. Instead of protecting and promoting human rights, the British, French, and Italians established administrations that made their violations a modus operandi. To make matters worse, the departing colonialists handed over power to their preferred leadership, that of Aden Abdullah Osman Daar.”<sup>149</sup> The United States and the Soviet Union also played their part in destroying Somalia. They supplied Siad Barre, a Human Rights abusing kleptomaniac, with weapons in return for access to Somalia’s strategic port.<sup>150</sup> To date Somalia is a dysfunctional state, bedeviled by internecine wars and abuse of Human Rights, a legacy which can fairly be attributed to colonialism and the Cold War.

It is impossible to rewind history. These former colonized multi-ethnic or multi-cultural nation states exist and the international community has to deal with them and their problems. Alleging that Human Rights abuse by those in power is an exclusive internal or sovereign matter is dangerously naive given that “violation of minority rights continues to constitute the most serious threat to international security because of their

<sup>148</sup> Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291, 298

<sup>149</sup> Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291,298-299. The same colonial legacy can be identified with the Belgians in Rwanda and Burundi where they perpetrated ethnic tension by totally disenfranchised the majority Hutu in favor of the minority Tutsi. The ethnic rivalry culminated in the 1993 and 1994 genocides in both Burundi and Rwanda.

<sup>150</sup> See Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291, 299-300.

possible effect on such crucial issues as statehood and stability of the international system.”<sup>151</sup>

The dynamics of global economy is a silent but very potent challenge to the doctrine of exclusive state sovereignty.<sup>152</sup> No state can survive or optimally utilize its economic potential without international trade.<sup>153</sup> International trade has made significant inroads to state sovereignty and, “with the realization that the global rather than the national economy exercises the greater influence on economic well-being, the state loses its significance as a center of authority through which people can express their preferences and claim their right.”<sup>154</sup> Even though its stated purpose is strictly international trade, the World Trade Organization (WTO) cannot avoid the Human Rights demands of trade. For example, paragraph 3 of the Declaration on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement on Public Health recognizes the importance of protecting intellectual property rights but for the benefit of public

<sup>151</sup> Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, *supra* note 76, at 143,143.

<sup>152</sup> See, Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 221 “The marketisation of domestic economies was paralleled by the globalization of capital, markets and services, as national barriers to investments and trade were removed... So democracy, marketisation of economies, the promotion of human rights and emergence of civil society were declared to be all of a piece. The result of the approach of the West was to bring out clearly the implications of the human rights work steadily... developed through the United Nations and its agencies. It brought to the fore the responsibility of the international community for the protection of human rights everywhere, and thereby highlighted the ways in which national sovereignty has been qualified by the UN Charter and the human rights conventions. Relations between a State and its nationals were no longer a matter merely for that State; some fundamental norms of that relationship... were now defined in international law, and subject not only to the scrutiny of the international community but also to its sanctions.”

<sup>153</sup> Yash Ghai, Human Rights and Governance: The Asia Debate, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 219, 241. “Despite the resistance of governments, the realisation of human rights in each country is intimately tied to wider global forces (particularly in the contemporary world wide pursuit of marketisation).”

<sup>154</sup> MAHONEY, *supra* note 7, at 165. Quoting Evans.

health, paragraph 4 encourages flexibility in the interpretation and implementation of the TRIPS agreement.<sup>155</sup>

Encouragingly, there is a growing number of authorities who have suggested that the doctrine of state sovereignty must be revisited so that states become more accountable to their citizens. Proponents of such rethinking include the former secretary of OAU Salim Ahmed Salim; former Nigerian president, General Olusegun Obasanjo; and former Secretary of the Commonwealth, Sir Shridath Kampal.<sup>156</sup> Former OAU secretary, Salim Ahmed Salim asserted that rethinking of a less inhibitive doctrine of sovereignty will foster accountability of governments both nationally and internationally.<sup>157</sup> The former president of Nigeria Olesugun Obasanjo advocated minimum standard of decent behavior which can only be realized by a transparent principle of sovereignty.<sup>158</sup> Sir Shridath Kampal proposed that developing nations should actually be at the forefront of advocating the rethinking of state sovereignty.<sup>159</sup> He argued that transparent state sovereignty will benefit the developing nations more because every state's policy will be open to the international community's scrutiny.

All sources of international law i.e. international customary law, international agreements and general principles of law common to major legal systems of the world are the starting point for Universal Human Rights.<sup>160</sup> The Universal Declaration, which is the foundation of modern day Human Rights regime, is declaratory of customary

<sup>155</sup> See WT/MIN(01)/DEC/W/2. Paragraph 5 notes the flexibilities in light of paragraph 4. They include but are not limited to each state flexibly deciding what constitutes national emergency or extreme urgency for a flexible interpretation of the agreement.

<sup>156</sup> AFRICA IN THE NEW INTERNATIONAL ORDER, RETHINKING STATE SOVEREIGNTY AND REGIONAL SECURITY, 41 (eds., Edmond J. Keller & Donald Rothchild 1996).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See LORIE DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 21, at 56.

international law.<sup>161</sup> “Customary human rights law has bound states that have been unwilling to accept treaties or that have done so with the inclusion of debilitating reservations.”<sup>162</sup> Therefore, the states’ obligation to observe Human Rights is controlled by customary law which emanates from Universal Declaration. Thus, Human Rights obligations from treaties supplement and not supplant the states’ customary Human Rights obligations.

### Human Rights and the United Nations Charter

With the passage of time Human Rights have established their station on the international scene. They are an invaluable asset to the maintenance of international peace and security.<sup>163</sup> Domestic and international stability, or for that matter instability depends on the promotion and observance of Human Rights.<sup>164</sup> Unlike wars or a nuclear conflict, violation of Human Rights poses a threat which is “not easily countered, or conquered by direct action... Human Rights violations, especially gross and systematic ones are *erga omnes* violations of international law which are not committed against a specific foreign state.”<sup>165</sup> A synopsis on collective security defined, “Any event or process that leads to large-scale death *or lessening of life chances and undermines states*

<sup>161</sup> See John P. Humphrey, *The International Law of Human Rights in Middle Twentieth Century*, in *INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE*, *supra* note 3, at 46, 50. “Many international lawyers now say that, whatever the intentions of its authors may have been, the Declaration is now binding as part of customary law.” He gives Judge Faud Ammoun’s Advisory Opinion in the case of South African presence in Namibia as indicative of the general trend to accept the UDHR as binding on the basis of custom.

<sup>162</sup> LORI F. DAMROSCH *et al*, *INTERNATIONAL LAW: CASES AND MATERIALS*, *supra* note 21, at 602.

<sup>163</sup> Wafula F. Okumu, *Human rights in transition societies: The cases of Somalia and South Africa*, in *HUMAN RIGHTS AND SOCIETIES IN TRANSITION*, *supra* note 1, at 291,293. “Although wars have captured headlines of African-related events, the world has rarely been told that human rights violations are one of the causes of these wars.”

<sup>164</sup> See Rein Mullerson, *Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda in HUMAN RIGHTS FOR THE 21<sup>ST</sup> CENTURY*, *supra* note 76, at 143, 143. “Violation of minority rights continues to constitute the *most serious threat* to international security because of their possible effect on such crucial issues as statehood and stability of international system.” [ *Emphasis added.* ]

<sup>165</sup> Rein Mullerson, *Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda in HUMAN RIGHTS FOR THE 21<sup>ST</sup> CENTURY*, *supra* note 76, at 143,149

*as basic unit of the international system” as a threat to international security.*<sup>166</sup>

[Emphasis added] Violation of Human Rights is a process that undermines an offending state “as a basic unit of the international community” and such violations lessen the life chances of the victimized citizens and sometimes lead to large-scale death. This notion shows the indispensability of Universal Human Rights to the maintenance of international peace and security. The importance of Human Rights to international peace and security is also supported by the following historical developments:

- i) The founding and subsequent growth of the United Nations.
- ii) The adoption of the Universal Declaration and the subsequent adoption of the two Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and
- iii) The proliferation of regional Human Rights Treaties.

An unbiased interpretation of the UN Charter dictates that Human Rights are critical to the United Nations’ purpose of maintaining international peace and security.<sup>167</sup>

Although the preamble, to any given charter or treaty, may not form part of the provisions of the charter or treaty it is an invaluable aide in ascertaining the intent of the framers of any given instrument. The preamble to the U.N. Charter identifies the main objectives of the United Nations.<sup>168</sup> It inextricably resonates with the provisions of the

<sup>166</sup> A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change, *supra* note 119, at 23.

<sup>167</sup> Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 53. “If human rights were always a matter of domestic jurisdiction and nerve a proper subject of external attention in any form, provisions of the UN Charter, the Universal Declaration of Human Rights, the various international covenants and conventions, and countless activities, resolutions, and actions of the United Nations and other international bodies would be *ultra vires*; every government would be guilty of meddling...and numerous nongovernmental organizations and millions of individuals would have labored egregiously and in vain for decades.”

<sup>168</sup> The preamble reads in relevant part:

We the people of the United Nations Determined

article 1 and article 55<sup>169</sup> of the Charter. UN Charter art. 1, para. 1. is self explanatory. It reads that United Nations was formed ‘to maintain international peace and security, and to that end: take effective collective measures for *the prevention and removal of threats to the peace.*’ [Emphasis added] However, at formation of the United Nations threat to international peace and security was defined in the light of foreign invasion.<sup>170</sup> The lack of international interest in Human Rights before 1945 was due to the geo-political and socio-economic conditions prevailing then.<sup>171</sup> All the powerful and most influential states were opposed to ‘elevating’ Human Rights issues to an international level. They violated Human Rights. Russia, with its gulags, considered Human Rights to be within the exclusive jurisdiction of a sovereign state, the United Kingdom also regarded the very inhumane treatment of the natives of its empire to be its sole prerogative, France like the

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[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

[T]o reaffirm faith in fundamental *human rights*, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small, and [emphasis added]

[To] establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and

[To] promote social and better standards of life in larger freedom.

<sup>169</sup> U.N Charter art. 55 para. c. reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations *shall* promote:

(c) universal respect for, and observance of, *human rights* and fundamental freedoms for all without distinction as to race, sex, language, or religion. [Emphasis added]

<sup>170</sup> Mohammed Bedjaoui, On the Efficacy of International Organization: Some Variations on an Inexhaustible Theme, *in* TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATION, ESSAYS IN HONOUR OF G. SCHEMERS, *supra* note 73, at 7, 8. He noted that, “[I]t is far from certain that the drafters of the Charter wanted freedom for colonial peoples. Their concern appears to have focused more upon equal rights as between peoples who were already free or, in other words, upon progress towards the equal rights of states, whether large or small, already in existence.”

<sup>171</sup> Threat of foreign invasion was a more pressing matter than abuse of Human Rights. Considering the violent historical past this was not an unfounded position to take. Abuse of Human Rights was hardly on the agenda of international discourse. During this era Human Rights abuses were commonplace.

UK did not want its hegemony over its colonies to be interrupted by Human Rights concerns<sup>172</sup> and the United States had laws which segregated against its own citizens.

The creation of the United Nations led to serious attention and/or attempt to observe and implement Human Rights.<sup>173</sup> But just like every new development the Human Rights culture has spent “its life stretched on the rack between certainty and adaptability, sometimes groaning audibly but mostly maintaining the stoical appearance of steady uniformity which public confidence demands.”<sup>174</sup> Although politics ended up dominating the formation of the United Nations the original intent was to make Human Rights a top priority of the international community. This is evidenced by the initial intent to adopt a Universal Bill of Rights as a legal document.<sup>175</sup> Unfortunately, the intended adoption of the Universal Bill of Rights was derailed by mistrust and disagreements (particularly between the United States and the Soviet Union). Nonetheless, the United Nations ended up adopting part of the Bill of Rights, i.e. the Universal Declaration of Human Rights in 1948.<sup>176</sup> In terms of Articles 10, 11, 13 and 14 of the Charter the General Assembly may make recommendations on issues about international co-operation and on matters that threaten international peace. Although,

<sup>172</sup> See Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989*, in *THE UNITED NATIONS AND HUMAN RIGHTS, A CRITICAL APPRAISAL* 25, 25-26 (Philip Alston ed., 1992)

<sup>173</sup> See, Louis Henkin, *THE RIGHTS OF MAN TODAY*, *supra* note 25, 90. “Human rights were generally not the stuff of international politics or law until after World War II.”

<sup>174</sup> Stephen Sedley, *Human Rights: A 21<sup>st</sup> Century Agenda* in *HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY*, *supra* note 76, at 1, 2

<sup>175</sup> Johannes Morsink, *The Universal Declaration of Human Rights as a norm for societies in transition*, in *HUMAN RIGHTS AND SOCIETIES IN TRANSITION*, *supra* note 1, at 29, 30.

<sup>176</sup> See, Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989*, in *THE UNITED NATIONS AND HUMAN RIGHTS, A CRITICAL APPRAISAL*, *supra* note 172, at 25, 25-27. “The International Bill of Rights was meant to be ratified at the same time with the UN Charter. It contained the declaration and the two international covenants. However, the Universal Declaration of Human Rights, which spelled out common standard achievable by all people, was unanimously adopted by the General Assembly. The two covenants were not adopted until 1966. The International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights went into force in 1976.”



General Assembly resolutions are “basically recommendatory,”<sup>177</sup> they “may be considered by governments and by courts or arbitral tribunals as evidence of international custom or as expressing (and evidencing) a general principle of law.”<sup>178</sup> The International Court of Justice weighed in and said:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or emergence of an *opinion juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinion juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinion juris* required for the establishment of a new rule.<sup>179</sup>

The General Assembly is a universal body made up of all the states and that enhances the legitimacy of its resolutions. Even though General Assembly’s resolutions are in theory non-binding, “certain resolutions, or declarations of the U.N. General Assembly may have a law-making function.”<sup>180</sup> Of particular relevance is the Universal Declaration which was unanimously adopted and is “now accepted as declaratory of customary international law.”<sup>181</sup>

The 1948 adoption of the Universal Declaration is extremely important because the Universal Declaration “is a document that expresses a shared minimum consensus of human rights law.”<sup>182</sup> It grandfathered the universality of Human Rights.<sup>183</sup> As a result,

<sup>177</sup> LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 20, at 142.

<sup>178</sup> *Id.* at 146. *See also*, Louis Henkin, THE RIGHTS OF MAN TODAY, *supra* note 24, at 95. “The declaration and resolutions of the UN organs and other international bodies on human rights may have greater weight in achieving international law here than other matters, since they purport to express the conscience of mankind on a matter of conscience.”

<sup>179</sup> Legality of the Threat or Use of Nuclear Weapons (United Nations). 1996, I.C.J. 226 at 254-255

<sup>180</sup> Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 3, 11.

<sup>181</sup> Michael W. Reisman, Sovereignty and Human Rights in Contemporary International Law, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 56, 239, at 240.

<sup>182</sup> David S. Koller, THE MORAL IMPERATIVE: TOWARD A HUMAN RIGHTS-BASED LAW OF WAR, 46 Harv. Int’l L.J. 231, at 240.

<sup>183</sup> *See, id.* at 240-241. “By claiming to be “common standard of achievement for all peoples and all nations,” the UDHR clearly distinguishes itself from most other treaties or conventions that are based on the principles of state interest or reciprocity.” *See also*, Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, *in* THE INTERNATIONAL BILL OF RIGHTS *supra* note 136, at 31, 38

the provisions of the Universal Declaration are constantly evoked and relied upon “in various political and legal contexts-including those involving states with different social, economic, and philosophical backgrounds”,<sup>184</sup> thus setting “into motion its gradual transformation into a source of customary international law.”<sup>185</sup> The United Nations Conference on Human Rights held in Teheran in 1968 proclaimed that “[t]he Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.”<sup>186</sup> The Conference affirmed the principles of the Universal Declaration and urged the international community to abide by these principles.<sup>187</sup> All the 84 states unanimously voted that “the Universal Declaration of Human Rights...constitutes an obligation for the members of the international community.”<sup>188</sup> In 1970 the General Assembly passed one of its most celebrated declaration, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the

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Commenting on the Universal Declaration he wrote, “Its declared significance and almost unanimous approval were not the only indications of the widespread recognition and influence the Declaration was destined to exert...For one thing, it has become a standard of reference and a practical guide for UN organs whenever human rights issues face them.”

<sup>184</sup> Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 54, at 31, 38.

<sup>185</sup> Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 54, at 31, 38.

<sup>186</sup> *See* Paragraph 2 of the proclamation to The Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran. U.N. Doc. A/CONF. 32/41 at 3 (1968). Then the international community was made up of 84 states only.

<sup>187</sup> *See id.* last paragraph. It reads:

Therefore, the International Conference on Human Rights,

1. Affirming its faith in the principles of the Universal Declaration of Human Rights and other international instruments in this field,
2. Urges all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare.

<sup>188</sup> *See*, Robert G. Patman, *International Human Rights after the Cold War* in *UNIVERSAL HUMAN RIGHTS?* *supra* note 3, at 1, 4.

Charter of the United Nations (The Friendly Relations Declaration), which *inter alia* declared, that “every State has the duty to promote through joint and separate action universal respect for and observance of Human Rights and fundamental freedoms in accordance with the Charter.”<sup>189</sup> In keeping with the general trend the Conference on Security and Co-operation in Europe<sup>190</sup> (The Helsinki Final Act of 1975) incorporated the purposes and principles of the United Nations Charter and the Universal Declaration.<sup>191</sup>

Even though these last two instruments forbid intervention it should be noted that:

in its traditional unwritten conception, in the principles of the United Nations Declaration on Friendly Relations, or in the principles adopted at Helsinki (which derive from the Declaration on Friendly Relations), the obligation not to intervene applies only to matters within a state’s domestic jurisdiction. *By virtue of the UN Charter and its aftermath, of particular conventions, or of Helsinki itself, human rights are not a matter of domestic jurisdiction and concern with them cannot be intervention or other impermissible interference.*<sup>192</sup>[Emphasis added.]

Besides, the Declaration on Friendly Relations encourages people who are denied the right of self determination to seek and receive support from the international community to enforce their rights<sup>193</sup> and Article VII of the Helsinki Final Act stipulates that “the participating States recognize the universal significance of *human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well- being*

<sup>189</sup> See General Assembly Resolution A/RES 2625 (XXV) (1970) G.A.O.R., 25 Sess., Supp. 28, at 121]

<sup>190</sup> Thirty five states: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia participated; and six non-participatory states: Algeria, Egypt, Israel, Morocco, Syria and Tunisia addressed the conference at its closing.

<sup>191</sup> The last paragraph of Article VII of the Helsinki Final Act reads, “In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound.”

<sup>192</sup> Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 62.

<sup>193</sup> Resolution 2625 (XXV) “Every State has the duty to refrain from any forcible action which deprives peoples ... their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”

necessary to ensure the development of friendly relations and co-operation among themselves as among all States.” [Emphasis added.] Despite the Cold War the Helsinki Final Act considered Human Rights to be relevant to both the Eastern and the Western blocks.<sup>194</sup> The United Nations World Congress on Human Rights held in Vienna in 1993 reiterated the universality of Human Rights.<sup>195</sup> The Conference recognized that Human Rights are a “legitimate concern of the international community.”<sup>196</sup>

All these conferences reinvigorated the main purpose and obligation of the United Nations which is to maintain international peace and security.<sup>197</sup> Threats to international peace and security are not limited to obvious military adventures.<sup>198</sup> Michael Clarke asserts that international peace and security should not be limited to the study of relationships between states but should “instead, be defined as the study of those forces which affect the outbreak of violent conflict between any significant groups of people in

<sup>194</sup> See Robert I. Rotberg, *The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair*, in *WHEN STATES FAIL*, *supra* note 107, at 1, 4.

<sup>195</sup> The Conference produced the Vienna Declaration and Programme of Action which considered “that the promotion and protection of human rights is a matter of priority for the international community”; reaffirmed the international community’s “commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights” and emphasized “that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”

<sup>196</sup> Robert G. Patman, *International Human Rights after the Cold War* in *UNIVERSAL HUMAN RIGHTS?* *supra* note 5, at 1, 8.

<sup>197</sup> Mohammed Bedjaoui, *On the Efficacy of International Organization: Some Variations on an Inexhaustible Theme*, in *TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATION, ESSAYS IN HONOUR OF G. SCHEMERS*, *supra* note 1, at 7, 17-18. “The ‘maintenance of peace and security’, mentioned no less than 28 times in the Charter of the United Nations is *the* primordial task.” See also U.N Charter art. 1. para. 1.

<sup>198</sup> See Rein Mullerson, *Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda in HUMAN RIGHTS FOR THE 21<sup>ST</sup> CENTURY*, *supra* note 76, at 143, 155. “The concept of security in foreign policy studies was at once narrow and too broad. It was too narrow ‘in being concentrated on safety against military threats and too broad ‘in having safety against military threats trumping all other considerations in the external relations of the state.” Quotation is from John Vincent.

the world.”<sup>199</sup> Human Rights violations are “forces which affect the outbreak of violent conflict” and they are now “viewed as threats to global peace, due in part to post-Cold War experiences with such violations resulting in domestic strife, regional instability and refugee crises in neighboring states.”<sup>200</sup> If Human Rights are violated the potential for an outbreak of violent conflict is likely<sup>201</sup> if not imminent therefore posing a threat to international peace and security. On the contrary if Human Rights are promoted and observed they greatly minimize the outbreak of violent conflicts.<sup>202</sup> Taken to its logical conclusion, if international peace and security is to be maintained the United Nations has no option but to intervene in areas where Human Rights are violated. In fact “a well circumscribed legal right to intervene exists.”<sup>203</sup> In its 2004 report the Secretary-General’s High level Panel on Threats, Challenges and Change noted that:

“Collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene. It is also an operational challenge: the challenge of stopping a Government from killing its own civilians requires considerable military deployment capacity.”<sup>204</sup>

<sup>199</sup> Michael Clarke, *Politics as Government and Politics as Security* in, *NEW PERSPECTIVE ON SECURITY*, 42, 57 (Michael Clarke, ed., 1993)

<sup>200</sup> Tania Voon, *CLOSING THE GAP BETWEEN LEGITIMACY AND LEGALITY OF HUMANITARIAN INTERVENTION: LESSONS FROM EAST TIMOR AND KOSOVO*, 7 *UCLA J. Int’l L. & Foreign Aff.* 31, 38.

<sup>201</sup> See Nina Graeger, *Human rights and Multi-functional Peace Operations*, in *UNIVERSAL HUMAN RIGHTS?* *supra* note 5, at 175, 189. “[T]he recognition that human rights violations often lead to armed conflict have provided the international community with new moral and political incentives to intervene in internal conflicts.”

<sup>202</sup> Mohammed Bedjaoui, *On the Efficacy of International Organization: Some Variations on an Inexhaustible Theme*, in *TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATION, ESSAYS IN HONOUR OF G. SCHEMERS*, *supra* note 73, at 7, 8. “[T]he equality and freedom of peoples become by-words for peace.” See also, Article 1 (2) of the UN Charter which states that the development of friendly relations is “based on respect for the principle of equal rights and self-determination of people.”

<sup>203</sup> John Merriam, *KOSOVO AND THE LAW OF HUMANITARIAN INTERVENTION*, 33 *W. Res. J. Int’l Law*, 111, at 114 (2001).

<sup>204</sup> *A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change*, *supra* note 119, at 18.

The challenge is more operational than normative.<sup>205</sup> Apart from the cross border threats that Human Rights violations pose “the willingness of the U.N. to intervene in domestic humanitarian crises stems from the development of international human rights law.”<sup>206</sup> Normatively, articles 2(4) and 2(7) of the UN Charter establish a general principle of collective intervention.<sup>207</sup> That is any intervention must be mandated by the United Nations. Unfortunately, political interests results in gridlocks within the Security Council. Thus, operational challenges rather than normative challenges militate against the United Nations’ right to intervene. Humanitarian intervention is rooted in international custom. Since the 19<sup>th</sup> century states have intervened in the affairs of other states on humanitarian grounds. In 1827-1830 Britain, France and Russia intervened in Greek revolt against the abusive Ottoman Empire; in 1860-61 France intervened in Syria to stop the massacre of Maronite Christians; in 1877-1878 Russia intervened and helped Romania, Serbia and Montenegro to claim their independence from Islamic domination by the Ottoman Empire and in 1903 Greece, Bulgaria and Serbia intervened to free Macedonia from the increasingly religious intolerant Ottoman rule.<sup>208</sup> These general customary practices

<sup>205</sup> Tania Voon, *supra*, note 200, at 46-47. Commenting on the on the successes that the U.N. scored in Namibia, Angola, and Cambodia and contrasting them with the failures U.N. failures in Yugoslavia, Liberia Rwanda and Somalia Voon asserted, “U.N. limitations in such operations often stem from failures to act decisively, or delays in acting, in circumstances where the public views immediate and forceful action as an obligation.”

<sup>206</sup> *Id.*, at 38. “Such violations will not necessarily be accompanied by the dislocation of peoples or other destabilizing effects that traditionally attend a threat to international peace.”

<sup>207</sup> UN Charter articles 2(4) and 2(7) read as follows:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

2 (4). All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independent of any state, or any other manner inconsistent with the Purposes of the United Nations.

2 (7) 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.

<sup>208</sup> See John Merriam, *supra*, note 203, at 119.

translated into international customary law.<sup>209</sup> Articles 2(4) and 2(7) abrogate these customary practices in favor of collective intervention. Thus, it can be argued that the United Nations' mandated right to intervene finds support from international customary law. Therefore, "normative challenges" are not critical to collective intervention. It is the United Nations operational flaws or incapacity to intervene in Human Rights crises that paralyzes its collective right to intervene, not the normative challenge.

The Panel recognizes the right to intervene<sup>210</sup> but distinguished the "right to intervene of any State" from the "responsibility to protect of *every* State"<sup>211</sup> and it endorsed "the emerging norm that there is a collective international responsibility to protect."<sup>212</sup> The responsibility to protect, which is the same as the collective right to intervene, translates into a United Nations' obligation to intervene because the UN Charter does "not embrace a right to unilateral humanitarian intervention."<sup>213</sup> This is in

<sup>209</sup> *Id.*, at 119. "A general custom and practice of humanitarian intervention existed as early as the 19<sup>th</sup> century."

<sup>210</sup> *See*, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, *supra* note 119, at 18. *See*, note 198 above. The Panel recognized the right to collectively intervene when it noted that "the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene." On page 19 of the same report the Panel went on to say, "[W]e have been struck once again by the glacial speed at which our institutions have responded to massive human right violations in Darfur, Sudan. When the institutions of collective security respond in an ineffective and inequitable manner, they reveal a much deeper truth about which threats matter. Our institutions of collective security must not just assert that a threat to one is truly a threat to all, but perform accordingly." These comments indicate that there is a duty on the part of the United Nations to intervene but that right is frustrated by the operational mechanics of collective action.

<sup>211</sup> *Id.*, at 65. "There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of *every* State when it comes to people suffering from avoidable catastrophe..."

<sup>212</sup> *Id.*, at 66. The Panel went on to identify genocide, large scale killing, ethnic cleansing or serious violations of international humanitarian law as grounds for military intervention. On page 83 the Panel also observed that "today, in an era when dozens of States are under stress or recovering from conflict, there is a clear obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly."

<sup>213</sup> Nico Krisch, Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo, 13 *Eur. J. Int'l L.* 323, 325. *See*, UN Charter article 2(4) forbids unilateral intervention or intervention without the United Nations mandate. *See also*, John J. Merriam, *supra*, note 203, at 115 "[A]ny military intervention in defense of human rights would be led by the United Nations, which has legal authority to conduct peacekeeping operations."

keeping with the United Nations purpose to maintain international peace and security. To avoid any misguided or disguised humanitarian intervention and pursuant fragmentation of international peace and security the UN Charter prohibits unilateral intervention but allows United Nations mandated collective intervention.<sup>214</sup> The intervention in Somalia is a typical example “signaling a significant advance in international acceptance of a right to intervene on humanitarian grounds under the auspices of the U.N., even in the absence of consent of the target state.”<sup>215</sup>

Ironically, the 1993 humanitarian crises in Burundi, Rwanda and Kosovo refute the normative challenge argument and support the notion that the United Nations has an obligation to intervene. When France claimed the right to intervene in Rwanda with the blessings of the Security Council “many states including the U.S., maintained that there was no legal or moral duty to intervene, and refused to assist France... However, in subsequent years numerous individuals from various fields, as well as non-governmental organizations and international organizations, have expressed horror at the failure of the international community to take stronger action.”<sup>216</sup> By implication all the individuals who commented on hindsight accepted that the United Nations has an obligation to intervene. The Independent International Commission on Kosovo concluded “that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council.”<sup>217</sup> Thus, the illegality of NATO’s intervention in Kosovo is premised on the lack of authorization from the

<sup>214</sup> See U.N Charter art. 39. See also, Nina Graeger, Human rights and Multi-functional Peace Operations, in UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 175, 180. “According to Chapter VII in the UN Charter, international military action requires a UN mandate based on a resolution in the Security Council.”

<sup>215</sup> Tania Voon, *supra*, note 200, at, 46.

<sup>216</sup> *Id.*, at 47.

<sup>217</sup> The Independent International Commission on Kosovo, The Kosovo Report, Executive Summary-Main Findings, 2.



United Nations, implicitly conceding that the United Nations has authority at least to authorize intervention.

The centrality of Human Rights is supported by U.N Charter art. 1, para. 3 which adds that the purpose of the UN is ‘to achieve international co-operation in solving international problems... and in promoting and encouraging respect for *human rights* and for fundamental freedoms for all.’ [Emphasis added]. U.N Charter art. 1., para. 2 provides for maintenance of international peace through the respect of equal rights and self determination.<sup>218</sup> Self-determination includes internal self- determination. Any internally oppressed people have a right to self determination without necessarily seceding from their defined territory.<sup>219</sup>

U.N. Charter art. 2, para. 6 obligates the United Nations to act against non-members so as to ensure international peace and security. The relevant part reads; “[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace an security.” U.N Charter art. 2, para. 2<sup>220</sup> ensures that member states must abide with the principles of the Charter in good faith. Some of these principles are contained in U.N Charter art. 55 para. c<sup>221</sup> and the Universal Declaration is “an *authoritative interpretation* of the obligation contained in Articles 55 and 56 of the U.N.

<sup>218</sup> The Article reads, in relevant part, “The purposes of the United Nations are: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”

<sup>219</sup> See Thomas M. Franck, *The Emerging Right of Democratic Governance*, 86 A.J.I.L. 46 (1992). Franck argues that self-determination extends to a post colonial internally oppressed people without implying a right to secede.

<sup>220</sup> U.N Charter art. 2, para. 2. reads:

All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

<sup>221</sup> See, note 169.

Charter.”<sup>222</sup> Therefore, these provisions together with the Universal Declaration establish *ius cogens* for Human Rights law.<sup>223</sup> No state should derogate from them.<sup>224</sup> Article 55 (c) explicitly ties in the observance of Human Rights and fundamental freedoms as “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.” Cumulatively read, articles; 1, 2(2), 2(6), 55 (c), and 56<sup>225</sup> obligate all states to maintain and observe Human Rights.<sup>226</sup>

Membership to the United Nations is regulated by Chapter II of the Charter. Of particular interest is U.N. Charter art. 4, para. 1. The article indicates that “[m]embership to the UN is open to all other peaceloving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” Peace loving may defy a universal definition but by any definition a state that denies and violates the Human Rights of its citizens is by no means peace loving.<sup>227</sup> Although the preamble to the Charter opens with the words: ‘We the

<sup>222</sup> Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, in HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory *supra* note 6, at 3, 21.

<sup>223</sup> Dinah Shelton, Commentary and Conclusions, in Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System *in*, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 137,137. “The UDHR remains, however, and many assert that its norms have become legally binding on all members of the United Nations as an authoritative interpretation of member state’s human rights obligations, or that the UDHR is binding on all states as customary international law through state practice and *opinio juris*.”

<sup>224</sup> See LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 20, at 107.

<sup>225</sup> U.N Charter art. 56 reads:

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purpose set forth in Article.

See also Louis Henkin, THE AGE OF RIGHTS, 55 (1990). “That states ‘pledge themselves’ imports legal obligation.”

<sup>226</sup> See, James Crawford, The UN Human Rights Treaty System: A system in Crisis?, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, 1, 1 (Phillip Alston and James Crawford, eds., 2000). “In 1945 almost for the first time, the United Nations Charter announced the idea of human rights as real rights at the universal level.” See also, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, 56. “The generality of states have supported the view that ‘a consistent pattern of gross violations of human rights’ is now a violation of international law and obligation if practiced by any party to the UN Charter and even, perhaps, by nonmembers.”

<sup>227</sup> See, Wafula F. Okumu, Human rights in transition societies: The cases of Somalia and South Africa, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, *supra* note 1, at 291,294. “[S]table peace in a nation-state

people of the United Nations,' the people it refers to are not individuals or natural persons. They are states in their representative capacity. Kofi Annan, the former UN Secretary General, reminded "[t]he governments of the world...that they are in the United Nations to represent not themselves but their peoples, who expect them to work together for the aims set out in the Charter."<sup>228</sup> He summarized the aims set out in the Charter as, "peace, *human rights*, justice and development"<sup>229</sup> [Emphasis added].

Since the United Nations was founded its membership has grown.<sup>230</sup> All the 193 countries in the world are member states of the United Nations<sup>231</sup> and their membership is conditioned on good faith fulfillment of the United Nations obligations.<sup>232</sup> Logically, the growth of the United Nations also expanded its obligation and the obligation of its member states. Observance and promotion of Human Rights is one of these obligations. If the member states do not fulfill their obligations then the United Nations may be obliged to intervene. In this context the United Nations has a right to intervene because international obligations are "by hypothesis, of international concern and no longer

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is made all the more possible by state institutions constituting a democratic government committed to human rights for all."

<sup>228</sup> Kofi Annan, Op-Ed., An Aspiration to a Larger Freedom, *in* FINANCIAL TIMES (London), March 21 2005, at 17

<sup>229</sup> *Id.*

<sup>230</sup> See Robert I. Rotberg, The Failure and Collapse of Nation-States, Breakdown, Prevention, and Repair, *in* WHEN STATES FAIL, *supra* note 107, at 1, 2. According to Rotberg, in 1914, after the collapse of the Ottoman Empire, there were 55 recognized states. By 1919 there were 59, in 1950 they were 69 and by 1960 there were 90 and when the Soviet Union disintegrated there were 191 states and by 2002 there were 192 states.

<sup>231</sup> The only UN recognized independent state that is not a member of the United Nations is the Vatican (The Holy See) but it holds a UN permanent observer status giving it some participatory opportunities in the affairs of the United Nations.

<sup>232</sup> See U.N Charter art. 2, para. 2. See also, A. H. Robertson, The Implementation System: International Measures, *in* THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 92, at 332, 332. "[I]nternational obligations are generally observed, without any special 'enforcement machinery.' The basis of international treaty relationships is good faith; it is assumed that states accept treaty relations in good faith with the intention of respecting their obligations, and that they will respect them. And, in fact, governments generally do respect them."

exclusively a matter of their domestic jurisdiction.”<sup>233</sup> As such, U.N Charter art. 2, para. 7 which guarantee state sovereignty and non-interference in domestic matters is not inconsistent with the United Nations’ purpose to intervene on Human Rights grounds.<sup>234</sup> The United Nations can maintain peace and security by enforcing the observance of Human Rights.<sup>235</sup> Poor or non-observance of Human Rights generally results in instability<sup>236</sup> which usually spills over into neighboring states and threatens whole regions. Fortunately, Human Rights as enshrined in the Universal Declaration are incrementally playing a positive role in the formulation of state policies<sup>237</sup> and state to state diplomatic relations.

<sup>233</sup> See A. H. Robertson, The Implementation System: International Measures, in THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 92, at 332, 333. Since all the states are members of the United Nations they impliedly accept the international Human Rights obligations stipulated by the Charter.

<sup>234</sup> Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 92, at 31, 37 Commenting on the work of the UN Human Rights Commission as it drafted the Bill of Rights he writes, “the Commission found that its mandate was well within the scope of the United Nations responsibility as defined in the Charter, and consequently could not be considered interference in the domestic jurisdiction of member states. Domestic jurisdiction...only covered questions that had not become international in one way or another; by agreeing that questions of human rights should form the subject of an international bill, states had clearly placed them outside their domestic jurisdiction and Article 2(7) of the Charter became inapplicable.”

<sup>235</sup> Nina Graeger, Human rights and Multi-functional Peace Operations, in UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 175, 182. “Many actors now accept the linkage between human rights and achievement of long-lasting peace and security. That is, addressing human rights is increasingly seen as a precondition for successful conflict resolution and conflict prevention.”

<sup>236</sup> See Albrecht Schnabel, International Efforts to Protect Human Rights in Transition Societies: Right, Duty, or Politics, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION, CAUSES, CONSEQUENCES, RESPONSES, *supra* note 1, at 141, 158. “Human rights conditions serve as useful indicators for the level of current and future peace and stability in a society. They also serve as a key entry point (possibly the most effective one) through which future instability, degeneration, and violent conflict can be averted. If human rights violations are detected early, and the causes of such violations are isolated and addressed, stability (even if fragile) can be preserved and further degeneration can be avoided.”

<sup>237</sup> See Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS *supra* note 92, at 31, 38 Commenting on the Universal Declaration he wrote, “Furthermore, caught by its impetus and perhaps persuaded by the overwhelming support for it that were obliged to do so, many states have enacted legislation or amended their laws to make them correspond with the provisions of the Declaration.”

The enforcement mechanism of the United Nations is set out in Chapters VI and VII of the Charter.<sup>238</sup> U.N Charter art. 39 gives the Security Council the mandate to decide what measures to take if international peace and security is threatened.<sup>239</sup> The issue is whether violation of Human Rights by any given state falls within the provisions of Article 39. Rein Mullerson, noted that, “[t]hough the notion of international peace and security are obviously closely related and often used together and even interchangeably, the ordinary meaning of security is usually wider. There may be peace but not security. Certain acts may not threaten peace directly but they may well undermine international security.”<sup>240</sup> Violations of Human Rights “undermine international security.” Therefore, Human Rights violations fall within the provisions of Article 39.

Unfortunately, Human Rights have not fully recovered from the sacrificial role they were relegated to at the formation of the United Nations. This was further aggravated by the Cold which trampled Human Rights for political and economic expediency.<sup>241</sup> What the United Nations must do to “maintain international peace and

<sup>238</sup> See, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change, *supra* note 119, at 106. “The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.” This paper concentrates on the provisions of Chapter VII which, in my opinion, is under- utilized but perhaps the most effective enforcement mechanism. Chapter VI, pacific settlement of Human Rights violations rarely succeeds.

<sup>239</sup> U.N Charter art. 39. reads “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”

<sup>240</sup> Rein Mullerson, Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda *in* HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY, *supra* note 76, at 143, 156

<sup>241</sup> See Robert G. Patman, International Human Rights after the Cold War *in* U NIVERSAL HUMAN RIGHTS?, *supra* note 5, at 1, 3. Even though the United States decried the prevalence of Human Rights abuses in the Soviet block it supported Human Rights abusing leaders like the Shah of Iran, Ferdinand Marcos of the Philippines, Augusto Pinochet of Chile, Mobutu Seseko of Zaire, even Pol Pot of Cambodia. On their part the Soviets supported dictators like Saddam Hussein, Mengistu Haile Mariam, Fidel Castro and Kim II Sung yet they hypocritically criticized the segregation laws, at least until 1964, which the United States implemented against its minority black population.

security”,<sup>242</sup> is broader than what was perceived in 1945.<sup>243</sup> The United Nations obligation includes enforcing Human Rights which were conveniently considered to be within the exclusive jurisdiction of a sovereign state.

The proliferation of regional Human Rights treaties<sup>244</sup> since WWII buttresses the universality and the importance of Human Rights to the maintenance of international peace and security. Outside the so called Asian block<sup>245</sup> regional Human Rights treaties are common in Europe, Americas, Africa, and among Arab states.<sup>246</sup> Regional treaties

<sup>242</sup> See U.N Charter art. 1 para. 1. It reads;

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It must be noted that although Art.1, para. 1 touts peaceful solutions to breaches of peace it must be read in conjunction with the provisions of Chapter VII, particularly Article 42 which gives the Security Council the power to use force where other means to restore peace peacefully have failed.

<sup>243</sup> Nina Graeger, Human rights and Multi-functional Peace Operations, *in* UNIVERSAL HUMAN RIGHTS? *supra* note 3, at 175, 180. “The world looks different on the eve of the turn of the century than it did in 1945. The UN Charter was framed in the shadow of the Second World War, whereas today’s conflicts are intra-state. Besides, views on humanitarian issues have changed and the UN should take this into account.” See also, John Merriam, *supra* note 203, at 114. “The United Nations was formed to accomplish two principles goals: 1) to prevent the use of force as a means of settling disputes; and 2) to protect universal human rights.”

<sup>244</sup> Regional Human Rights are not discussed in length because they are outside the scope of this thesis.

<sup>245</sup> It should however be noted that there are efforts to create Asian Pacific Human Rights treaties. See, Lillich *et al*, The European System for the Protection of Human Rights, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 3, at 617, 618.

<sup>246</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) was signed in Rome in 1950 and came into effect in 1953. The American Convention on Human Rights (the American Convention) was signed in San Jose, Costa Rica in 1968 and came into effect in 1978. The African Charter on Human Rights and Peoples’ Rights (the Banjul Charter) was adopted by the Organization of African Unity in 1981 and came into effect in 1986. The Arab Charter on Human Rights (Arab Charter) was adopted by the Council of the League of Arab States in Cairo in 1994. Party membership to these regional treaties is widespread. All members of the European Council are parties to the European Convention and every new member state to the European Council is expected to ratify the treaty. Out of thirty five members of the Organization of American States twenty four are members of the American Convention. All fifty three African states are parties to the Banjul Charter and all member states to the Arab League are parties to the Arab Charter. The statistical data is relevant because it gives prominence to each regional treaty and generally enhances the universality of Human Rights. All regional treaties promote Human Rights. See also, Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, at 117, 122. “Unless one wishes to give up the very notion of an international law of human rights altogether, these rights should have essentially the same meaning regardless of local traditions.”

“offer a surprisingly uniform articulation of human rights law.”<sup>247</sup> This is not surprising because the provisions of Regional Human Rights treaties are directly influenced by the Universal Declaration.<sup>248</sup> For example, the European Convention on Human Rights affirms the Universal Declaration.<sup>249</sup> The American Convention on Human Rights borrowed its wording from the Universal Declaration by reaffirming the democratic institutions within the region through the “essential rights of man...based on attributes of human personality.”<sup>250</sup> Even though the African Charter on Human Rights has a caveat qualifying individual rights with community rights, it also heavily borrowed from the Universal Declaration.<sup>251</sup> The Arab Charter for Human Rights is also heavily influenced by the UN Charter and the Universal Declaration. All the fundamental rights that are contained in the Universal Declaration are repeated in these regional treaties.<sup>252</sup> Therefore, a right to life, right to liberty, right to justice and equity or right to mutual respect, caring and integrity precede any culture.

It can be argued that if the United Nations, with its universal membership denotes universalism of Human Rights regionalism fragments it. Further, regional Human Rights

<sup>247</sup> Fernando R. Teson, International Human Rights and Cultural Relativism, *in* HUMAN RIGHTS, The International Library of Essays in Law and Legal Theory, *supra* note 6, 117, 122.

<sup>248</sup> Dinah Shelton, The Promise of Regional Human Rights Systems, *in* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE, *supra* note 6, at 619,619. “Virtually all the legal instruments creating the various regional systems refer to the Universal Declaration of Human Rights (UDHR) and the Charter of the United Nations, providing a measure of uniformity in the fundamental guarantees and a reinforcement of the universal character of the Declaration.”

<sup>249</sup> The preamble to the European Convention on Human Rights explicitly mentions that it considered the Universal Declaration and resolved to enforce some of the rights contained in the Universal Declaration. Section I of the convention mimics some of the rights that are contained in the Universal Declaration.

<sup>250</sup> The preambles considers and reiterates the Universal Declaration ideals of freedom from fear and want which is only achievable if conditions allow man to enjoy his political, economic and social rights freely.

<sup>251</sup> The Charter reaffirms and takes due regard of the Universal Declaration. Most of the provisions in Chapter I of the Charter are very similar to the rights contained in Universal Declaration.

<sup>252</sup> *See*, article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms 213 U.N.T.S. 221, Nov. 4, 1950; article 2 American Convention on Human Rights OEA/Ser. K/XVI/1.1, Nov 22, 1969; and articles 1 and 2 of the African Charter on Human and People’ Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, June 27, 1981.

treaties have “clawback clauses” which subjugate Human Rights to national laws.<sup>253</sup> This apparent contradiction can be explained by fact that the UN Charter and all regional Human Rights treaties make the Universal Declaration their reference point.<sup>254</sup> The General Assembly proclaimed that the Universal Declaration is the common standard of all peoples and nations.<sup>255</sup> Regional treaties give regional context and treaty based legalities to the universal dictates of Human Rights.<sup>256</sup> They are not a departure from the core values of Universal Human Rights.<sup>257</sup>

### Human Rights Covenants

The final adoption of the initially intended Universal Bill of Rights was realized in 1966 when the United Nations adopted the two Covenants.<sup>258</sup> The adoption of the two Covenants was not a coincidence. It was an unavoidable step to cement the importance of

<sup>253</sup> See, Dinah Shelton, The Promise of Regional Human Rights Systems, in INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE *supra* note 3, at 619, 619.

<sup>254</sup> See, above notes 70 and 71.

<sup>255</sup> All the regional treaties borrowed their Human Rights guarantees from the Universal Declaration. See, Section 1 of the European Convention, Chapters I and II of the American Convention, Chapter 1 of the Banjul Charter and Part II of the Arab Charter. The treaties commonly guarantee the following: right to life; prohibition of torture and slavery/force labor; right to personal liberty and fair trial; freedom of association, assembly, thought, conscience religion and the right to property.

<sup>256</sup> See, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change, *supra* note 119, at 85. “Recent experience has demonstrated that regional organizations can be a vital part of the multilateral system. Their efforts need not contradict United Nations efforts, nor do they absolve the United Nations of its primary responsibilities for peace and security. The key is to organize regional action within the framework of the Charter and the purposes of the United Nations, and to ensure that the United Nations and any regional organization with which it works do so in a more integrated fashion than has up to now occurred.”

<sup>257</sup> See, Louis Henkin, Introduction, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 92, at 1, 28, “The Declaration and the covenants grew up while regional human rights agreements were also developing, insights and knowledge of each other, dealing with the same problems, in the same universe, with some of the same participants. Inevitably, they drew on and reacted to each other... Different agreements may have different texts as well as different contexts, but common phrases suggest common meanings, and practice under, or accepted or authoritative interpretations of the European Convention and late the American Convention, are not irrelevant to interpretation of the International Covenant.”

<sup>258</sup> LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 20, at 602. “Whereas many international treaties have codified and developed pre-existing customary principles of international law, human rights covenants and conventions have helped to shape customary legal norms.”



Human Rights on the international plane.<sup>259</sup> The final part of the Universal Bill of Rights is made of the International Covenant on Civil and Political Rights (ICCPR)<sup>260</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>261</sup> These are the “principal international human rights agreements”<sup>262</sup> and “together with other conventions adopted by the United Nations and its specialized agencies, they form a single body of new international law of human rights.”<sup>263</sup>

<sup>259</sup> See, Martti Koskeniemi, *supra* note 73, at 397-398. “The 1966 U.N. Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights have affirmed that states have international obligations to their citizens. Along with more recent instruments on the prevention of racial and sexual discrimination and torture, and on the establishment of rights for children and migrant workers, these covenants have also instituted a universally applicable system of international inspection and supervision. The practical effects of such international standards may still be rather small, but their existence means that a state may not claim that mere statehood justifies any internal activities.”

<sup>260</sup> Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, *in* THE INTERNATIONAL BILL OF RIGHTS *supra* note 92, at 31, 64 “The legal strength of a treat depends not only on the substance of the rules but also on the number of states that have consented to be bound by these rules.” Out of 192 states, the ICCPR has 160 state parties and the ICESCR has 157 state parties.

<sup>261</sup> Initially the drafters intended to have one legal instrument which covered political and civil rights but the addition of economic and social rights led to two instruments. LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS *supra* note 21, at 596-597. The western powers argued that “economic and social rights were essentially aspirations or plans, not rights, since their realization depended on availability of resources and on controversial economic theory and ideology. These, they said, were not appropriate subjects for binding obligations and should not be allowed to dilute the legal character of provisions honoring political-civil rights...”

<sup>262</sup> Louis Henkin, Introduction, *in* THE INTERNATIONAL BILL OF RIGHTS, The Covenant on Civil and Political Rights *supra* note 92, at 1,16. See also, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 20. “The international law of human rights is contained *principally* in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, *which together legislate essentially what the Universal Declaration had declared.*” [Emphasis added] See also, Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, *in* THE INTERNATIONAL BILL OF RIGHTS *supra* note 92, at 31, 35. Although he was commenting on the ICCPR it also applies to the ICESCR. “The covenant is not an accident of history, but a logical consequence of an integral design of the UN Charter to make human rights both universal and international. Time and intervening events may have reduced the differences between the Universal Declaration and the International Covenant insofar as their respective legal authority and actual impact are concerned and may have made some of the reason for a treaty less compelling. But they have not negated the essential purpose of the Covenant, namely, to become and indispensable legal means for securing worldwide respect for, and observance of, fundamental human rights.”

<sup>263</sup> Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, *in* THE INTERNATIONAL BILL OF RIGHTS *supra* note 92, at 31, 43. Although Conventions e.g. the Convention against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, etc. are equally important this paper does not discuss them in detail. All these Conventions and the Covenant promote Human Rights. See, Articles 2.1 and 2 of the ICCPR, 999 U.N.T.S. 171, Dec. 16, 1966; article 2.1 and 2 of ICESCR, 993 U.N.T.S. 3, Dec 16. 1966; article 2.1 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Article 2(1) of the ICCPR states that “[e]ach 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.” To that end article 2(2) obligates the state parties to make their internal legislation consistent with the provisions of the Convention.<sup>264</sup> It is worth emphasizing that although states are the parties to these Covenants:

[i]nternational human rights agreements are like other international agreements, creating legal obligations between the parties and international responsibility for their violation. They are essentially mutual undertakings among states for the benefit of third parties (the inhabitants of the countries party to the agreement) and in principle are enforceable by the promises, that is, the other parties to the agreement.<sup>265</sup>

All Human Rights treaties provide some kind of enforcement or monitoring mechanism. Unfortunately, “[t]he only procedural obligation that is mandatory under all of the treaties is self-reporting by state parties; provisions for inter-state complaints and individual petition procedures are usually optional.”<sup>266</sup> Civil and political rights are enforced by Article 28 of the ICCPR. Article 28 establishes the Human Rights Committee (the Committee)<sup>267</sup> and Article 40 obligates all the state parties to submit

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Punishment 1465 U.N.T.S 85, Dec. 10, 1984; article 2.1 of the Convention on the Rights of the Child, 1577 U.N.T.S. 3, Nov. 20, 1989; article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1249 U.N.T.S. 13, Dec. 18, 1979. So discussing the two Covenants will serve the same purpose and the purpose of this paper.

<sup>264</sup> It reads, “Where not already provided for by existing legislative or other measures each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

<sup>265</sup> LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 21, at 638 an excerpt from Henkin.

<sup>266</sup> Lillich, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE *supra* note 3, at 583.

<sup>267</sup> Torkel Opsahl, The Human Rights Committee, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 369, 370. “Despite the Committee’s pretentious name, it would

reports of measures that they have adopted to give effect to the rights recognized by the Covenant. The reports must be submitted within a year of the entry into force of the Covenant or whenever the Committee requests. Although it is a mandatory measure, the reporting mechanism has not been fully complied with.<sup>268</sup> In its 1996 annual report the Human Rights Committee “expressed ‘its serious concern’ that ‘more than two thirds of all States parties were in arrears with their reports.’”<sup>269</sup> Despite the poor reporting record the reports that reach the Committee have played a significant role in the “ever growing [Human Rights] jurisprudence.”<sup>270</sup> Article 41 is the most under-utilized or up to date never-utilized provision of the Covenant. It allows the Committee to receive from any state party communication of Human Rights violations by another state party and the right of the state parties to force another state party to comply with the Covenant and the reporting provision.<sup>271</sup>

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more accurately be described as the ‘Civil and Political Rights Committee’ because it only functions within the confines of the ICCPR and it has no jurisdiction outside its enabling Covenant.

<sup>268</sup> See, Louis Henkin, *THE RIGHTS OF MAN TODAY*, *supra* note 25, at 107. “Unilateral reporting by states to the UN or to a special body apparently does not deter violations and improve performance, perhaps because the reports tend to be self-serving and evasive and have not been effectively scrutinized.”

<sup>269</sup> LORI F. DAMROSCH *et al*, *INTERNATIONAL LAW: CASES AND MATERIALS*, *supra* note 21 at, 635. See also, JACK DONNELLY *supra* note 57, 209. “The reporting procedure thus has provided a fairly widely accepted promotional mechanism, but it involves only information exchange and weakest monitoring. And even the information exchange is flawed. The reports of many countries are thorough and revealing, but others are farces, and some are not even submitted.”

<sup>270</sup> Louis Henkin, Introduction, in *THE INTERNATIONAL BILL OF RIGHTS*, The Covenant on Civil and Political Rights *supra* note 92, at 1, 16. “Governments and especially nongovernmental organizations have invoked the Covenant. Disputes about compliance by particular parties are daily fare, reflecting differences of interpretation that cry to be discussed.” See also *id.*, at 22 “There is a tendency to deprecate and depreciate it, since it is based largely on voluntary reporting, which at best tends to be self-serving and no likely to reveal violations... But the fact that a state has to report inevitably has some influence to induce better compliance.” See also, Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the UN Human Right Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 226, at 15, 53. “By expounding the ICCPR and spurring dialogue about it, by enriching and instituting more deeply the discourse of human rights, the Committee can best contribute to the massive work of the next fifty years.” See also Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 369, 415-416. The Committee “deliberate matters of substance, the very contents of the Covenant, in public session. It is applying the Covenant, discussing interpretations, and drawing conclusions, in the manner of a quasi-legislative body.”

<sup>271</sup> Given the comradeship that currently prevails among many states there are very slim chances that Article 41 will be used. See LORI F. DAMROSCH *et al*, *INTERNATIONAL LAW: CASES AND MATERIALS*, *supra*

Optional Protocol to the ICCPR provides that the Committee can receive communications from individual victims of Human Rights abuse.<sup>272</sup> The only communicants covered by this protocol are citizens of state parties to the protocol and the aggrieved individuals should first exhaust all the available domestic remedies before submitting a complaint to the Committee.<sup>273</sup> An obvious weakness is that the protocol is optional and many states that abuse their citizens' rights are not party to the protocol. Nonetheless, "[t]he one area where guarded optimism may be appropriate is the committee's consideration of individual petitions under the Optional Protocol to the Covenant."<sup>274</sup> The relevance of the Optional Protocol is indicated by the growth of state membership to the protocol and the number of cases that the Committee has concluded. In 1988 there were only 87 state parties to the protocol and the Committee considered 211 communications and concluded 72 of them on merits.<sup>275</sup> By 2004 there were 104 state parties and out of the 1,279 communications that were submitted the Committee concluded 452 on merits.<sup>276</sup> The optional protocol has not been optimally utilized either because the procedure is not widely known or because some of the state parties have similar but more effective regional procedures.<sup>277</sup> Even though there are procedural,

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note 21, 596. "Unlike the Declaration, the Covenant, since it created legal obligations addressed the need to provide measures for their enforcement. While in legal principle every state party is a promisee and entitled to request compliance by any other state party, ordinarily no other state has any interest in doing so and is especially reluctant to demand compliance or threaten sanctions for violation at the expense of its friendly relations and diplomatic capital." Except from Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in, *International Enforcement of Human Rights*.

<sup>272</sup> See, Article 1 of Optional Protocol to the ICCPR, 999 U.N.T.S. 171.

<sup>273</sup> See, *Id*, Article 2 of the Optional Protocol.

<sup>274</sup> JACK DONNELLY *supra* note 79, 209.

<sup>275</sup> *Id.* at 209-210

<sup>276</sup> See, Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. (3 May, 2004.)

<sup>277</sup> See Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, 369, 422. Opsahl gives the absence of individual reports from Congo and Central Africa Republic as an example of lack of knowledge of the procedure and compares the

planning and disciplinary opportunities for improvement,<sup>278</sup> the Committee has made some positive strides in the application of the Covenant by expressing its views “which contain a significant contribution to doctrine and case law.”<sup>279</sup> Although the Committee is an independent organ it is linked to some United Nations organs.<sup>280</sup>

Unlike the ICCPR which spells out individual rights the ICESCR targets the states<sup>281</sup> and the obligation it imposes is somewhat less onerous than the ICCPR. However, that does not diminish the relevance of the ICESCR. The covenant makes “the United Nations ... the only place where the issues of peace, security, and development can be addressed together at the global level.”<sup>282</sup> The difference between the two Covenants emanate from the historical dichotomy between them.<sup>283</sup> Some philosophers

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Optional Protocol with the more preferred and effective regional treaty of the European Convention on Human Rights.

<sup>278</sup> Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 369, 436. He cites punctuality, discipline in debates and preparation for interventions and deliberations as some of the weaknesses.

<sup>279</sup> Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 369, 434.

<sup>280</sup> Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 369, 385. “[T]he General Assembly provides for member’s emoluments and receives annual reports, ECOSOC transmits the report and may receive the Committee’s general comments along with copies of State reports, and the Secretary-General provides staff and facilities and convenes sessions.” Arguably, this constrains the Committee’s independence but the Committee also benefits from the services it receives from the United Nations organs. “Inter-agency consultations on collaborations in implementation of the Covenant took place before the Committee began its work. Their experience is relevant to the Committee, and co-ordination of activities might be useful, and indeed necessary.” *Id.*, at 392.

<sup>281</sup> See, Louis Henkin, *THE RIGHTS OF MAN TODAY*, *supra* note 25 at 98. “The two covenants recognize the difference in the character of rights in various subtle ways. For example, the Covenant on Civil and Political Rights is drafted in terms of the individual’s rights...The Covenant on Economic, Social and Cultural Rights, on the other hand, speaks only to the states, not to the individual.”

<sup>282</sup> A MORE SECURE WORLD: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, *supra* note 119, at 87.

<sup>283</sup> JACK DONNELLY *supra* note 79, at 30-31. “Initially, arguments based on natural liberty were used to free the process of capital accumulation from traditional restraints and to justify social and political mobility, but once bourgeois political power was established, arguments of natural liberty came to be used principally to prevent the rise, and even the protection, of lower classes...Given such a partisan understanding of civil and political rights, it is not surprising that the economic and social right championed by the left came to be seen...as essentially antagonistic...Civil and political rights did have their initial social basis in the bourgeoisie, and the demand for economic and social right did begin with the working class and socialist intellectuals.” See, also, Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at

and contemporary conservatives and libertarian have argued that economic and social rights are not real rights.<sup>284</sup> For example, Maurice Cranston argued that “traditional civil and political rights to life, liberty, and property are ‘universal, paramount, categorical moral right.’ Economic and social rights, however are neither universal, practical, nor of paramount importance and ‘belong to a different logical category’...that is, they are not truly *human rights*.”<sup>285</sup> However, since civil, political, economic, social and cultural rights are and have been confirmed to be “interdependent and indivisible”<sup>286</sup> the argument that economic and social rights are not real rights does not pass muster.<sup>287</sup> The Committee on Economic, Social and Cultural Rights noted that the ICESCR “*does* impose ‘various obligations which are of immediate effect’ contrary to the assertions of those who argue that the Covenant is wholly aspirational.”<sup>288</sup>

Article 2 of the ICESCR requires each,

“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 realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” [Emphasis added.]

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473, 490. “[T]he content of the Covenant on Economic, Social and Cultural Rights was not based upon any significant bodies of domestic jurisprudence as was the case with civil and political rights. Thus, phrases like ‘cruel, inhuman or degrading treatment or punishment’ had been the subject of in-depth judicial and academic analysis long before their inclusion in the Covenant on Civil and Political Rights.”

<sup>284</sup> JACK DONNELLY *supra* note 79, 31.

<sup>285</sup> *Id.*, at 31.

<sup>286</sup> *See, id.*, at 28. “Today it is commonly claimed that all human rights are “interdependent and indivisible,” as it is regularly put in U.N. resolutions. *See also*, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, *supra* note 119, at 86. “The framers of the Charter of the United Nations understood that peace and security were inseparable from economic development.”

<sup>287</sup> JACK DONNELLY *supra* note 79, at 31. “We must not dismiss or disparage civil and political rights because of their bourgeois heritage or partisan abuses by industrial capitalist regimes, any more than the murderous excesses of Stalin, allegedly in the name of economic and social rights, should cause us to reject those rights...In fact, one of the principal reasons for abandoning the conventional dichotomy between civil and political and economic and social rights is to overcome the ideological biases of both the left and the right with which that dichotomy was so long associated and which too often lead to politically dangerous arguments for the priority of one set and the neglect or even suppression of the other.”

<sup>288</sup> Philip Alston, The Committee on Economic, Social and Cultural Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 473, 495.

The article obliges every member state to take steps to realize the rights contained in the covenant even though the realization is dependent on the availability of resources in a given state. Therefore, realization of economic, social and cultural rights may differ from state to state. However, this does not diminish the universality and value of these rights because at the end of the day the obligation is relevant to every state despite the differences in the availability of resources.<sup>289</sup> A state party to ICESCR satisfies its Article 2 obligation by showing that, given the resources at its disposal it has taken the maximum steps to have economic, social and cultural rights realized.<sup>290</sup> Conversely, “a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is *prima facie* failing to discharge its obligations under the Covenant”.<sup>291</sup> Besides, “the impediments to implementing most economic and social rights...are political rather than physical.”<sup>292</sup> The ICESCR gives the social, economic and cultural rights contained in articles 12, 16, 22-27 of the Universal Declaration of Human Rights a readily available legal footing.

<sup>289</sup> See, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 33. Commenting on the differences between the ICCPR and the ICESCR he wrote, “As a matter of law, however, I do not think any of these differences is critical. The Convention on Economic, Social and Cultural Rights uses language of obligation, not merely of aspiration or hope.”

<sup>290</sup> See, Louis Henkin, THE AGE OF RIGHTS, *supra* note 6, at 33 (1990). “An undertaking to do something ‘to the maximum of its available resources’ and to achieve ‘progressively’ creates a clear and firm legal obligation, subject to those limitations.”

<sup>291</sup> Philip Alston, The Committee on Economic, Social and Cultural Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 473, 495. “Most importantly of all, the Committee observes that ‘a minimum core obligation to ensure the satisfaction of, at very least, minimum essential levels of each of the rights is incumbent upon every State Party.’”

<sup>292</sup> JACK DONNELLY *supra* note 79, at 32. “For example there is more than enough food in the world to feed everyone; widespread hunger and malnutrition exist not because of a physical shortage of food but because of political decisions about its distribution.” *Id.*, at 32-33.

A Committee on Economic, Social and Cultural Rights (the Committee) was created to “assist the [ECOSOC] in fulfilling the Council’s role under the Covenant”<sup>293</sup> that is “taking...measures designed to promote realization of the economic, social, and cultural rights of every individual living within the jurisdiction of the State concerned.”<sup>294</sup> The Committee should not be confused with the ICCPR Human Rights Committee. The ICESCR Committee was preceded by a Working Group but unlike working groups the Committee is not a representative of governments.<sup>295</sup> Article 16 of the Covenant provides that each state party undertakes to submit reports of implementation to the Secretary-General of the United Nations and the Secretary-General in turn transmits the reports to the Committee albeit in the name of ECOSOC.<sup>296</sup> Unfortunately, a lot of states have failed to submit their reports.<sup>297</sup> Except for the few states the reports submitted by the majority of states are not up to standard and therefore not informative of the economic, social and cultural rights prevailing in the states concerned.<sup>298</sup> At its third

<sup>293</sup> See, Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 473. At 488-489, “The Committee was established pursuant to ESC Res. 1985/17.” Although, it was expected to emulate the Human Rights Committee, it was not treaty based and it existed at the pleasure of ECOSOC but in practice the Committee acted independently of the Council except for the Rules of Procedure.

<sup>294</sup> Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 491.

<sup>295</sup> Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 487.

<sup>296</sup> See, Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 491. See, also Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS, The Covenant on Civil and Political Rights*, *supra* note 92, at 1, 16. “Compliance with the Covenant is not the charge of a special monitoring body but of political bodies, the Economic and Social Council and the General Assembly.” See also, Lillich, *supra* note 7, 583. “Each of the core UN human rights treaties, except the Covenant on Economic, Social and Cultural Rights, creates a specific monitoring body, usually a committee of independent experts numbering between 10 (CAT) and 23 (CEDAW).”

<sup>297</sup> See, LORI F. DAMROSCH *et al*, *INTERNATIONAL LAW: CASES AND MATERIALS*, *supra* note 21, at 633.

“Like other U.N. human rights treaty bodies, the Committee on Economic Social and Cultural Rights has faced the problem of persistent failure by states parties to satisfy their reporting obligations.”

<sup>298</sup> Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 491. The reason given for these poor reports is that these states consider the reports to be a “diplomatic chore. Accordingly, the accepted



session the Committee insisted that state parties should not take the reporting requirement as “a procedural matter designed solely to satisfy each State Party’s formal obligation to report.”<sup>299</sup> The report must disclose an accurate state assessment of the rights contained in ICESCR.

Initially, it could take a state party a possible nine year period to complete a comprehensive report, but the Committee later introduced a single reporting system and reduced the reporting period to one year.<sup>300</sup> In an attempt to encourage state parties to comply with the reporting requirement the Committee resolved that it will schedule reports and notify the defaulting states parties. If the concerned states fail to submit the scheduled report after the notification the Committee will go ahead and make its assessment without the report from the state.<sup>301</sup> This position encouraged some defaulting state parties to comply with the Covenant.<sup>302</sup> The Committee has proposed an Optional Protocol, similar to the ICCPR Optional Protocol. The Optional Protocol will allow individuals to file complaints with the Committee.<sup>303</sup>

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‘wisdom’ has been that it should be carried out with the least possible expenditure...with little involvement on the part of those in government who are actually concerned with the rights in question, and with no involvement at all of the broader range of social partners in the community.”

<sup>299</sup> Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 492.

<sup>300</sup> *See*, Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 473, 504. The rights were divided into three categories and each category was reported in a three year interval.

<sup>301</sup> *See*, Committee on Economic, Social and Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions* (28 April-16 May 1997, 17 November- 8December 1997) U.N. Doc. E/1998/22, p. 19-20 para. 44.

<sup>302</sup> *See*, Scott Leckie, *The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 226, at 129, 130. “[T]he Committee can provide an impetus for the fuller realisation of domestic human rights objectives.”

<sup>303</sup> The United Nations High Commissioner for Human Rights urged the Commission for Human Rights to give high consideration priority to the protocol. *See*, Sub-Commission on Human Rights resolution 2001/6. *See also* Lillich, *INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE* *supra* note 3, at 584.

Despite the fact that states are the primary parties to these Covenants, the Vienna Convention on the Law of Treaties (the Vienna Convention) governs these international treaties. It is declaratory of customary international law.<sup>304</sup> Thus, the doctrine of *pacta sunt servanda* which obligates states to observe agreements in good faith also applies to the two Covenants.<sup>305</sup> Every state party to the Covenants and other Human Rights treaties surrenders its sovereignty to the terms of the treaty it enters.<sup>306</sup> No reservations that are “incompatible with the object and purpose of the treaty”<sup>307</sup> are permissible. Therefore, all the member states to the two Covenants are legally obligated to observe civil, political, economic, social and cultural rights in good faith.

### **The Commission on Human Rights/Human Rights Council**

The creation of the Commission on Human Rights (the Commission)<sup>308</sup> within the United Nations mechanism is further evidence of the critical role that Human Rights are supposed to play. The Commission, under the auspices of Economic and Social Council (ECOSOC) monitored Human Rights standards in every state.<sup>309</sup> The General Assembly

<sup>304</sup> LORI F. DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 21, at 453.

<sup>305</sup> Article 26 of the Vienna Convention reads, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” *See also*, The Nuclear Tests Case: Australia and New Zealand v. France 1974 I.C.J 253, 457. The International Court of Justice held that *pacta sunt servanda* in the law of treaties is based on good faith.

<sup>306</sup> *See also*, Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 92, at 31, 35 “By virtue of the principle *pacta sunt servanda*, parties to a treaty not only give up the right of nonperformance but also acquire the right to call any other party to account if they have grounds to believe that the provisions of the covenant are not being fully and effectively implemented. The exercise of this right cannot be regarded as an illegitimate intervention or an inimical act on the part of the complaining state party, nor can the concern so manifested be lightly dismissed. That some states have shown reluctance to exercise the right does not mean that states have generally looked upon the principle of mutual scrutiny as ineffectual.”

<sup>307</sup> Article 19 (c) Vienna Convention on Law of Treaties.

<sup>308</sup> U.N Charter art. 68 reads, “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.” The commission had its working groups and special rapporteurs which did the field work studying or investigating human rights violations.

<sup>309</sup> *See*, A MORE SECURE WORLD: Our Shared Responsibility. Report of the High –level Panel on Threats, Challenges and Change, *supra* note 119, at 89. “The Commission on Human Rights is entrusted with promoting respect for human rights globally, fostering international cooperation in human rights,

replaced the Commission with the Human Rights Council (the Council) in 2006.<sup>310</sup> The Council assumed the duties of the Commission and it is expected to improve on the Commission's work.<sup>311</sup>

In 1967 and 1970 ECOSOC passed resolutions 1235(XLII)<sup>312</sup> and 1503(XLVIII)<sup>313</sup> respectively. The two procedures established the Commission's power to study or investigate violations of Human Rights by states.<sup>314</sup> The Commission "played a consistently important role in standard-setting."<sup>315</sup> The 1235 procedure was held in public and the 1503 procedure was conducted in private.

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responding to violations in specific countries and assisting countries in building their human rights capacity."

<sup>310</sup> See General Assembly resolution A/RES/60/251. Unlike the Commission which was a subsidiary of ECOSOC the Council is a standing body which is directly under the General Assembly. Resolution A/60/L48 created the Council to redress the shortcomings of the Commission. One of the ways in which these shortcomings were redressed is the Council's periodic review of each state's implementation of Human Rights objectives.

<sup>311</sup> See paragraph 6 of the A/RES/60/251. It reads, The General Assembly "Decides also that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;" Resolution A/60/L48 created the Council to redress the shortcomings of the Commission. One of the ways in which these shortcomings were redressed is the Council's periodic review of each state's implementation of Human Rights objectives.

<sup>312</sup> See 42 U.N. Doc. E/4393 (1967). It authorizes the Commission to study reports of Human Rights violations in trust and non-self governing territories where there were allegations of systematic human rights abuses.

<sup>313</sup> It created and authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to investigate or study systematic human rights abuses. This extended the investigations self governing territories.

<sup>314</sup> Although the present discussion concentrates on the Commission it should be noted that it is not the only source of Human Rights data. Outside the bodies and procedures that are created by Human Rights treaties the General Assembly may get reports from Trusteeship Council, Special Committee on Decolonization, Commission on Status of Women, United Nations Educational, Scientific and Cultural Organization (UNESCO), International Labor Organization (ILO) etc. See also, Lillich *supra*, note 3, at 562-563.

<sup>315</sup> See, Philip Alston, The Commission on Human Rights, in Philip Alston, The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 126, 126-136. "[T]he Commission on Human Rights has undergone a profound transformation in terms of its role and functions within the international community. In the process, it has firmly established itself as the single most important United Nations organ in human rights field despite its subordinate status as one of several specialized ('functional') commissions answerable to the Economic and Social Council and, through it, to the General Assembly." The Commission drafted the International Bill of Rights and in 1948 the UN unanimously adopted the Universal Declaration as part of the International Bill of Rights. It finished drafting the other part i.e. the two Covenants (ICCPR and the ICESCR) in 1954 which was adopted later in 1966. It also influenced the establishment of thematic procedures e.g. Working Group on

Resolution 1503 gave the Commission the power to “look into situations insofar as it is able to look anywhere, in all countries, not only those party to a particular treaty. Therefore, it is in many ways the procedural core of the global human rights regime.”<sup>316</sup> Phillip Alston characterized the 1503 procedure as a “petition-information’ system because its objective is to use complaints as a means by which to assist the Commission in identifying”<sup>317</sup> Human Rights violations. Assessing Human Rights situations in private was meant to encourage cooperation between the concerned states and the Commission. Unfortunately, the need for cooperation led to “unprobing [and] apologist” reports<sup>318</sup> and some governments merely ignored the Commission’s requests.<sup>319</sup> Despite these apparent weaknesses many of the 1235 public Human Rights debates originated from the 1503 procedure.<sup>320</sup> Besides, the 1503 procedure allowed the working group “to consider *all* communications... which appear to reveal a consistent pattern of gross and reliably

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Enforced and Involuntary Disappearances, Special Rapporteur on Summary or Arbitrary Executions, Special Rapporteur on Torture, Special Rapporteur on Religious Intolerance etc. *id.* at 173-175.

<sup>316</sup> JACK DONNELLY *supra* note 79, at 208.

<sup>317</sup> Philip Alston, The Commission on Human Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 126, 146.

<sup>318</sup> Philip Alston, The Commission on Human Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 126, 150.

<sup>319</sup> For example Equatorial Guinea ignored the Commission’s inquiry about Human Rights abuses under 1503 procedure. *See* Philip Alston, The Commission on Human Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 126, 159. “The situation in that country was chronic and attempts to deal with it since 1977 under the 1503 procedure had simply been ignored by the government. The case was transferred to the public procedure thereby making it the first country to be ‘graduated’ from 1503 in this way...”

<sup>320</sup> Philip Alston, The Commission on Human Rights, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 172, at 126, 147. “[M]any of the situations dealt with under the Commission’s public procedures [were] raised in the 1503 context.” *See also id.* at 151 “There is no bar to focusing on the same country in both procedures at the same time.”

attested violations of human rights and fundamental freedoms.”<sup>321</sup> [Emphasis added.]

Thus working groups also considered communications from individuals.<sup>322</sup>

Resolution 1235 was initially and primarily meant to target Human Rights violations in occupied states.<sup>323</sup> As a result, the Commission ignored violations of Human Rights in non-foreign occupied states.<sup>324</sup> The turning point was in 1973 when the Commission investigated Human Rights violations in Chile, thereby setting a precedent<sup>325</sup> for the Commission to investigate situations involving “neither colonialism nor racism.”<sup>326</sup> Since then “[a]n enormous range of situations has been specifically

<sup>321</sup> See ECOSOC resolution 1503 (XLVIII) of 27 May 1970. Even one was to agree with Philip Aston that the “individual is but a piece of evidence” (See also, Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 146. Individuals play an evidentiary role.)

<sup>322</sup> See Robertson A.H., *Implementation System: International Measures, in THE INTERNATIONAL BILL OF RIGHTS, The Covenant on Civil and Political Rights*, *supra* note 92, at 332, 358. “Resolution 1503... confirms a clear if timid recognition that the United Nations and the international human rights system cannot totally ignore individual complaints of violation of human rights.” See also, Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 151. “[D]espite the focus on ‘situations’ some individuals have been directly assisted under the [1503] procedure.”

<sup>323</sup> See Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 156. Initially the resolution was meant to target racism and apartheid in Southern Africa and occupied states but a compromise between the Eastern and the Western blocks led to a broader application of the procedure to include any Human Rights violation.

<sup>324</sup> See, Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 159. For example the Commission did not respond to the 1971 mass killings in East Pakistan (now Bangladesh); the 1972 mass expulsion of Asians and killings in Uganda by Idi Amin; killings in Cambodia during Pol Pot’s reign of terror (1976-1979); Jean-Bedel Bokassa’s repression in Central Africa Republic from 1976 to 1979 and disappearances in Argentina and Uruguay. See also, *id.* at 130. The Commission’s “failure to take any action on communications and the ineffectiveness of its so-called ‘promotional’ activities are more readily understood in the light of the Commission’s own perception that it could, and even should, be a technical rather than a political body.”

<sup>325</sup> In 1974 the General Assembly passed Resolution 3219 (XXIX) which endorsed that the Commission should study the Human Rights violations in Chile. In 1978 the Commission asked the governments of Kampuchea (Cambodia) and Nicaragua to respond to allegations of Human Rights violations and in 1979 Equatorial Guinea was the subject of the Commission’s investigation. Since 1980 other countries that have been investigated by the Commission include Bolivia, El Salvador, Haiti, Liberia, Cuba, Somalia, Burundi, Sudan etc.

<sup>326</sup> Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 158. “In principle at least, the door had finally been opened, albeit only a fraction, to permit the effective use of 1235 in virtually any situation, provided only that the political will could be mustered... It is important to note at this point that each... precedent-setting investigations... had been authorized on the ‘understanding’ that it would not in fact create a precedent... By

discussed under the 1235 item, and in some cases, the mere expression of serious concern or the threat of a resolution has been sufficient to provoke a constructive response from the government concerned.”<sup>327</sup>

The Commission used to meet once a year to discuss these reports (later amended to a meeting in between sessions). Since Human Rights issues require urgent redress meeting once or twice a year adversely affected the Commissions effectiveness to deal with issues that require urgent redress. Despite this flaw the “glass [was] at best half full.”<sup>328</sup> The General Assembly and the Commission complemented each other.<sup>329</sup> The Commission provided “a forum in which various activities can be undertaken and it is itself an actor playing the roles of a catalyst, a manager, a generator of norms, and a protector of rights.”<sup>330</sup> Besides, the Commission laid the foundation for the Human Rights Council. The jury is still out to rule on the effectiveness of the Council since it is still in its formative stage.

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the time Chile was added to the list the assumption that no precedent was being set was not an especially credible one, despite the protestations of those who sponsored the proposal.”

<sup>327</sup> Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 161. Even though governmental cooperation is still sought under this procedure the fact that it is public has led to great majority of governments seeking “to defend themselves systematically and vigorously within the Commission. Thus detailed rebuttals of country-specific reports are now very much the norm rather than the exception.” *Id.*, at 171.

<sup>328</sup> Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 173.

<sup>329</sup> *See*, Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 164.

<sup>330</sup> Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 172, at 126, 204.

## Chapter 4

### Conclusion

The observance and promotion of Universal Human Rights is critical for peaceful and secure co-existence of mankind. Interdependence and international trade among states have shrunk the world to a global village. What may have been considered as a purely 'internal state affair' sixty years ago, in this case Human Rights, is after all not exclusively internal.<sup>331</sup>

Since 1945 there has been a steady and irreversible growth of a Human Rights movement. The movement stretches from the United Nations and Universal Declaration to the Nuremberg and Tokyo trials<sup>332</sup> and from the Covenants and Conventions to the regional Human Rights treaties and non-governmental organizations.<sup>333</sup> Although, there is a gap between the Human Rights rhetoric and enforcing them an optimistic assessment of the growth and realization of Universal Human Rights is irresistible.<sup>334</sup> Since WWII

<sup>331</sup> See, Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 27. "The impression that issue of human rights is essentially domestic, not international is patently mistaken. That which is the subject of international law is ipso facto not domestic."

<sup>332</sup> Perhaps the Nuremberg and Tokyo trials are the most celebrated instances of Human Rights intervention by the international community. Unfortunately, a permanent International Criminal Court of the same magnitude as the Nuremberg and Tokyo tribunals was not established until 2002.

<sup>333</sup> See, Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 29. "No one is prepared to say that human rights would be better without the forces for compliance generated by the human rights movement." See also, Shale Horowitz and Albrecht Schnabel, *Human rights and societies in transition: International context and sources of variation*, in *HUMAN RIGHTS AND SOCIETIES IN TRANSITION*, *supra* note 1, at 1, 5 "Human rights NGOs and their individual and organizational supporters are the final component of the international human rights regime... Although they have their own ideological biases, competition among them [NGOs] produces a large and relatively objective stream of information about human rights practices around the world." See also, Robert G. Patman, *International Human Rights after the Cold War in UNIVERSAL HUMAN RIGHTS?*, *supra* note 5, at 1, 12 He gives the examples of NGO like Amnesty International and Human Rights Watch as authoritative and invaluable dispensers of Human Rights information.

<sup>334</sup> See, Louis Henkin, *THE RIGHTS OF MAN TODAY*, *supra* note 25, at 133-134. "The vindication of the rights of man began 200 years ago, in some matters, to some extent, for some people. Today, human rights are alive, if not wholly everywhere, but for most people, perhaps everywhere, human rights are much better

“human rights have... been deeply implicated in the realities of international politics.”<sup>335</sup>  
 Granted, not all states observe Human Rights but even Human Rights abusive states have Constitutions which recognize and promote Human Rights.<sup>336</sup> Like any other historical movement the universal enforcement and observance of Human Rights will withstand the test of time.<sup>337</sup>

Human Rights are guard rails against the excesses of the state. No state is immune to Human Rights scrutiny. The primacy of Human Rights is as old as the existence of organized society. States are obliged to follow their dictates. Cultural relativism is perpetual but it is not a passport to Human Rights violations. No culture is imperiled by the fundamentals of Human Rights. The argument that cultural relativism negates the universality of Human Rights is shallow because the essence, significance and/or relevance of Human Rights are common among different cultures.<sup>338</sup> Despite the multiplicity of different cultures, all cultures do not deny people their right to life, right to liberty, right to justice and equity or right to mutual respect, caring and integrity. There are ethnic and cultural differences in almost every culture. Besides, no culture can claim cultural purity. Foreign influence has permeated in almost every culture.

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than they were 200 years ago.” *See also*, Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 29. “The international human rights movement has established the idea of human rights, and that idea is not likely to be superseded. In modern, industrial urbanized societies that idea and forms into which it has been poured remain essential for human dignity.”

<sup>335</sup> Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 27.

<sup>336</sup> *See*, Louis Henkin, *THE AGE OF RIGHTS*, *supra* note 6, at 26. “Human rights are in the constitution of virtually every state. All states have recognized the idea of human rights and have accepted their articulation in the Universal Declaration; most states are parties to some of the principal international instruments, and at least half of the world’s states...are parties to the principal, comprehensive covenants.”

<sup>337</sup> LAUREN, *supra* note 75, at 39. “All the major breakthrough in the long struggle for international human rights...emerged in the wake of upheaval, wars, and revolutions.”

<sup>338</sup> Vivit Muntarbhorn, *Asia and Human Rights at the Crossroads of New Millennium: Between the Universalist and the Particularist?* in *UNIVERSAL HUMAN RIGHTS ?*, *supra* note 5, at 81, 84. “Universal human rights are rooted in many cultures.”



The universality of Human Rights is challenged by governments that violate and oppress their own citizens. They hypocritically argue against any involvement by the international community in the ‘internal affairs’ of their sovereign states and question the West’s moral position to champion Human Rights given the West’s history of Human Rights abuse. At the UN Vienna Conference on Human Rights, Warren Christopher’s admonished the international community to “respect the religious, social and cultural characteristics that make each country unique. *But we cannot let cultural relativism become the last refuge of repression*”<sup>339</sup> [Emphasis added] Unfortunately, “[r]eality shows that the international community is deeply rooted in a culture of reaction, not proaction, and that it reacts only if the interests of some major powers are significantly threatened.”<sup>340</sup> Consequently, Human Rights violations are not pursued with the vigor and urgency that they deserve.

All former foreign dominated or colonized states, be they Asian, African, European or Latin American gained their independence by appealing to the international community to support and enforce the observance of their Universal Human Rights. Unfortunately, poor governance and politically motivated dismissal of the universality of Human Rights by former colonized leaders negatively impacts the symbiotic relation between Universal Human Rights and cultural relativism. It is sad that hypocrisy and political expediency triumph over Human Rights.

Universal Human Rights are not a western imperialist agenda. Human Rights are an international concern and they are within the jurisdiction of the international

<sup>339</sup> MAHONEY, *supra* note 7, at 170. Warren Christopher was a former US Secretary of State.

<sup>340</sup> Albrecht Schnabel, International Efforts to Protect Human Rights in Transition Societies: Right, Duty, or Politics, *in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION, CAUSES, CONSEQUENCES, RESPONSES *supra* note 1, at 141, 155-156.

community. The West may be more vocal about the observance and promotion of Human Rights but it also had its fair share of violating Universal Human Rights. The fact that at one point or the other all nations abused or were victims of Human Rights abuse means that the recognition and observance of Human Rights is a universal challenge rather than a form of cultural imperialism.<sup>341</sup> When the United Nations was founded Belgium and Mexico expressed concern over the tyrannical potential of the Security Council if it was given power to deal with the internal matters of United Nations member states.<sup>342</sup> While this fear may have been reasonable and perhaps warranted at that time,<sup>343</sup> history has shown that it is actually the United Nations lack of urgent concerted and decisive action on Human Rights issues that sets dangerous precedents and threatens international peace and security today and not the Security Council's tyranny.<sup>344</sup>

Unless we subscribe to the an Indian system (*varnashramadharma*), which states that there are “fundamental and unchangeable differences in the nature of human beings that prevent any uniform or universal standard from being even considered, let alone applied”<sup>345</sup> we cannot deny the universality of Human Rights. Ironically, the founding father of independent India, Mahatma Gandhi, decried violations of Human Rights in South Africa and India. Human Rights violation should be the yardstick to justify

<sup>341</sup> See MAHONEY, *supra* note 7, at 111. “A final approach, then, to the charge of Western imposition of human rights on other cultures is to accept the differences between various cultures and traditions as the product of history, and to view human rights not as an imposition but as a challenge...to every culture.”

<sup>342</sup> Mohammed Bedjaoui, On the Efficacy of International Organization: Some Variations on an Inexhaustible Theme, in TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATION, ESSAYS IN HONOUR OF G. SCHEMERS, *supra* note 73, at 7, 17.

<sup>343</sup> Following the failure of the League of Nations the UN had just been created and was still in its infancy. There was lack of trust among the international players. The USA, UK, Russia, China and perhaps France where the most influential UN powers. They could easily sway the way the Security Council operated.

<sup>344</sup> For example, Nazi genocides were encouraged by the international community's failure to act when the Armenians were massacred by the Turks in WWI. Inaction or delayed action by the United Nations in Rwanda, Yugoslavia, Sudan, Congo (formerly Zaire) etc. threatened whole regions.

<sup>345</sup> LAUREN, *supra* note 75, 23.

intervention by the international community.<sup>346</sup> Granted, every Human Rights crisis is unique and has its own peculiarities but common among them is the suffering of innocent citizens.<sup>347</sup>

Rein Mullerson supports the notion that violation of Human Rights is a threat to international peace and security and even implies that the United Nations Security Council is of the same mindset.<sup>348</sup>

“Customary law is the ‘oldest and the original source of international law’ and it is the source of the law of humanitarian intervention.” Pg 117 John J. Merriam

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<sup>346</sup> MAHONEY, *supra* note 7, at 171. “Part of the function of human rights...as expressing a globally effective ethic is to act as a continuing critique not only on individuals but also on whole societies and cultures, North and South, East and West”.

<sup>347</sup> For example, the Security Council had to justify its intervention in Haiti and Somalia because Security Council considered each of these crises to be ‘unique’ but the Human Rights abuses perpetrated by Louis Jodel Chamblain in Haiti and Mohamed Farah Aydid in Somali had the same adverse effect on the suffering victims of Human Rights violations.

<sup>348</sup> See Rein Mullerson, *Fifty Years of the United Nations: Peace and Human Rights in the UN Agenda in HUMAN RIGHTS FOR THE 21<sup>st</sup> CENTURY*, *supra* note 76, at 143, 154. “The UN Security Council has started to use the concept of a ‘threat to international peace and security’ while dealing with grave human rights violations...Some of these humanitarian emergencies may really have had serious security implications (e.g. the situation in former Yugoslavia), while others have hardly had any, especially in the traditional military sense (e.g. the situation in Haiti)”

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