**UNIVERSITY OF SOUTHAMPTON**

FACULTY OF LAW, ARTS & SOCIAL SCIENCES

School of Social Sciences

# Analysis of the United Nations Universal Declaration of Human Rights

by

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ABSTRACT

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This thesis is an examination of the lack of effective global human rights observation in spite of the exalted status of the U.N. Declaration of Human Rights as a universal standard of achievement. In actual state practice, global human rights implementation remains weak, to say the least. It is my aim, on the one hand, to provide an explanation of the continued lack of human rights implementation and, on the other hand, to assess the nature and limitations of the normative dimension of human rights. Human rights, as asserted by the U.N. Declaration, represent liberal and secular standards which are arguably parochial and thus open to the challenge that they are neither representative of, nor compatible with, non-Western cultural values. Furthermore, the human rights articulated by the Universal Declaration give rise to a partisan mandate which is difficult to reconcile with the inherently pluralist function of a predominantly positive, voluntarist and horizontal international legal system grounded in Westphalian sovereignty. Yet, a structurally revised set of fundamental human rights can nevertheless be coherently defended to constitute a standard of civilization in international law, a peremptory jus cogens. The pursuit of an international law representative of human progress must acknowledge that the agency of every individual is a factor worthy of international legal protection in the interest of the international community as a whole. Fundamental human rights norms transcend the entrenched sanctity of sovereignty and large scale violations of fundamental human rights must accordingly be remedied by virtue of humanitarian intervention.

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## Introduction

In the operative paragraph of the Universal Declaration of Human Rights, the General Assembly had proclaimed "*a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction.*"

This operative paragraph of the Universal Declaration invites us, in Morsink's words, to "make performance judgments" on the progress of the human rights project.[1] As we are approaching the 60th anniversary of the inception of the U.N.'s Universal Declaration, an observer of current affairs must surely come to the conclusion that the postulated 'common standard' is not all too common. Schachter comments poignantly on this continued lack of human rights proliferation in saying: "a considerable number of the state parties have reported to the Human Rights Committee that no additional measures are required in their countries, that all rights are recognized and 'ensured', and that adequate remedies are available to individuals for their violation. These declarations have been supported by quotations of constitutional and legislative texts and explanations of judicial and administrative procedures. To a man from Mars, a large part of the World would seem safe for human rights and the Covenant virtually redundant. To an observer of contemporary events, the assertions that all the necessary measures have been taken in some countries may seem bizarre in the light of their actual practice."[2] In view of this continued lack of effective human rights implementation, Alston reminds us that it is "difficult to accept that, after almost half a century of concerted efforts, the principal UN procedures for responding to violations are quite as embryonic, marginally effective and

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[1] Johannes Morsink, The Universal Declaration of Human Rights – Origin, Drafting, and Intent (Philadelphia: University of Pennsylvania Press, 1999), p. 324

[2] Oscar Schachter, 'The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights', The American Journal of International Law, Vol. 73, No. 3, 1979, p. 463

unevenly applied as they are."[3] My enquiry was motivated by trying to reach an understanding of why the effective recognition and observance of human rights remains unfulfilled to such a large extent, and, in view of this inertia, to assess the nature and limitations of the normative dimension of human rights which delineates the search for effective remedial measures.

In view of the U.N.'s postulation of the universality of human rights, and as human rights are primarily claimed against the state, the focus for future hopes of the realization of their universal recognition and observance must surely fall onto international law, because international law regulates the conduct of all states. "The status of international law is a topic in jurisprudence which the wise avoid if they can", says Chris Brown.[4] Yet, it is obvious that in relation to the legal human rights conception, the status, as well as the historical formation, of international law cannot be avoided. Generally, works of political theory and moral philosophy on the subject of human rights lack that they do not provide sufficient explanations concerning their status in international law, and I felt it necessary to try to gain an understanding thereof. In having delved into the complexities of international law, I may have exposed myself to be one of those deeply confused laymen of which McNair warned when he said "that the subject of international law attracted a considerable following of dilettante enthusiast; and it was well to beware of them."[5] My thesis is an attempt, at the risk of having exposed myself as an incompetent dilettante, to bridge that general void between the treatment of human rights provided by the works of political philosophers and theorists and that provided by legal scholars. Making a philosophical case for human rights is one matter, to try to reconcile any such assessment with the reality of international law another matter altogether. Human rights per se can be assessed from a purely theoretical or philosophical position, and so can the rights of the Universal Declaration, but normative arguments for their effective implementation, or

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[3] Philip Alston, 'The Commission on Human Rights', in Philip Alston (ed), The United Nations and Human Rights – A Critical Appraisal (Oxford: Oxford University Press, 1992), p. 173

[4] Chris Brown, 'Universal human rights: a critique', in Tim Dunne and Nick Wheeler (eds.), Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999), p. 115

[5] Quoted in Robert Y. Jennings, 'An International Lawyer Takes Stock', International & Comparative Law Quarterly, Vol. 39, 1990, p. 513

against the current lack thereof, must be related to the nature and limitations of the international legal system.

It could be argued that any attempt to focus on international law as the locus for progress of human rights implementation is a futile or misconceived venture. In spite of idealist human rights aspirations, one possible answer to questions about the continued lack of human rights implementation is the realist reply that it may forever remain true that the conduct of states is primarily delineated by a ceaseless struggle for power and considerations of national security and self-interest, and that the idea of a universal morality to which all states must adhere to is an essentially alien notion for this realm. Maybe liberals who aim to promote a universal human rights in international law merely engage in "wish-dreams". Human rights may just be another "exuberance of utopianism", of which liberal universalists are often accused.[6] Perhaps, as Morgenthau asserted, the pursuit of power in international relations is permanently imposed upon us as a law grounded in human nature which will forever provide the basis for the assessment of rational conduct in international relations. States and cultures are historically transient, emerge and wither away, but what remains is that the "workmanlike manipulation of the perennial forces that have shaped the past as they will the future" must be grounded in prudence and not morality.[7] Indeed, in a broad historical perspective, the attempt to establish a universal morality in the form of human rights may be seen as nothing more than a fleeting fancy. Or, if the pursuit of power "is the perennial standard by which political action must be judged", then perhaps human rights are but the mere pursuit of particular interests disguised as noble moral aspirations.[8] As Carr pointed out: "these supposedly absolute and universal principles (peace, harmony of interests, collective security, free trade) were not principles at all, but the unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time'.[9] Perhaps the human rights project cannot be grounded in international law in that human nature is only of minor relevance to international relations. For Waltz, the

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[6] E. H. Carr, The Twenty Years' Crisis (Hampshire: Palgrave, 2001), p. 14
[7] Hans Morgenthau, Politics Among Nations, 6th ed. (New York: Knopf, 1985), p. 12
[8] Morgenthau, Politics Among Nations, p. 12
[9] Carr, The Twenty Years' Crisis, p. 111

structure of international relations can only accommodate the state as a unitary actor, and the role of the human individual is largely irrelevant. Within this structure, any considerations pertaining to human nature are of little consequence, and the search for power and self-help are imposed as the sole systemic requirements.[10] Regardless of the nuances of realist theory, what unites realists is their emphasis on the anarchical nature of international relations. The interests of states will and must prevail against moral considerations in a system of ceaseless competition and latent insecurity, and human rights considerations imposed by international law will never be able to impede the sovereign prerogatives of states. "Westphalia", as Rousseau once said, "will perhaps forever remain the foundation of our international system".[11]

Yet, is the international system which realism describes really a permanent feature of the human situation? Rationalists have long asserted that anarchy need neither be a permanent, nor the sole, feature of international relations. Even Carr acknowledged that: "pure realism can offer nothing but a naked struggle for power which makes any kind of international society impossible".[12] In the end, it is in the interest of all states to avoid a continuous Hobbesian posture of war and to seek ordered co-existence instead.[13] For Bull the international realm benefits from mutual co-operation in the pursuit of common interests. Progress is not alien to the international system and we can indeed speak of a society of sorts. Bull asserted that an international society arises when states gain a mutual understanding of interests and values and when they begin to abide by common rules established in order to safeguard these interests and values and cooperate to bring about their realization.[14] However, even the rationalist belief in international societal progress stops short of believing in the likelihood of the formation of universal moral imperatives. Wight argued that a coherent version of international relations will have

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[10] Kenneth N. Waltz, 'Realist Thought and Neo-Realist Theory', Journal of International Affairs, Vol. 44, No. 1, 1990, pp. 33-34

[11] Quoted in Kalevi Jaakko Holsti, Taming the Sovereigns – Institutional Change in International Politics (Cambridge: Cambridge University Press, 2004), p. 43

[12] Carr, The Twenty Years' Crisis, p. 97

[13] Hedley Bull, 'Society and Anarchy in International Relations', in Herbert Butterfield and Martin Wight (eds.), Diplomatic Investigations – Essays in the Theory of International Politics (London: George Allen & Unwin, 1966), p. 35

[14] Hedley Bull, The Anarchical Society (London: Macmillan, 1977), p. 13

difficulty in departing from a via media between anarchy and revolutionist progress towards international justice.[15] As Wight pointed out, moral considerations can and do arise within the confines of the safety of domestic legal systems, but it may not be feasible to try to impose universally peremptory moral considerations onto the latent insecurity of the international system.[16] For Wight, international relations is "the realm of recurrence and repetition", and against those who would assert that international relations is capable of making significant progress he pointed out that if Sir Thomas More could visit the present, then he would find little which had changed in the relations of states.[17] Bull did believe that during certain stages of international relations we had witnessed conviction on human rights in what he termed the Grotian conviction. It was a central Grotian assumption, he argued, "that individual human beings are subjects of international law and members of international society in their own rights" and this conviction also gave rise to a "right of humanitarian intervention".[18] He also identified that international relations contains at times even an element of Kantian universalism, a revolutionism which tends to separate "humanity into two camps - the trustees of the immanent community of mankind and those who stand in its way, those who are of the true faith and the heretics, the liberators and the oppressed."[19] These are however only aspects of international relations and in the end Bull shares Wight's lack of optimism about the prospects of human rights universalism. Firstly, he believed that Western liberals had to acknowledge the difficulty of getting other cultures on board.[20] Secondly, he thought that change in international relations towards greater human rights justice could only be achieved on the basis of "overwhelming evidence of a consensus in international society as a whole".[21] Thirdly, he thought that international human rights justice was a worthwhile aim, but, in the absence of a tangible common conviction,

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[15] Martin Wight, 'Western Values in International Relations', in Herbert Butterfield and Martin Wight (eds.), Diplomatic Investigations – Essays in the Theory of International Politics, p. 91
[16] Martin Wight, 'Why is there no International Theory?', in Herbert Butterfield and Martin Wight (eds.), Diplomatic Investigations – Essays in the Theory of International Politics, p. 33
[17] Martin Wight, 'Why is there no International Theory?', p. 26
[18] Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds.), Diplomatic Investigations – Essays in the Theory of International Politics, p. 64
[19] Bull, The Anarchical Society, p. 26
[20] Bull, The Anarchical Society, p. 126
[21] Bull, The Anarchical Society, p. 95

human rights proponents ought not to embark on a venture which could potentially endanger international order in its attempt to erode Westphalian sovereignty. [22]

Realism provides the liberal human rights project with insights regarding the inertia of effective global human rights implementation. Yet, we should not resign ourselves to the realist diagnosis of permanence. The rationalist belief in the possibility of progress in international relations provides human rights proponents with sufficient grounds to insist on a continued pursuit towards the realization of human rights justice as an essential component of international law. Liberals should however bear in mind Wight's via media, for when trying to make a case for remedial measures, then one must avoid a lofty idealism which is divorced from the constraints which the reality of the political and cultural global situation imposes on the human rights project. Rationalist caution need however not lead to realist resignation. As Carr pointed out, utopianism is also a remedy against "the barrenness of realism".[23] The entrenched lack of moral values in international law can be ameliorated if only we believe in our ability to progress as a species as a whole. For Bull, order between states was merely "instrumental to the goal of order in human society as whole".[24] In the end, he asserts: "Order among all mankind is of primary value, not order within the society of states".[25] It is in view of this paramount goal that Bull argued: "the idea of the rights and duties of the individual person has come to have a place, albeit an insecure one and it is our responsibility to seek to extend it".[26] An endorsement of cosmopolitan utopia, which Bull thinks represents an aspiration of all "intelligent and sensitive persons", also motivates the normative aspect of my enquiry.[27]

Yet, to make assertions about an ethics which holds for human society as a whole is obviously problematic, because the human situation is marked by tremendous cultural and political differences. It becomes questionable whether a set of human rights can be formulated which is compatible with, and acceptable to, the great diversity of beliefs and

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[22] Bull, The Anarchical Society, p. 22
[23] Carr, The Twenty Years' Crisis, p. 93
[24] Bull, The Anarchical Society, p. 22
[25] Bull, The Anarchical Society, p. 22
[26] Hedley Bull, Justice in International Relations: The Hagey Lectures (Waterloo: University of Waterloo Press, 1984), p. 12
[27] Bull, The Anarchical Society, p. 289

opinions which characterize humanity. Indeed, it can even be questioned whether we can speak genuinely of a global human society. However, the notion of human rights can be defended to constitute a genuine universal ethics in that it protects and fosters one aspect which is common to all human beings, namely human agency.[28] Unlike other animals, which are also sentient and in possession of rationality to a greater and lesser degree, the human animal possesses a degree of rationality which is unrivalled in the animal kingdom. As a consequence of the contingent evolution of the human species we are by definition animals capable of agency and we can use our capacities for progressive critical reflection and revision. Thus, we are animals capable of shaping our own destiny to a far greater extent than any other animal on earth. This protean capacity bestows upon the human species as a whole the possibility of emancipatory progress, and human rights play a vital role in the fostering and preservation that social experiment which the human situation represents, because they protect human agency. The liberal and secular cultural values in which human rights have traditionally been grounded are arguably not universal, in that they have contingently come to prominence in the West, but they do represent a universally validatory and coherently defensible ethics in that they preserve a bottom up pluralism and tolerance which liberates and protects the agency of all individuals in the pragmatic quest for scientific and cultural progress.

When looking for an understanding of the continued failure of principled and effective human rights proliferation, one must take care to avoid overzealous criticism of the U.N. and its human rights project, for as Schachter cautions: "That the glass is half empty does not deny that it is also half full."[29] Only in realizing the gargantuan endeavour of this project and in assessing the deeply entrenched current of classic international law in spite of which it was established, can we fairly criticize and assess the U.N.'s human rights project. Chapter I of this enquiry gives an account of this endeavour and aims to explain the motivations and efforts which led to the inception of the U.N. as well as the very obstacles which this process had to overcome from the very onset. Part i of this chapter will explain how the trauma and devastation of World War Two had inspired a desire to

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[28] One could obviously point to severe cases of mental disability or to infants, of which the latter possess only a potential rationality, as exceptions to this generalization.

[29] Oscar Schachter, International Law in Theory and Practice (Dordrecht: Martinus Nijhoff, 1991), p. 330

concretize the dream of collective security which the League had failed to achieve. Yet, in spite of a perceived mutuality of interest in collective security, the inception of the U.N. was immediately confronted with the very obstacles which the realist view of international relations asserts so forcefully. The organization had initially been envisioned as a covenant between equals but this idealism soon became compromised. The initial negotiations were the exclusive prerogative of the Great Powers, and due to the instrumental nature of their contribution for the pragmatic viability of the project, the envisioned equality of states great and small had to accommodate the imposition of a Security Council. It also transpired that the idea of a mitigation of sovereignty in the pursuit of human rights would have to yield to the primacy of security considerations and national interest. Part ii of the first chapter will explain how this compromise between idealism and realism is also reflected in the very nature of the Charter. In an attempt to overcome the failure of the League, the Charter reified the superiority of the Great Powers due to their obvious ability to provide the organization with the strength needed to effectively remedy breaches of collective security. This empowering could however only be achieved by giving the Great Powers a right to veto, a right which ambiguously condemns the organization to an all too easy infliction of stalemate and inertia. The desire to create a powerful collective security mechanism also led to a clear demarcation of organizational competence and the originally intended pursuit of universal moral values was deemed to be beyond the purview of this organization. The Charter is primarily, arguably exclusively, a security covenant, and only indirectly a vehicle for the promotion of universal moral values. Part iii gives an account of the inception of the Universal Declaration as an attempt to concretize the pursuit of human rights as a Purpose of the Charter. The drafters of the Declaration were clearly inspired, on the one hand, by the values of the Enlightenment, and on the other, by a desire to remedy the root causes of that total annihilation of individual dignity which the holocaust had represented. The Universal Declaration was an attempt to complement and strengthen the pursuit of collective security on the level of the relations between states from the bottom up by placing an emphasis on the instrumental function of the protection of the rights of the individual for international peace and security. The drafters clearly endorsed the liberal belief that domestic human rights observation will lead to a more peaceful

international order. However, the liberal aspirations of the drafters had to content with the Charters reification of sovereignty and the instrument took on a purely hortatory role. Nevertheless, the Universal Declaration initiated a significant shift in international law and part iii is also intended as an analysis of the extent of this legal innovation, an assessment of the status of United Nations human rights instruments in international law.

The second chapter is devoted, on the one hand, to an analysis of the problematic epistemological and ontological dimensions of the human rights conception as postulated by the Universal Declaration, and, on the other hand, to an exploration of the nature and limitations of the normative dimension of human rights per se. In the search for answers for the continued failure of human rights proliferation and observance, the parochial origin of the conception in natural law and liberal and secular values is arguably a primary cause of this failure. To this extent, part i will assess epistemological and ontological critiques of human rights which question the coherence of the postulation of a universal morality. The philosophical foundationalism of natural law in which human rights have historically been grounded has been forcefully criticized, but, problematically, arguably all human rights discourse which endorses universal values must be grounded in some version of natural law. In a world characterized by a diversity of political and cultural allegiances, the identification of a coherent ontological foundation for human rights and the assertion of an epistemological defence of human rights which avoids problematic metaphysics is a pressing normative concern for the future prospects of human rights. Against cultural relativism and human rights agnosticism, I will argue that liberal and secular values can indeed be coherently maintained as a universally validatory ethics. The parochialism and partisanship of human rights are universal in that they endorse the evolutionary progress of human civilization as a whole. This stance however need not succumb to the philosophical pitfalls of an essentialist Enlightenment foundationalism, for the notion of human rights can be coherently defended precisely because it promotes an anti-foundationalism. An anti-foundationalist epistemological grounding of human rights emphasizes that the liberal and secular values of human rights preserve the capacity for freedom of thought and freedom of opinion of all individuals, and as a consequence our ability to critically

discuss, refute and revise scientific hypotheses and the tenets of philosophy, law and ethics. Human rights are thus arguably intrinsically tied to human progress, whether scientific or cultural. Part ii of the second chapter is a critical assessment of the influential substantive and consensus-based revisionist projects. These projects question the coherence and legitimacy of the current human rights project grounded in liberal and secular values. Both projects argue that only a revised conception will become the subject of successful universal proliferation. Against these projects, I intend to argue that the human rights conception is intrinsically partisan and parochial, and that substantive revision, though philosophically laudable, is politically obfuscatory, and that consensus-based revision merely perpetuates human suffering as it is detrimental to the core values of the human rights mandate. Part iii of the second chapter addresses whether and in what form the human rights conception can be reconciled with the sources of international law as outlined by Article 38 of the Statutes of the International Court of Justice. In view of the ineffectiveness of human rights treaty law, the question of whether human rights do constitute customary law or general principles does not only shed light on the inertia of human rights proliferation and observance, but it is also of tremendous pragmatic importance for an assessment of the nature and limitations of the normative dimension of human rights. Human rights as customary law or general principles would not only become more conducive to constitutional enactments in many states, but would also constitute peremptory legal obligations for all states. I will argue that although the human rights listed by the Universal Declaration as a whole are difficult to reconcile with customary law or general principles, there exists international jurisprudence and increasing consensus among legal scholars that fundamental human rights can be coherently defended as such. Fundamental human rights are obligations erga omnes and, arguably, do constitute jus cogens. In the search for remedies against human rights inertia, I will argue in part iv that a structurally revised human rights conception is more conducive to global implementation. As opposed to consensus-based revision, the benefits of structural revision lie in its ability to accommodate the parochial and partisan mandate of the conception whilst prioritizing certain norms in order to pragmatically facilitate proliferation and enforcement. Structural revision represents the ongoing project of explicating and cementing in international law those rights which have gained jus

cogens status. The final part v is a normative assessment of humanitarian intervention related to the conclusions reached throughout my enquiry. I will locate my discussion in the debate between theorists which adopt individualist pluralist and internationalist pluralist positions, and will argue that the human rights conception demands enforcement as a necessary conceptual consequence. I will assess the viability of such enforcement in view of current international law and endorse humanitarian intervention of fundamental human rights norms as principles of jus cogens. Fundamental human rights constitute a standard of human civilization as a whole and their observance must also be seen as a standard of legitimacy in international law. In view of the rationalist cautions outlined at the beginning of this introduction, intervention must however be ad hoc because the formation of general legal principles which firmly establish humanitarian intervention could potentially jeopardize the functional nature of international law in its current stage of development. Human rights intervention must be seen as an occasionally necessary remedy, but as a rule it could endanger the social utility of international law, barring further progress.

# I Human Rights and the United Nations

## I.i The Inception of the United Nations Organization

The chaos of World War Two provided a stimulus for the gargantuan endeavour of creating, in spite of the League's failure, a universal democratic forum of equally represented states strengthened by a collective enforcement structure backed by the military might of the Great Powers. The political motivation behind this world wide organization had already been outlined by the earlier 'Atlantic Charter'. The Atlantic Charter made explicit a liberal vision of world order, the hope "to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want."[30] In a world traumatised by the ravages of war, the intentions of the Atlantic Charter chimed with the public's deep seated desire for peace. Having conferred with the leaders of all Allied Powers and having secured their support for such a venture, Roosevelt appeased the public's hope for a new world order when he declared: "The best interests of each Nation, large and small, demand that all freedom-loving Nations shall join together in a just and durable system of peace. In the present world situation, evidenced by the actions of Germany, Italy, and Japan, unquestioned military control over disturbers of the peace is as necessary among Nations as it is among citizens in a community. And an equally basic essential to peace is a decent standard of living for all individual men and women and children in all Nations. Freedom from fear is eternally linked with freedom from want. All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being."[31]

In a radio address on the Christmas Eve of 1943, Roosevelt announced the plans of his government to actively participate in the establishment of a world wide security organization based on an alliance of the four major powers, Britain, Russia, China and

[30] Excerpt from the 6th paragraph of the Atlantic Charter
[31] Excerpt from the 6th paragraph of the Atlantic Charter

the U.S.. These nations were jointly representative of three quarters of the world's population and their combined military might could repel any potential future aggressor. If these nations were to co-operate, then a system could be created, which not only guarded the sovereign rights of every nation, but also protected the fundamental rights of every individual.[32] In accordance with this vision, Roosevelt instructed his State Department Staff to research a novel conception of international cooperation based on the idealism of the League, but without the impotence of the League system, for it was clearly intended that the new organization should be able to enforce its rules if it was meant to survive and flourish. In order to ensure enforcement power for the organization it was thought that the democratic assembly of states should be complemented by a Security Council composed of that alliance which had proved its merit in the fight against the Axis. As Russell explains: "Given the fundamental decision to clothe the new institution with some kind of enforcement power, it was natural to think of making the smaller organ more of an executive agent for the whole organization and of centering in it the control of the security function."[33] The hegemonic cooperation of all major powers was seen as a necessary price to pay in order to facilitate the political devotion and material contribution needed to introduce and ensure the prospects of the new organization, as opposed to the League which had been stifled from the onset primarily because of U.S. abstention.

Roosevelt argued that: "The rights of every Nation, large and small, must be respected and guarded as jealously as are the rights of every individual within our own Republic."[34] Yet, the experiences of the League had demonstrated that any strict adherence to the legal equality of all states would prohibit the formation of a collective security organization from the onset. Thus, in their design intentions for a viable collective security organization the Great Powers desired that the smaller states be precluded from the initial

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[32] See Jean Krasno, 'The Founding of the United Nations: International Cooperation as an Evolutionary Process', Academic Council of the United Nations System, Occasional Papers 2001, No. 1, pp. 9-10. Krasno's paper is particularly insightful as it includes many first hand accounts of the original participants during the negotiations leading up to the U.N. by virtue of interviews conducted by the U.N. Oral History Project.

[33] Ruth B. Russell, A History of the United Nations Charter: The Role of the United States 1940-45 (Washington DC: Brookings Institution, 1958), p. 228-229

[34] Quoted in Krasno, 'The Founding of the United Nations', p. 10

negotiations.[35] From the onset, the Great Powers were in unanimous agreement, as Simpson says: "that the system would be hegemonic in style and structure (though the euphemism 'collective security' was preferred)."[36] The formation of the U.N. was marked by the realizations which legal scholars had reached during the League on the potentially obstructive nature of absolute legal equality amongst states for international institution building. As P. M. Brown said: "A great difficulty in the way of the formation of an international organization of states would probably be the insistence of smaller states on the recognition of the right of equality."[37] Legal scholars of the inter-war period had come to realize that an assertion of absolute equality among states was not only incompatible with the reality of power distribution among nations, but also potentially obfuscatory. In acknowledging the superior status of the Great Powers, the smaller nations stood to gain benefits and compensations which only the voluntarist cooperation of the Great Powers could ensure. In view of a desire to create an international collective security organizations with enforcement power, as P.M. Brown pointed out, smaller states simply had "to abandon extravagant claims to equality with other states possessing enormous communal interests of vastly greater importance."[38] Similarly, Baker argued that since the League's inception the world was "on the threshold of a great new creative period in international law", but its experiences had also demonstrated that "the movement towards an organised international political system necessarily means the restriction of the typical rights of independence which were the foundation of the old system of international law. This being so it needs no argument to show that of all theoretical paradoxes the most absurd would be to allow the development of this movement and the organisation of the international institutions in which it is embodied to be affected by the analogical application of an alleged principle of equality".[39]

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[35] See Gerry Simpson, Great Powers and Outlaw States (Cambridge: Cambridge University Press, 2004), p. 172

[36] Simpson, Great Powers and Outlaw States, p. 169, Simpson's parenthesis

[37] Philip Marshall Brown, 'The Theory of the Independence and Equality of States', American Journal of International Law, Vol. 9, 1915, p. 332

[38] P. M. Brown, 'The Theory of the Independence and Equality of States', p. 332

[39] P. J. Baker, 'The Doctrine of the Legal Equality of States', British Yearbook of International Law, 4, 1923-1924, p. 2 and pp. 18-19

Yet, the fundamental decision to create an organization with effective enforcement power controlled by the Great Powers unavoidably reintroduced political tensions between legalized hegemony and legal equality which had initially erupted at The Hague.[40] The State Department Committee which had been created by Roosevelt to research the prospects of a world wide collective security organization anticipated this tension, but came to the conclusion that the instrumentally necessary military contribution of the Great Powers could only be ensured through their voluntarist participation.[41] Having learnt from Wilson's domestic defeat in the Senate, Roosevelt knew that any renewed attempt to create an enforcement organization would scarcely gain domestic support, particularly from the Republicans, if it involved a significant surrender of sovereignty. Accordingly, Roosevelt stated that: "We are not thinking of a superstate with its own police forces and other paraphernalia of coercive power. We are seeking effective agreement and arrangements through which the nations would maintain, according to their capacities, adequate forces to meet the needs of preventing war and of making impossible deliberate preparations for war, and to have such forces available for joint action when necessary."[42] To ensure their voluntarist participation it was envisioned that the Great Powers would occupy a permanent position on the Security Council reflecting their greater and, therefore riskier, military contribution, whereas the lesser nation-states would receive non-permanent alternating seats in accordance with their lesser and relatively risk free military contribution. The permanent position of the Great Powers, as Russell explains, was intended to reflect their instrumental "responsibility for the maintenance of peace" and was grounded in the "juridical principle that more extended rights were granted to those states which have the heaviest obligation."[43]

However, it was anticipated that a hegemonial structure could be read by the plethora of smaller states as an attempt to create a renewed legalized hegemony along the lines of the Concert of Europe, and such suspicion and fear could severely undermine the

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[40] A U.S. State Department memorandum made this explicit: "equality should not be extended, however, to the field of enforcement, in which states having greater responsibilities should have correspondingly greater powers.". See Russell, A History of the United Nations Charter, p. 405

[41] See Krasno, 'The Founding of the United Nations', p.10

[42] Department of State Bulletin, Vol. 10, June 17th, 1944, see Krasno, 'The Founding of the United Nations', p. 11

[43] Russell, A History of the United Nations Charter, p. 650

organization's moral authority. The British Foreign Minister Eden allayed such fears in declaring the dominance of the Great Powers as necessary for the maintenance of peace: "special responsibilities do rest on our three powers and we did at Moscow try to devise machinery and agree on a policy that would enable us to give full expression to that sense of our responsibility."[44] To remedy this dilemma, the State Department Committee concluded that, the hierarchical position of the permanent members should be tempered by making any decisions of the Security Council subject to the majority approval of all the council members, and that decisions reached would have to be binding on all members regardless of status.[45] The stipulation of majority voting, as opposed to the League's unanimity clause, was considered to be a particularly effective remedy against that permanent stalemate which in the end befell the League. The State Department Committee concluded that a halfway approach, in part hegemonic, in part egalitarian, was deemed generally conducive towards the achievement of a balance between organizational viability and international consensus.

A series of meetings of the delegations of the Big Four was called at the Dumbarton Oaks estate between August and October of 1944 in order to negotiate the creation and remit of the organization. Interestingly, albeit Roosevelt's insistence that the "four powers must be united with and cooperate with all the freedom loving peoples of Europe, and Asia, and Africa, and the Americas"[46], political tensions were present from the start. The British position on Chinese membership echoed nineteenth century feelings of cultural superiority and deemed "the Chinese to be unworthy of this status".[47] The Soviets "refused to even talk to the Chinese as equals".[48] Furthermore, the Soviets, who had not entered the war in the Pacific region, did not want to alienate the Japanese through open collaboration with the Chinese.[49] Consequently, the British and Soviets arrived on August 22 only to leave the day before the Chinese delegation arrived on August 28 for their nine day stay. Chinese membership was ultimately ensured due to the U.S. desire to have "the

[44] In an Address to the British Parliament after the Moscow Conference of 1941, quoted in Russell, A History of the United Nations Charter, p. 146. In 1941 China was not yet included in the negotiations.
[45] See Krasno, 'The Founding of the United Nations', p. 10
[46] Quoted in Krasno, 'The Founding of the United Nations', p. 10
[47] Simpson, Great Powers and Outlaw States, p. 173
[48] Simpson, Great Powers and Outlaw States, p. 173
[49] See Krasno, 'The Founding of the United Nations', p. 14

Chinese as (junior) policing partners in the Pacific."[50] The result of this political intrigue was that all the major issues were debated, and some conclusions reached, in the absence of the Chinese delegation.[51] In the end, the Dumbarton Oaks negotiations established a tentative agreement, to become finalized at Yalta, on the formation of a Security Council, a General Assembly, a Secretariat and the formation of an International Court of Justice.[52] Yet, the agreements reached were not very substantial and many points remained ambiguous. The issue of trusteeship had not even been broached, and the issue of the voting procedure of the Security Council, particularly the complications of a veto clause, was far too sensitive for a discussion that did not include the heads of state.

Interestingly for an organization which would become synonymous with universal membership, according to the preliminary organizational design agreed upon at Dumbarton Oaks the organization was originally never intended to have universal membership.[53] The membership question was only resolved as far as that it was decided, in line with the Moscow Declaration of 1943, that all member states would have to be 'peace-loving', a phrase which was later ratified at Yalta to apply to all those nation-states which had declared war on the Axis by the 1st of March 1945.[54] Indeed, the issue of original membership was far from resolved due to strong disagreement between the U.S. and the Soviets as to which states would be eligible for original membership. When Roosevelt heard of the Soviet delegate Gromyko's demand that each of the fifteen Soviet republics and the Soviet Union should all be given membership in the new organization,

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[50] Simpson, Great Powers and Outlaw States, p. 173

[51] According to Alger Hiss, who was U.S. Secretary of State and part of the U.S. delegation, "the meeting with the Chinese was largely a formality", quoted in Krasno, 'The Founding of the United Nations', p. 14

[52] See Krasno, 'The Founding of the United Nations', p. 14

[53] This aspect was even reflected in the original U.N. emblem, conceived of by assistant San Francisco delegate Donald McLaughlin, which was intentionally designed to reflect limited membership. The chief member of the U.S. delegation Lundquist explained this intention: "We had originally based it on what's called an azimuthal north polar projection of the world, so that all the countries of the world were spun around this concentric circle and we had limited it in the southern sector to a parallel that cut off Argentina, because Argentina was not to be a member of the United Nations. We centered the symbol on the United States as the host country. ... Subsequently, in England our design was adapted as the official symbol of the United Nations, centered on Europe as more the epicentre I guess of the east-west world, and took into account the whole earth including Antarctica. By then of course, Argentina had been made a member of the United Nations so that it was no longer necessary to cut them off.", quoted in Krasno, 'The Founding of the United Nations', p. 22.

[54] See Krasno, 'The Founding of the United Nations', p. 15

he instructed his staff to contact Stalin to: "Tell him the whole thing's off."[55] Faced with an adamantine U.S. position that only the Soviet Union should receive membership, Stalin objected that should the British be allowed to make India, which was under trusteeship, a full member, then due process should apply to the Soviet satellite republics. Later at Yalta, Stalin had mitigated his demand to membership for the Soviet Union, Ukraine and Byelorussia. Curiously, this issue was in the end not resolved due to negotiated agreement, but rather ambiguously decided in favour of Stalin due to a quirky misunderstanding during a telephone communication between Roosevelt and Stalin.[56] At Yalta, an agreement had been reached to invite 51 states to the negotiations at the San Francisco Conference.

The Yalta negotiations also made clear that any serious abolition of colonial involvement was to be avoided at all cost. The contentious issue of trusteeship riled Churchill to such an extent as that he shouted at a meeting that he was not elected to "preside over the liquidation of the British Empire."[57] Churchill's outburst was so emphatic that Roosevelt had to adjourn the meeting until the following handwritten definition of trusteeship by U.S. Secretary of State Hiss appeased Churchill: "the territories in trusteeship shall be territories mandated under the League, territories detached from the Axis powers and such territories as any member nation may wish to place in trusteeship."[58] This definition did not really commit the British government to any concrete action, if it did not 'wish' to

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[55] Hiss quoting Roosevelt, in Krasno, 'The Founding of the United Nations', p. 14

[56] U.S. Secretary of State Hiss recalled the details of this amusing anecdote: "It was my duty to read the minutes as soon as they were completed and to my surprise I saw that the minutes said that agreement had been reached, that votes would be given to White Russia (Byelorussia) and the Ukraine. So I rushed up to Eden and said, 'Mr. Eden, it's a mistake, we didn't agree.' And he, quite testily – which wasn't his usual manner – said, 'You don't know what's happened, speak to Ed.' I went to Stettenius and he threw up his hands and said that after the meeting on which there was substantial agreement on many matters, he had reported to Roosevelt as he usually did and had started by saying: 'Mr. President, it was a marvellous meeting. We reached general agreement.' At that moment Bohlen brought in Stalin for a personal call on Roosevelt. Not a negotiating call, really just a courtesy call. Roosevelt in his expansive way said: 'Marshal Stalin, I have just been getting a report from my Secretary of State on the morning meeting and he told me there was agreement on everything.' Stettenius started to grab at Roosevelt's sleeve, but Stalin came back quickly 'and the two republics too?' And Roosevelt said, 'Yes'.", quoted in Krasno, 'The Founding of the United Nations', p. 16. Roosevelt was too embarrassed to recall his remark, and later made a desperate attempt to remedy the accidental concession by trying to make Alaska and Hawaii permanent members. Stalin agreed to this demand knowing full well that the membership of these U.S. states would have breached the U.S. constitution.

[57] Quoted in Krasno, 'The Founding of the United Nations', p. 17

[58] Quoted in Krasno, 'The Founding of the United Nations', p. 17

place any territories in trusteeship. On one issue there was however immediate agreement amongst the heads of state at Yalta, namely the Great Power veto. The only genuine concession towards international egalitarianism was that, it was intended that the permanent members would lose their veto power on issues "which dealt with the pacific settlement of disputes".[59] With the structure of the organization thus delineated the Latin American states, constituting 21 of the 51 invited members, reasserted their egalitarian objections at the 'Inter-American Conference on the Problems of Peace and War' of the Pan-American Union in Chapultepec, Mexico. The Latin American intention was to demand at San Francisco that the General Assembly be open to all states including Argentina, which had colluded with the Axis, as well as membership of the Axis nations themselves upon termination of hostilities. At Chapultepec it was also decided that direct and equal representation on the Security Council would be needed in order to counter the military hegemony of the major powers.[60]

The San Francisco Conference was under intense media scrutiny and there was strong semblance of egalitarianism. After all, the Great Powers had committed themselves publicly to create "a general international organisation based on the principle of sovereign equality of all peace-loving states and open to membership by all states, large and small."[61] However, in spite of this professed spirit of openness, the Latin American demand for the inclusion of Argentina was immediately an issue of controversy with Molotov staunchly refusing to accept its membership. The Latin American delegates tried to assuage his opposition by voting in favour of membership for Ukraine and Byelorussia as a gesture of good will, but Molotov would not budge because Poland, a Soviet colony in all but name, had at this stage not been accepted as a member. His continued refusal allegedly did "more in four days to solidify Pan America against Russia than anything that ever happened."[62] Yet, the primary focus of attention at the San Francisco negotiations by the smaller states was the issue of the composition of the Security

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[59] Gladwyn Jebb, part of the British delegations at Dumbarton Oaks and Yalta, quoted in Krasno, 'The Founding of the United Nations', p. 17-18

[60] See Krasno, 'The Founding of the United Nations', p. 19

[61] Moscow Joint Four-Nation Declaration of October 1943, quoted in Simpson, Great Powers and Outlaw States, p. 175

[62] U.S. delegate Senator Vandenberg quoted in Russell, A History of the United Nations Charter, p. 693

Council and the subject of the Great Power veto. Interestingly, the Charter does not mention the term 'veto', and throughout the San Francisco proceedings the term was consciously avoided by the Great Powers and, as far as possible, substituted with the less assertive phrase 'unanimity clause'.[63] The implications were however clear to all members of the conference. The Great Powers intention to control the Security Council was a clear signpost that an adherence to sovereign equality would not imply an adherence to absolute equality, for the latter was deemed by the Great powers to be incompatible with collective security.[64] Because the heads of state of the Great Powers had often used the metaphor of an 'international police' to describe the role to be fulfilled by the Security Council, the "smaller states were naturally alarmed at the prospects of four policemen in a world in which they were to be disarmed. Many states worried that the Dumbarton Oaks proposals had concretised a system of permanent alliance among the Great Powers"[65] Although the smaller states, spearheaded by the Latin Americans and Australia, deeply resented the veto clause, it became soon apparent that "they were going to have to swallow it because there would be no Charter without it and they couldn't afford not to have the Charter."[66] To bring the issue to a close at San Francisco, the U.S. delegation dispatched Senator Connally to make the position forcefully explicit to the smaller states. Connally reputedly said: "If you don't lay off on this veto you're not going to have a Charter. You're going home without it."[67]

Even the only concessions made at Yalta on the veto, namely that matters 'which dealt with the pacific settlement of disputes' should not become subjected to the veto clause, soon came under threat by Molotov. As Finkelstein explains: "the question was not whether there should be a veto but how far down in the process of decision making veto should apply. Here, the United States wanted to avoid the application of the veto to

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[63] See Krasno, 'The Founding of the United Nations', p. 28
[64] See Simpson, Great Powers and Outlaw States, p. 178
[65] Simpson, Great Powers and Outlaw States, p. 176. On the police metaphor see ibid., p. 170
[66] U.S. State Department Staff member and delegate Lawrence Finkelstein quoted in Krasno, 'The Founding of the United Nations', p. 30
[67] Finkelstein's account, quoted in Krasno, 'The Founding of the United Nations', p. 30. According to Finkelstein, the Texan Connally had been specifically chosen for this task due to his reputation as a fierce orator and his large physique, which appeared even more imposing as he wore a black preachers coat with string tie and twenty gallon hat.

decisions that an issue should be discussed. The Russians were arguing that the decision to discuss should be subject to the veto as well."[68] Molotov's position was however untenable in the long run. It was considered to be pointless by all delegates, aside from Molotov, to dedicate resources towards the formation of an organization in which the veto could bypass any rational debate and enquiry in the first place. Truman, now president due to Roosevelt's untimely death two weeks before the conference, had to despatch Harry Hopkins as an envoy to Moscow to negotiate with Stalin directly. Stalin realized Molotov's transgression, withdrew him from the conference and replaced him with the more moderate Soviet Ambassador Gromyko, who had earlier participated in the Dumbarton Oaks discussions. Thus having returned to the agreement reached at Yalta, the veto issue was settled between the major powers, and had to be grudgingly accepted even by those who opposed it. As Finkelstein says: "So it came out that, although there can be no veto on discussion as such or on a decision to put an item on the agenda of the Security Council, beyond that the veto is pretty pervasive."[69] Molotov's departure also resulted in agreement on Argentine and Polish membership.

In stark contrast to the Atlantic Charter vision of a democratic international society, the topic of colonialism was intentionally never put onto the agenda of the San Francisco founding conference so as not to alienate the British and French governments, and the Great Power delegates tried their best to keep the subject out of debates. This position was a particularly uncomfortable one for the U.S. with its officially anti-colonialist stance. The U.S. did indeed grant independence to its only pre-war colony, the Philippines, immediately after the war, but was unwilling to grant either U.N. trusteeship or full independence to certain territories on purely strategic grounds.[70] The Soviets

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[68] Quoted in Krasno, 'The Founding of the United Nations', p. 29
[69] Quoted in Krasno, 'The Founding of the United Nations', p. 30
[70] As Lawrence Finkelstein explains: "There had been a lot of preparation in the State Department of drafts for a trusteeship plan and a declaration having to do with principles of colonial government. There had been some consultations with the British. Most thought that this plan was ready to proceed but, it was the military service which threw a monkey wrench into the works for two reasons. The first, they were concerned that these questions would involve territorial issues which might open up disputes among the countries still conducting the war against the Axis. We are talking about 1944. Their main argument was that they didn't want to introduce any unnecessarily contentious issues that might cause splits particularly between us and the Russians. The second issue was the belief particularly in the navy that it had to have the islands which we were winning island by island from the Japanese, some of which had been under League

official anti-colonial position throughout the inception of the U. N. was sheer hypocrisy, as the Soviet satellite republics were colonies in all but name. For example, Soviet involvement in Poland during 1945 created a campaign of pro-Soviet intimidation and violence and during the fraudulent elections held that year the communists gained an 80 percent majority which resulted in the formation of a puppet government.[71] It is also worth bearing in mind that a great many colonies were officially still under the trusteeship mandate of the League of Nations, which was officially still operative until its dissolution in 1946 shortly after the creation of the U.N.. Following the League's prolonged demise in the run up to the war and throughout the years of conflict, these trusteeship territories were hardly governed by the League's mandate, but were instead left to their own devices and soon considered their status to be independent in all but name. In view of this rising tide of calls for independence during the restructuring of the political landscape in the aftermath of the Second World War, the European powers desire to retain their colonies created tremendous international tension.[72] In the case of French colonies this circumstance was particularly severe due to the Nazi occupation of France, which largely prohibited it from fulfilment of its colonial mandate. Thus, when Syria and Lebanon, both of which were invited to participate as original members at San Francisco, demanded independence from the League of Nations mandate and any subsequent U.N. trusteeship, France bombed Damascus to set a signal against any aspirations for independence. Incredibly, this bombardment took place whilst the San Francisco Conference was ongoing. The French only withdrew after the British and U.S. governments launched an official protest, which strongly condemned such bellicose actions during a period in which the world's nation-states were trying to establish a lasting world wide peace. In view of mounting international pressure the French

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of Nations mandate after World War One but others which had not. So, the navy was against any concept of trusteeship which might internationalize those islands and thus deprive the navy of U.S. sovereignty over them. On this they were clearly opposed by the President himself, but somehow or another the navy managed to keep the issue alive. It persisted in the internal debates in Washington right up to the eve of the San Francisco.", quoted in Krasno, 'The Founding of the United Nations', p. 26

[71] See Michael S. Neiberg, Warfare and Society in Europe – 1898 to the Present (London: Routledge, 2004), p. 160

[72] Neiberg, Warfare and Society in Europe – 1898 to the Present, p. 162

withdrew, and Syria proclaimed immediate independence and broke of all diplomatic contact with the French.[73]

Shortly before his death Roosevelt had ordered that the word 'independence' ought to be included in the U. N. Charter to describe the goal of U. N. trusteeship administration, but his instructions were never adhered to. The U.S. government did not want to alienate its main ally Britain and the U.S. delegate Harold Stassen delivered a public address at San Francisco which explicitly demanded that the word 'independence' should not to be included in the U.N. Charter. His speech was received very unfavourably by the international press and considered a "massive embarrassment to the US, itself a former colony".[74] Upon two nights of deliberation under fierce pressure from the Philippine delegation, it was accepted upon voting that the aspirations of non-self-governing people should be described as 'self-government or independence'. Yet, the phrase 'self-government or independence' can mislead a contemporary observer. As Krasno explains: "Ultimately a compromise was reached so that independence was included as a goal for the trust territories but was not included in the wording which dealt with all other colonies. The concept of self-determination also met with some confusion during the conference. It did not signify, as we interpret it today, democracy. It simply meant self-rule, as opposed to colonial rule, be it monarchy, oligarchy, dictatorship, or democracy. The term independence was seen as interchangeable with self-government or self-determination. So these ideals did not include the concept of democratic rule, just national self-rule by what ever authority might emerge."[75]

However, the universal proliferation of democratic government was intended to be ensured in the long run by that most distinguishing feature of Roosevelt's internationalism, namely his acute awareness and fervent endorsement of the intrinsic relation between international collective security and human rights. For Roosevelt, a fervent proponent of the liberal internationalist tradition, the internal nature of states was intrinsically connected to their external predisposition. For any peaceful and democratic

[73] See Krasno, 'The Founding of the United Nations', p. 25
[74] See Krasno, 'The Founding of the United Nations', pp. 26-27
[75] Krasno, 'The Founding of the United Nations', p.27

international order to remain viable in the long run it would have to be able to guarantee the freedoms of all individuals: "Freedom means the supremacy of human rights everywhere."[76] Roosevelt made explicit that the protection of human rights was instrumental for the realization of a secure international order: "Now, what do those rights mean? They spell security."[77] A commitment towards the instrumental role of human rights for the preservation of international security was also tacitly given by the leaders of the other Allied powers, and in his 1944 'Message to the Congress on the State of the Union' he confirmed that the major powers had reached an agreement to cooperate in the promotion of human rights: "The one supreme objective for the future, which we discussed for each nation individually, and for all the united nations, can be summed up in one word: Security. And that means not only physical security which provides safety from attacks by aggressors. It means also economic security, social security, moral security--in a family of nations."[78] To uphold the intrinsic connection between collective security and human rights implied global "progress toward a better life."[79]

What had united these powers in their promotion of human rights as an essential aspect of the long term viability of collective security was their professed realization of the truth that "the great majority of really dangerous international disputes arise out of matters which indisputably fall within the category of domestic jurisdiction, and the problem of how to deal with them is the most crucial, and unfortunately also the most intractable, of all international problems."[80] The shocking experience which World War Two had provided strengthened the realization that domestic violations of civil and political rights could engender disastrous international consequences. The horrors of World War Two, as De Visscher says, "threw new and revealing light upon the bond between the rights of

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[76] F. D. Roosevelt, 'The Annual Message to the Congress', January 6, 1941. See http://www.udhr.org/history/.
[77] F. D. Roosevelt, 'Campaign Address at Soldiers' Field, Chicago, Illinois', October 28, 1944. See http://www.udhr.org/history/
[78] F. D. Roosevelt, 'Message to the Congress on the State of the Union', January 11, 1944. See http://www.udhr.org/history/. The term 'Generalissimo' refers to the Chinese leader.
[79] Roosevelt, 'Message to the Congress on the State of the Union', January 11, 1944
[80] James Leslie Brierly, The Basis of Obligation in International Law and Other Papers (Oxford: Clarendon Press, 1958), p. 86

man and the creation of an international order founded on law."[81] The totalitarian states had come to power through, and thrived on, a systematic annihilation of civil and political rights. Furthermore, these states operated on a basis of ideological and ethnic superiority and exclusivity which strove to suppress and annihilate any opposition, whether domestic or international. De Visscher described this posture of the totalitarian state aptly in saying: "Aggressiveness is its principle of action and its rule of life; it is born enemy to international organization and peace."[82] With the Second World War having been caused solely by the transgressions of the Axis, the 'peace loving states' of the Charter stood seemingly united in their effort to prevent a further holocaust of global dimension, and they desired to bolster their apparently unanimous commitment to collective security with human rights provisions.

With this ideal in mind, on 26 June 1945 the fifty original signatory governments assembled at the San Francisco Conference signed the Charter in an atmosphere which venerated the document as a promise for a better future, a new dawn for mankind.[83] The signatories also solemnly and euphorically declared their unanimous "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", and that they would "promote social progress and better standards of life in larger freedom".[84] All Charter signatories furthermore vowed to "achieve international cooperation" in order to inspire and foster "respect for human rights and for fundamental freedoms, for all without distinction as to race, sex, language, or religion."[85] The official beginning of this organizational promise

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[81] Charles De Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1968) p. 127

[82] De Visscher, Theory and Reality in Public International Law, pp. 127-128

[83] The extent of Charter veneration can be aptly illustrated with a humorous anecdote told by State Department Staff member and General Secretary of the San Francisco Conference Alger Hiss: "It was decided that there was no proper, let's call it, receptacle, place of safekeeping, for the Charter. The United Nations hadn't come into existence, and the conference Secretariat would be disbanded. And it was agreed that Truman would keep it in the safe in the White house. Since the US had been the host, this would be appropriate. I was therefore deputed to carry the Charter to the White House and deliver it to him for safekeeping. And the army put a plane at my disposal for that purpose. The humorous aspect of this was that since the Charter was so valuable it had a parachute attached to it – and I didn't.", quoted in Krasno, 'The Founding of the United Nations', p. 35

[84] From the opening paragraph of the U.N. Charter. Poland signed in the coming month increasing the number of signatories to fifty-one.

[85] Third paragraph of Article 1 of the U.N. Charter.

for a better future was the 24 October, when the Charter had become ratified by a majority of 29 of the original signatories. In the United States, which had taken the lead in ratifying the document on 28 July, the Senate adopted the Charter nearly unanimously in contrast to Wilson's earlier defeat.[86] The United Nations was inaugurated on 27 December 1945, by which date the Charter had become ratified by all original signatories.

## I.ii The Charter of the United Nations

From a historical perspective, the successes and failures of the League's attempt to realize the ideal of collective security have had a lasting legacy on the subsequent inception of the U.N.O. and its Declaration of Human Rights. As Walters explains: "the establishment of the United Nations throws a revealing illumination backward over the whole story of the life and death of the League of Nations. ... In its purpose and principles, its institutions and its methods, the United Nations bears at every point the mark of the experience of the League."[87] Yet, in spite of these overarching similarities there is also an important difference of organizational principle between these two institutions, for better and for worse. In contrast to the Covenant, the Charter substituted "the co-operative basis of the association for one that is organic."[88] This substitution of organizational principle became possible because the U.N. seemingly summoned not only the united support of the smaller states but also the apparent benediction of all the Great Powers for its mandate, whereas the League faltered in achieving unanimous Great Power support. Consequently, the Charter system was able, as Brierly explains, to take "a first step, a rather hesitating first step it is true, away from the purely co-operative basis of international organization. All the emphasis in the Covenant is on what the High Contracting Parties, that is to say, the members of the League, are to do; they are to accept obligations not to resort to war, to follow prescriptions of open, just, and

[86] 89 members of the Senate voted in favour of the Charter with only 2 votes against adoption. See Krasno, 'The Founding of the United Nations', p. 35
[87] F. P. Walters, A History Of The League Of Nations (London: Oxford University Press, 1960), p. 812
[88] Brierly, The Basis of Obligation in International Law, p. 316. Brierly points out how a British Member of Parliament having returned form Geneva described the League as "not 'it' but 'they'", ibid., p. 316

honourable relations between nations, to respect treaty obligations, and so on. In the Charter, on the other hand, the 'Purposes' are those of the United Nations, and the context shows that this means the Organization as a whole and not its members severally. The same contrast runs all through the two documents."[89] The primary intention of this organic approach was an attempt to overcome the weakness of the League in matters of collective security. The League system, as Simpson explains, "was a mild form of collective security by the standards of the UN Charter. The League's council possessed nothing like the power of the Security Council. Peaceful resolution was less obligatory under the Covenant."[90] Yet, the intention to supply the organization with constructive strength also created its greatest weakness. The well intended ability of the U.N. to possess enforcement powers so as to transcend the impotence of the League was based purely, and necessarily, on the idealist assumption of an organic bond between all nations, and more importantly all of the Great Powers, but with the onset of the Cold War the viability of that organic alliance on which the future hopes of the U.N. had been based all but disappeared.[91] In fact, the beginnings of the Cold War had emerged already with the nuclear strike on Japan whilst delegates were still gathered at the San Francisco founding conference. Even the U.S. delegates, including several prominent members of the U.S. administration, knew nothing of a planned nuclear strike, which had been kept in strictest confidence.[92] Within the first year of the U.N.'s existence Stalin began to assert the Soviet Union's ideological and military opposition to the West and during the same year Churchill delivered his famous Iron Curtain speech.[93] The Cold War opposition

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[89] Brierly, The Basis of Obligation in International Law, p. 317

[90] Simpson, Great Powers and Outlaw States, p. 158

[91] As U.S. State Department Staff member and General Secretary of the San Francisco Conference Alger Hiss explains: "One reason why I felt confident that military enforcement was foreseen from the beginning is that this was one of the strong reasons why the veto was insisted upon. ... So I think we oversimplified the idea of a military contingent that would be readily available. This is why the Military Staff Committee seemed so important and of course when the Cold War began it fell into complete disuse, as we were assuming unanimity of the Permanent Members on enforcement.", quoted in Krasno, 'The Founding of the United Nations', p. 32. At Dumbarton Oaks the Soviets too were very enthusiastic about the creation of an international intervention force. As the Soviet delegate Roschin says: "we even proposed the creation of an international army in order to mix in the different parts of the world to establish a guarantee of security. Later we changed this position, we considered that our attitude concerning the presidency of Truman and his administration was rather complicated and here it was the beginning of the Cold War.", quoted in Krasno, 'The Founding of the United Nations', p. 32

[92] See Krasno, 'The Founding of the United Nations', pp. 32-33

[93] Neiberg, Warfare and Society in Europe – 1898 to the Present, p. 161

between the Great Powers at once illustrated the systematic weaknesses of the Charter vision.

The Charter's attempt to overcome the inertia of the League in times of crises was based on a modification of the League's principle of unanimity as stipulated in Article 5 of the Covenant. Instead the Charter introduced a system of majority voting intended to allow for swifter and more effective action in line with Article 24 of the Charter, which states that: 'In order to ensure prompt and effective action by the United nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' As Brierly explains: "Now undoubtedly, so long as we are considering principles of political organization in the abstract and not the context in which a particular political organization will have to work, this change is the first and necessary step towards the formation of what the American Constitution calls 'a more prefect union'. If, indeed, a corporate body is to act, it is the only way, as the Charter says, 'to ensure prompt and effective action.' But for this advance there has been a price to pay, and the question is whether it has not been too heavy. The price is the veto of the Permanent Members of the Security Council."[94] The problematic nature of the veto had already been an issue of fervent debate during the San Francisco Conference. The smaller states were concerned that the veto power of the Permanent Members would further entrench their legalized hegemony and that it would create a static configuration of Great Powers in spite of a historically continually changing distribution of power between states.[95] To this extent proposals were made by the smaller states which ranged from the introduction of a rotation of membership on the Security Council, to gradations in the status of power, to limiting the application of the veto purely to matters of security enforcement, as well as the introduction of a regional separation of spheres of influence.[96] Ultimately though the smaller states, as Simpson explains, merely succeeded in achieving "the General Assembly's right to be kept abreast of all questions being dealt with by the

[94] Brierly, The Basis of Obligation in International Law, p. 321
[95] As Simpson says: At least two of the P5 powers of 'today' were in fact, already in 1945, the Great Powers of yesterday.", Simpson, Great Powers and Outlaw States, p. 174
[96] See Simpson, Great Powers and Outlaw States, p. 174 and pp. 181 to 185

Security Council (Article 12(2)), but virtually every other modification was rejected by the P5."[97] The reasoning put forward by the Great Powers for a necessarily static arrangement of Permanent Members with veto power on the Security Council was that this would prevent the organization from becoming deadlocked. They argued that the League had been paralyzed all too easily because any state could dissent due to its unanimity clause, whereas under the Charter there was only a possibility of five dissenters, thus decreasing chances of obstruction by a single state.[98] The Cold War clearly demonstrated that this reasoning was wholly assumptive and that the Charter arrangement was all too easily paralyzed. As Brierly says: "Thus the desire for a system of security ready always for immediate action, which was the leading motive behind the substitution of the Charter for the Covenant, has resulted in a system that can be jammed by the opposition of a single Great Power. Under the Covenant the League might be unable to act as a League, but at least the members of the League could act together if the occasion demanded joint action. The members of the United Nations cannot even do that; a Great Power can forbid it."[99]

The Charter system's predisposition to an easy infliction of stalemate aside, there is also a potential danger that the system can be abused in one of two ways. Firstly, there is the danger that a single Great Power will veto sanctions imposed against its own misconduct. The veto, as Brierly says, "made it impossible that enforcement measures should ever be taken against a Great Power. ... But today the only event which can seriously endanger the peace of the world is the aggression of a Great Power, and a system which solemnly declares, as the Charter does, that its purpose is 'to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression', and yet does not propose to deal with aggression by a Great Power, is, I venture to say, not a system of collective security at all."[100] Secondly, there is a danger that members of the Security Council in concert abuse their position of responsibility and intervene in smaller states in violation of the purposes of the United Nations. This danger

[97] Simpson, Great Powers and Outlaw States, pp. 185-186. Simpson's parenthesis
[98] See Brierly, The Basis of Obligation in International Law, p. 319
[99] Brierly, The Basis of Obligation in International Law, p. 324
[100] Brierly, The Basis of Obligation in International Law, pp. 321-322

is particularly acute as Article 39 of Chapter VII of the Charter states that: '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 Articles 41 and 42, to maintain or restore international peace and security.'[101] The Security Council was thus given almost complete liberty to decide what constitutes threats to or breaches of the peace, or acts of aggression, and this liberty is only held in check by the provisions contained in the Purposes and Principles of the United Nations, which, as Brierly points out, are "little more than a string of platitudes."[102] As Simpson puts it: "The middle and small powers were left with the forlorn hope that the P5 would treat the veto as a 'sacred trust'."[103] Indeed, paragraph 3 of Article 2 states that: 'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered', but whether peace security and justice have been or have not been endangered is to be decided at the discretion of the Security Council. In contrast, Articles 12 to 15 of the Covenant stated a clearly delineated procedure which, if the Covenant would have been adhered to in a principled manner, was intended to protect the interests of all League members. Furthermore, Article 16 clearly stated that the Council would be entitled to invoke military action only in the event of warfare in violation of the Covenant, with neither the League Council nor its Assembly having interpretational discretion. Yet, if the Great Powers of the U.N. were to unite, supported by the remaining non-permanent members of the Security Council, then these states could potentially abuse their status in order to decide that one situation or another which runs counter to their political self-interest constitutes a threat to international peace.[104] As Brownlie reminds us, we should not forget "that the United Nations is not unconditionally an ill-funded and rather amiable monster dependent on consensus and unable to jail tax

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[101] Article 41 outlines economic, infra-structural and diplomatic sanctions, whereas Article 42 allows for military intervention in case the provisions of Article 41 prove inadequate.

[102] Brierly, The Basis of Obligation in International Law, p. 318. Chapter V of the Charter, which delineates the 'Functions and Powers' of the Security Council, states in Article 24 that the 'Security Council shall act in accordance with the Purposes and Principles of the United Nations.' See Simpson, Great Powers and Outlaw States, pp. 187-188

[103] Simpson, Great Powers and Outlaw States, pp. 185-186. The phrase 'sacred trust' was mentioned in Document 505 of the United Nations Conference on International Organisations, 10 June 1945.

[104] As Brierly says, a threat to peace could "conveniently be met by another Hoare-Laval or Munich solution at the expense of a weak Power"; Brierly, The Basis of Obligation in International Law, p. 319

evaders. If by a political accident the permanent members were a firm faction, the Security Council could launch a variety of violent actions to shape the world in the image shared by the coalition: the European directorate of the nineteenth century would be but a mild precedent for such a new order."[105]

Thus, the U.N. Charter system's approach to principled and effective collective security is highly ambiguous. It has at once the potential to fulfil its Purposes and Principles as outlined in the Charter in that it could muster historically unprecedented strength, but the very same capacity makes it also a tremendous danger in that it could establish a tyrannical hegemony which could far surpass the powers of the Concert. It is very fortunate that the Charter's systemic weaknesses have hitherto proved to be primarily a hindrance to the achievement of progress, rather than the source of an international scourge.[106] The danger of a Great Power assault or coalition appears to have waned at this point in history, but the inertia on human rights remains. The long term success of the U.N. chimaera, in part Concert, in part League, in part principled, and mostly hypocritical, in the promotion and implementation of human rights law is thus questionable. Indeed, one could argue that whereas the Concert's hegemony achieved consensus and pragmatic progress due to a harmonized balance of power and intervened on behalf of human rights, the U.N., particularly in view of the all too prominent tensions on the Security Council, failed to achieve consensus and progress due to a paralyzing balance of power. Thus, despite sound intention and great fanfare, the U.N. Charter has failed in creating an organic approach to international relations and the principled cooperation of nations in the promotion and enforcement of human rights remains a lofty but unfulfilled ambition. Falk reminds us that the U.N. has primarily achieved "a 'peace' marred, and partially sustained, by more than 125 wars and upwards of 40 million war-related deaths."[107] The U.N.'s prominent status and the self-congratulatory rhetoric of its members creates the illusion of an organization which has achieved progressive

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[105] Ian Brownlie, 'The United Nations as a Form of Government', Introduction to 'The United Nations, 26th Session', Harvard International Law Journal, Vol. 13, 1972, p. 423

[106] Perhaps, I venture to guess, it was due to similar considerations that Brierly said: "I do not myself feel that in present world conditions the insistence of the Great Powers on their veto, however much we deplore it, is altogether unreasonable"., Brierly, The Basis of Obligation in International Law, p. 325

[107] Richard Falk, 'The challenge of genocide', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 178

international reform. Yet, an uncritical acceptance of this stance constitutes, firstly, a rather unscientific and delusory denial of the reality of contemporary international situation, and secondly an unsound basis for a critical human rights reform of the organization. The U.N. Charter system, as Held says, "failed effectively to generate a new principle of organization in the international order – a principle which might break fundamentally with the logic of Westphalia and generate new democratic mechanisms of political coordination and change."[108]

### I.iii The United Nations' Human Rights Project

The fundamental problem to which ideas of human rights were addressed throughout history was the injustice of arbitrary and oppressive government.[109] In essence these ideas asserted, as Akehurst's states, that "law was derived from justice" and, importantly, the theory "logically lead to a much more radical conclusion, namely that an unjust rule is not law at all".[110] The legal codification of Enlightenment aspirations in the constitutional milestones of the eighteenth century, as well as all those constitutional enactments which were to follow across the globe throughout the nineteenth and twentieth centuries, represent the outcome of a progressive historical development which can be traced back to the origins of natural law in remote antiquity.[111] The distant conceptual origins of human rights can be found in Greek Stoic philosophy and its belief in an immutable law and higher reason which transcends any earthly authority and before which all men are ultimately equal. This idea of a higher law of nature found some continuity in Roman legal philosophy and was strongly reaffirmed by the natural law thinkers of the middle ages.[112] After the middle ages, a further prominent factor delineating the evolution of the

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[108] David Held, 'Democracy: From City-states to a Cosmopolitan Order?', in Goodin and Pettit (eds.), Contemporary Political Philosophy - An Anthology (Oxford: Blackwell, 2002), p. 91

[109] See Richard McKeon, 'The Philosophic bases and Material Circumstances of the Rights of Man', Ethics, Vol. 58, No.3, Part 1, April 1948, p. 183

[110] Peter Malanczuk (ed.), Akehurst's Modern Introduction to International Law (London: Routledge, 1997), p. 16

[111] See Hersh Lauterpacht, International Law and Human Rights (London: Stevens & Sons, 1950), pp. 89-90 for a survey of constitutional enactments of the nineteenth and early twentieth centuries.

[112] Cicero argued that the possession of reason and a capacity for virtue are to a greater and lesser extent common to all humans, Seneca argued that slavery affects the body only but that the slave's mind was

human rights conception was the increasing demand for religious toleration in the wake of the Reformation, which paved the way for secular political thought as a safeguard for religious pluralism.[113] One can also point to the early peace projects of humanist thinkers which emphasized certain indestructible ties which bind humanity in spite of its cultural diversity.[114] The emergence of Renaissance republicanism is a further important factor in

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naturally free, and Ulpian similarly asserted that slavery was merely a factor of civil law and in contradiction to natural law according to which all men are free. See Lauterpacht, International Law and Human Rights, p. 80-84. By the middle ages the idea of natural law became central to political theory. Natural law, in the words of St. Thomas Aquinas, was "the participation in the eternal law of the mind of a rational creature", quoted in ibid., p. 84.

[113] The Revolutionary Army of 1648 curbed the powers of the English parliament in demanding: "We do not empower our Representatives to continue in force, or make, any laws, oaths, covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion, or God's worship.", quoted in Lauterpacht, International Law and Human Rights, p. 86. The most prominent contributor towards the emergence of secular political thought was perhaps Grotius. In 'On the Rights of War and Peace', published in 1625, Grotius observed that there is one factor of morality which is universal, the need for self-preservation. Grotius identified two propositions on which he believed all genuine systems of morality must be based: Firstly, the fundamental right to preserve one's life, and secondly, the un-justifiability of wanton cruelty. Grotius' minimal moral core appeared to be compatible with all moral and religious outlooks, and as such it would provide a sound basis for the articulation of universally validatory secular moral guidelines. As Tuck says: "Grotius's minimal moral core of rights and duties gave rise to a 'state of nature' (though he did not himself use this term), a state in which *all* men must find themselves simply *qua* men, and on to which would be grafted the various appurtenances of developed civil life, including benevolence. Thus whatever rights or duties were claimed by governments must have arisen from or be compatible with the rights and duties of the state of nature. In this sense Grotius was a thorough going individualist: no political community could have any moral hold over its members unless those members had in some way given it that moral hold.", Richard Tuck, Hobbes (Oxford: Oxford University Press, 1989), p. 22, Tuck's parenthesis and italics. In view of the complete subjection implied by the medieval feudal hierarchy, "Grotius and other classical writers postulated a natural law of nations which provided a certain basis for the subject's protection form his sovereign." Although Grotius' ideas "did not have much substance for their contemporaries", and even though "the forms of social contract prominent in his time were designed as instruments for the justification of strong government under monarchy", his ideas nevertheless "prepared the way for acknowledgement of the place of the individual in a national community", and in doing so "foreshadow more modern concepts of the status of the individual", Ian Brownlie, 'The Place of the Individual in International Law', Virginia Law Review, No. 50, 1964, p. 436-437. See also Donnelly who argues that Grotius contributed to the idea of the universality of human rights due to that most crucial contribution of Grotius' thought, namely his modern interpretation of natural rights as the entitlement of every individual, in stark contrast to the orthodox idea of natural rights in the sense of rectitude. Jack Donnelly, 'The Social Construction of International Human Rights', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 78

[114] When Crucé published 'The New Cyneas' in 1623 he desired "to bring in accord peoples who are so different in wishes and affections," Because, in Crucé's words: "hostilities are only political, and cannot take away the connection that is and must be between men. Why should I a Frenchman wish harm to an Englishman, a Spaniard, or a Hindoo? I cannot wish it when I consider that they are men like me, that I am subject like them to error and sin and that all nations are bound together by a natural and consequently indestructible tie.", Emeric Crucé, The New Cyneas (Philadelphia: Allen, Lane and Scott, 1909), p. 85-86. Crucé's thought, representative of many Renaissance humanists, illustrates the advent of a mode of moral reasoning, which explicitly embraced cultural and religious diversity, and which was quite outspoken on the culpability of religious dogma to cause dissent and strife. In the spirit of the Enlightenment emancipation to come he argued that: "We see an infinity of men who do not consider themselves obliged

that it contributed significantly to the idea of the social contract, implying the individual's possession of certain rights before the state and the latter's duty to uphold these rights for the contract to remain valid.[115] The Habeas Corpus Acts of the Magna Carta, the Westphalian Treaties' clauses for the protection of religious dissenters, the English Bill of Rights of 1689, these are but some prominent early precursors of human rights which have upheld the inviolability of certain rights of the individual and which have emerged from this process of historical evolution.

This process culminated in the Enlightenment's reification of critical progressive rationality, its belief in the emancipatory nature of science, and its demand of a limitation of governmental powers in order to protect the agency of the independent, rational and possessive individual. As Locke said, man is "free...absolute lord of his own person and possessions, equal to the greatest and subject to nobody", and accordingly any just government served to guarantee "the mutual preservation of their lives, liberties and estates, which I call by the general name, property."[116] The revolutionary demand that every government must observe certain fundamental civil and political rights significantly altered the internal and external political relations of states.[117] Imbued with

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to believe except what reason shows them...The number of such people augments every day." Quoted in John Hale, The Civilization of Europe in the Renaissance (London: Harper Collins, 1993), p. 138

[115] As Quentin Skinner explains, Renaissance republicanism claimed that, "if there is any prospect of attaining the *optimus status republicae*, we must always institute a self-governing form of republican regime." This tradition's commitment to civic autonomy and independence was essentially grounded in the acute awareness of early Renaissance humanists that all political power was prone to corruption, and it served primarily to bulwark the political liberty of communities against imperial or papal interference. Yet, importantly,this negative claim to freedom from external interference was further developed by Renaissance humanists "in the form of a positive claim about the precise type of regime we need to institute if we are to retain our libertas to pursue our chosen goals. The essence of the republican case was that the only form of government under which a city can hope to remain 'in a free state' will be a *res publica* in the strictest sense. The community as a whole must retain the ultimate sovereign authority, assigning its rulers or chief magistrates a status no higher than that of elected officials. Such magistrates must in turn be treated not as rulers in the full sense, but merely as agents of *ministri* of justice, charged with the duty of ensuring that the laws established by the community for the promotion of its own good are properly enforced." Thus, the idea of a right to civic freedom, initially intended to ward off external interference, was bolstered by the claim that "a city can never hope to remain in a free state unless it succeeds in imposing strict conditions on its rulers and magistrates." This assertion of strict conditions of government was claimed against the tyrannical ambitions of local feudatories, but "it was even more vehemently directed against the jurisdictional pretensions of the church." Skinner, 'The State', in Goodin and Pettit (eds.), Contemporary Political Philosophy, pp. 9-11, Skinner's italics. See also Held, 'Democracy: From City-states to a Cosmopolitan Order?', p. 80, and Tuck, Hobbes, pp. 5-7

[116] 'Second Treatise of Civil Government', IX, 123

[117] Brownlie, 'The Place of the Individual in International Law', 437

Enlightenment spirit, the American Declaration of Independence of 1776 and the American Constitution of 1787 declared: 'we take these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain unalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness'. Yet, whereas the American Declaration's and Constitution's universality was only tentative, as the rights declared were primarily a consequence of citizenship, the French Declaration of the Rights of Man and of the Citizen of 1789 asserted concretely and categorically that 'all men are born free and equal in their rights'.[118] The French Revolution initiated fundamental and irrevocable political changes due to the fact that it had "two important features: man had rights and not merely as a citizen."[119] In the wake of the Enlightenment revolutions, government across Europe "became increasingly based on legal means and deliberative processes, and less on royal whims, prejudices, and status considerations".[120]

What united the ideas of natural law which had emerged since antiquity with the revolutionary demands for natural rights during the Enlightenment was their mutual grounding in "human nature as a source and standard of political rights" [121] In the guise of natural law these ideas constituted primarily an intellectual reaction against, and a demand for protection from, tyrannical rule. Yet, as a consequence of the Enlightenment natural rights were not only declared inalienable but also formally anchored in domestic constitutions as positive law. Henceforth, natural rights served to protect the individual not only from the tyranny of the sovereign ruler, but also from the democratic electorate, the tyranny of the sovereign majority. Although constitutions were not permanently immune from change by the sovereign people, they nevertheless "were destined to acquire a degree of sanctity which made them impervious to the vicissitudes of arbitrary

[118] Yet, as Brownlie points out, "much depended on the content given these concepts, and in practice constitutions of the early nineteenth century did not always give the citizen a new status. Instead the new national states with liberal pretensions seemed to have replaced the terminology of vassalage with that of citizenship without changing the reality of individual allegiance.", Brownlie, 'The Place of the Individual in International Law', p. 437

[119] Brownlie, 'The Place of the Individual in International Law', p. 437

[120] Holsti, Taming the Sovereigns, p. 45

[121] Lauterpacht, International Law and Human Rights, p. 88

change."[122] The assertion of the individual's inalienable possession of fundamental civil and political rights came to represent, as Brierly says, "the rationalization of the right of rebellion against tyranny, real or supposed; it asserted the right of appeal to the judgement of the individual against an authority that was to him external, something that he had himself instituted, and that he therefore had the right to control or change."[123] Inspired by the Enlightenment's liberalism and secularism, the idea of civil and political rights functioned as an important safeguard not only against arbitrary and despotic government, but also against the potential revolutionary unrest which such government may cause. The UNESCO's 1948 report 'The Grounds of an International Declaration of Human Rights' expressed this inherently remedial function of human rights with clarity. Civil and political rights, the report argued, "received eloquent defence on the grounds, not only that they may be granted without danger to the peace of the State, but also that they may not be withheld without danger."[124] Civil and political rights served to protect and delineate that scope of individual agency which was compatible with the demands created by the individual's relation to society and government. These rights asserted those freedoms of the individual which could be exercised without undermining the freedom of other individuals and which allowed the individual to exert constructive influence and participation in the democratic process. The idea of government of the people, by the people and for the people, in Lincoln's famous words, represents the essence of that liberal and secular human rights mandate which emerged during the Enlightenment. The notion that the individual's civil and political rights cannot be violated and must be safeguarded through a constitutional government dependent on the consent of the governed was essentially a political idea intended to promote human social progress. The idea of human rights, as McKeon explains, "did succeed in stating ideals which had a profound influence in improving the relations of men and in advancing the

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[122] Lauterpacht, International Law and Human Rights, p. 89

[123] Brierly, The Basis of Obligation in International Law, p. 4

[124] UNESCO (eds.), Human Rights – Comments and Interpretations (London: Allan Wingate, 1949), p. 264, original italics. Interestingly, the official Drafting Committee of the U.N.U.D.H.R. was not all too impressed with this report, and even considered it as obfuscatory. See Morsink, The Universal Declaration of Human Rights, p. 301. The authors of this report and members of the Committee were E.H. Carr, R. P. McKeon, Pierre Auger, Georges Friedmann, Harold J. Laski, Chung-Shu Lo and Luc Somerhausen. The 'Committee on the Principles of the Rights of Man' originally circulated the report in 1948.

practice of justice".[125] Historically, the ideas of secularism and liberalism had emerged in the wake of the Renaissance and mutually enforced and perpetuated each other in order to ensure and regulate the peaceful cohabitation of individuals in a society which was characterized by a plurality of often irreconcilable metaphysical and philosophical beliefs. The humanist demand for secular politics emerged to mitigate the deep cleavages and incessant warfare which religious schism had created across Europe. The articulation of secular ideas served to rescue societies which had been brought to the brink of ruin through apparently irreconcilable religious opposition. Secular thinkers realized that certain rules, recognizable to all reasonable men, would ensure the preservation of a pluralist society and allow for peaceful cohabitation in spite of irreconcilable beliefs. As Grotius asserted, his postulation of natural rights "would have a degree of validity even if we should concede that which cannot be conceded without great wickedness, that there is no God, or that the affairs of men are of no concern to Him".[126] In similar vein, the emergence of liberal ideas served to delineate the greatest compatible freedom of human agency in spite of the divergent political and philosophical beliefs of individuals, thus avoiding anarchy, despotism or a need for rebellion. As McKeon explains, "The conception of natural rights, sacred and inherent in man, was written into the constitutions of the eighteenth, nineteenth and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophic differences, on the formulation of a solution to a series of moral and political problems."[127] Thus the idea of natural rights served from the onset as a political remedy for a political problem. In delineating a sphere of freedom of individual agency, the human rights conception provided a solution to that "perennial problem of law and politics", namely "the question of the relation of the individual to the State – and his protection against the State".[128] As Lauterpacht explains, this political and legal problem stems from a need to harmonize two often irreconcilable factors: "The first is that the State, however widely its object may be construed, has no justification and no valid claim to obedience except as an instrument for securing the welfare of the individual human being. The second is that the

[125] McKeon, 'The Philosophic bases and Material Circumstances of the Rights of Man', p. 183
[126] Quoted in Lauterpacht, International Law and Human Rights, p. 100
[127] McKeon, 'The Philosophic bases and Material Circumstances of the Rights of Man', p. 182
[128] Lauterpacht, International Law and Human Rights, p. 79. My parenthesis

State – though not necessarily the existing sovereign State – has come to be recognised as the absolute condition of the civilised existence of man and of his progression towards the full realization of his faculties. ... in the history of political and legal thought and action, the conflict between these two factors has been bridged by the notion, variously disguised, of the fundamental, natural, inherent or inalienable rights of man. These are the bounds which, it has been asserted, the Leviathan of the State must not transgress."[129] However, although the notion of human rights was originally conceived as an explicit political remedy against unchecked governmental powers, it is also structurally dependent on the nation-state apparatus for its pragmatic implementation. This structural dependency represents a dilemma which continues to haunt the human rights conception to this day. As Donnelly says: "With power and authority thus doubly concentrated, the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement."[130]

"The human rights revolution", as Sohn says, "did not appear suddenly full-grown, like Minerva springing from Jupiter's head."[131] Yet, this is precisely what the Universal Declaration did in view of the firmly established status of international law as a legal system in which states are "not subject to international moral requirements".[132] Throughout history, the nature of the domestic treatment of individuals had been predominantly the sovereign states' prerogative. It is in view of this aspect of international law that the prominent place given to human rights initially by the Charter, and subsequently cemented by the Universal Declaration, represents a significant departure.[133] Indeed, the U.N.'s human rights project represents "one of the most startling innovations" in international law.[134] The U.N.'s human rights project must be seen as revolutionary within the context of international law in that it attempted to explicitly undermine a fundamental aspect of the classic system of international law, namely the

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[129] Lauterpacht, International Law and Human Rights, p. 80
[130] Donnelly, 'The Social Construction of International Human Rights', p. 86
[131] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 1
[132] Beitz quoted in Held, 'Democracy: From City-states to a Cosmopolitan Order?', p. 87
[133] See Dominic McGoldrick, 'The principle of non-intervention: human rights', in Vaughan Lowe and Colin Warbrick (eds.), The United Nations and the Principles of International Law – Essays in memory of Michael Akehurst (London: Routlegde, 1994), p. 85 and p. 94
[134] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 211

view that domestic jurisdiction and the resulting treatment of individuals are the *domaine réservé* of the sovereign state. Surely, attempts to promote and enforce human rights were made by the humanitarian interventions of the Concert and the League's mandate system and minorities clauses. Yet, the Concert's ambiguity of intention aside, the pioneering influence of these developments must be considered as merely tentative, because, as Akehurst's explains, "until 1945 international action tended to concentrate on remedying particular abuses or on protecting minority groups or aliens. In general, the relationship between states and their own nationals was considered to be an internal matter for each state."[135] Under the influence of the United Nations human rights became explicitly a 'universal' concern.

The Charter's human rights provisions intentionally departed from what was accepted as "the basic tenet of the State system – the right of a State to determine its own political and social affairs free from external interference".[136] The Charter was an attempt to provide an answer to that perennial question of international law and relations "whether a truly universal system of law is possible at all under the conditions of a divided world with such deep cleavages in values, interests, and perceptions."[137] Arguably, the Charter represented an apparent solution to this problem in that it was intended to articulate a set of perpetual and universally validatory legal principles. As Sohn points out: "Its basic provisions, constituting the jus cogens, the practically immutable law of the international community, are broad in scope and sufficiently flexible to permit their interpretation to be adjusted to the needs of each generation."[138] When the Charter is seen as the "constitution of the world, the highest instrument in the intertwined hierarchy of international and domestic documents", then one can view the effective implementation of its human rights provisions as a need of humanity as a whole in the quest for universal justice.[139] In a significant departure from the decentralized and voluntarist nature of international law, the Charter set in motion an important shift of that line which demarcates matters of

[135] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 209
[136] Schachter, International Law in Theory and Practice, p. 332
[137] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 30
[138] Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', American University Law Review, No. 32, 1982, pp. 13-14
[139] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 13

domestic law and matters of international law. Such a change of demarcation was cautiously anticipated by the Permanent Court of International Justice in its advisory opinion in the Tunis and Morocco Nationality Decrees of 1923: "The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations ... it may well happen that, in a matter which ... is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to a State is limited by the rules of international law."[140] Having witnessed the dire global ramifications of the totalitarian trampling of human dignity and its systematic undermining of civil and political rights, this shift of demarcation in order to extend the scope of international law was deemed necessary by the founding members of the U.N..[141] In the preamble of the Charter, the member states proclaimed 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women', as well as 'to promote social progress and better standards of life in larger freedom', and in Article 1 they pledged that the promotion and encouraging of 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' represents one of the Purposes of the United Nations. Under the Charter the concept of human rights was explicitly judged to be instrumental in ushering in a genuine system of mutually beneficial organic cooperation between hitherto merely, more or less peacefully, coexisting separate entities. The promotion of human rights was intended to reinforce the pursuit of collective security. For the first time in history, the status of the individual and the protection of human rights were elevated to being fundamental functional aspects of international law in the pursuit of international peace. As Brownlie explains: "the concepts of human rights and the institutions aimed at the monitoring and enforcement of human rights constitute what is, to a certain extent, a discrete public order system. The human rights system supplements the community of states as a public order system."[142]

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[140] Quoted in McGoldrick, 'The principle of non-intervention: human rights', p. 86. See also Brierly, The Basis of Obligation in International Law, p. 84

[141] See Morsink, The Universal Declaration of Human Rights, pp. 36-37

[142] Ian Brownlie, The Rule of Law in International Affairs (The Hague: Martinus Nijhoff, 1998), p. 65

Indeed, if one accepts that the U.N. Charter "prevails expressly over all other treaties, and implicitly over all laws, anywhere in the world", then the functional role of human rights as stipulated by the Charter and their specific content as agreed upon by the General Assembly should be considered to impose binding legal obligations on all member states.[143]

The framing and adoption of the Universal Declaration was intended to render concrete that 'faith' in human rights which had been expressed by the Charter in abstract terms.[144] The intention to institute an 'International Bill of Rights' had already been made explicit during he founding conference of the U.N. at San Francisco.[145] Indeed, Truman, who had adopted Roosevelt's human rights vision with enthusiasm, made this point explicit when he addressed the closing conference at San Francisco: "under this document we have good reasons to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much part of international life as our own Bill of Rights is a part of our Constitution."[146] It is in view of this aim that the Economic and Social Council worked towards the adoption of the Universal Declaration as, in the words of the Council, it was officially "charged under the Charter with the responsibility of promoting universal respect for, and observance of, human rights and fundamental freedoms."[147] The drafters of the Universal Declaration considered the document to be "a development of the Charter which had brought human rights within the scope of positive international law."[148] This law building progress became possible, because, as Alston asserts, the Universal Declaration "constituted a qualitatively different undertaking" when compared to other historically prominent "catalysts to reform or revolution".[149] The U.N. members had explicitly acknowledged the authority of the General Assembly to explicate the specific content of universal human rights and had reached general

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[143] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 13, p. 17 and p. 32
[144] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 16
[145] Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', The American Journal of International Law, Vol. 78, No. 3, 1984, p. 609
[146] Quoted in Morsink, The Universal Declaration of Human Rights, pp. 3-4
[147] Quoted in Morsink, The Universal Declaration of Human Rights, p. 4
[148] Cassin quoted in Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 15
[149] Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', p. 608

agreement to adopt the rights thus explicated. For Alston this was a triumphant historical achievement: "For the first time in history, at the international level, a final arbiter had emerged in area where conflicting ideologies, cultures and interests had previously made the prospect of general agreement seem far beyond reach and even utopian."[150] In their explication of the fundamental rights of the individual the drafters of the Universal Declaration clearly followed the spirit of the Enlightenment.[151] The drafters envisioned a dual function for the Declaration, namely, on the one hand, to serve as an universal educational tool for human rights awareness in all individuals, and, on the other hand, to provide a legal standard for the assessment of the justice of any domestic legal systems.[152] It was also a clear intention of the drafters that the document should become incorporated in the domestic legal systems of all states. As Cassin pointed out, the Universal Declaration should "guide governments in the determination of their policy and their national legislation", and he insisted that the Universal Declaration ought to be "considered as an authoritative interpretation of the Charter of the United Nations and as the common standard to which the legislation of all the Member States of the United Nations should aspire". [153]

Building on this foundation, the subsequent law building progress achieved by the U.N.'s human rights project does appear tremendous. The supreme status of the Universal Declaration was reaffirmed by the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as the subsequent adoption of some fifty additional declarations and conventions pertaining to human rights.[154] In view of this "pyramid of documents, with the Charter at its apex"[155], Sohn appears correct in asserting that the Universal Declaration has become "part of the constitutional structure of the world community", and that it "has become a basic component of

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[150] Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', pp. 608-609
[151] See Morsink, The Universal Declaration of Human Rights – Origins, Drafting and Intent, ch. 8
[152] Morsink, The Universal Declaration of Human Rights, p. 324
[153] Cassin quoted in Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 15
[154] For a compilation see 'United Nations, Human Rights: A Compilation of International Instruments', U.N. Doc. ST/HR/1/Rev. 1, 1978; or Ian Brownlie (ed.), Basic Documents on Human Rights (Oxford: Clarendon Press, 1965)
[155] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 12

international customary law, binding on all states, not only on members of the United Nations".[156] Sohn would argue even that "the consensus on virtually all provisions of the Covenant on Civil and Political Rights is so widespread that they can be considered part of the law of mankind, a *jus cogens* for all."[157] In view of this tremendous law building progress the Universal Declaration has gained the status of a veritable "moral touchstone".[158] Indeed, the "obligation of all states to observe the Universal Declaration fully and faithfully" was reiterated by the 1968 United Nations Conference on Human Rights at Teheran where all members proclaimed 'a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the international community'.[159] The Teheran conference also unanimously adopted a resolution which asserted that 'the Universal Declaration of Human Rights ... constitutes an obligation for the members of the international community'.[160] An apparent acceptance of the supreme legal status of the Universal Declaration was also voiced by the 1975 Helsinki Conference on Security and Cooperation in Europe, attended by 35 states including of the U.S. and the former Soviet Union, which declared in its Final Act: "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."[161]

Yet, in spite of this exalted status of the Universal Declaration and the legalistic intentions of its drafters, it is important to bear in mind that, although the founding members had solemnly declared that human rights do constitute an intrinsic Purpose of the U.N., the peremptory status of human rights as positive law was heavily disputed

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[156] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 17
[157] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 32. Sohn's italics.
[158] Charles R. Beitz, 'Human Rights as a Common Concern', American Political Science Review, Vol. 95, No. 2, June 2001, p. 269
[159] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 16
[160] Quoted in Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 213
[161] Quoted in Brownlie, The Rule of Law in International Affairs, p. 72, italics of the original. See also Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 16

from the onset. Indeed, there is not a single article in the Charter document which authoritatively demands the actual institution of an international bill of human rights, but merely a provision which recommends the formation of a Human Rights Commission. In contrast to solemn professions of a faith in human rights, at San Francisco it had already become clear that many states were reluctant to accept the moral considerations of human rights as binding legal obligations, and after all, the Charter was adopted with the reservation that domestic matters were beyond the purview of the U.N..[162] The members had merely promised in Article 55 of the Charter that they 'shall promote' human rights as outlined by paragraph c. And in Article 56 they only vouched to 'pledge themselves' to realize the human rights purpose of Article 55. As explained in Akehurst's: "the word 'pledge' ... implies a legal obligation , but the obligation is probably not to observe human rights *now* (the rights are not defined or listed in any case), but to work towards their fulfilment in the *future*; the vagueness of the language probably leaves a wide discretion to states about the speed and means of carrying out their obligations".[163] This attitude also influenced the drafting process of the Universal Declaration during which the U.S., Soviet and French delegations had argued against tremendous international public pressure that an authoritative demand for the legal codification and ratification of human rights would have to be shelved necessarily during the formative years of the organization until the ratified collective security framework would become successfully operative.[164]

In the end, the Universal Declaration became a purely hortatory instrument, as expressed by its title, a mere declaration and neither a convention nor an amendment to the Charter. This shortcoming was also reflected by the wording of the operative paragraph of the Declaration of Human Rights which was chosen carefully so as to avoid any suggestion of positive legal obligations for governments. Even Eleanor Roosevelt, who had worked with great devotion towards a binding convention, had to acknowledge in the end that the

[162] See Krasno, 'The Founding of the United Nations', p. 33
[163] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 212, Akehurst's italics
[164] See Morsink, The Universal Declaration of Human Rights, p. 17. According to Morsink, the delegates of the majority of the smaller states, with the fervent support of the United Kingdom, pressed for a convention. Indeed, the United Kingdom delegates tried to force the issue with an 'either a convention or nothing' position; see ibid., p. 15. The British delegation later made a "remarkable turnaround" and accepted a mere declaration; see ibid., p. 19

Declaration "was not a treaty or an international agreement and did not impose legal obligations".[165] The drafters' clear realization that the Universal Declaration could not transcend a purely hortatory character was the reason why in the end they chose to address the document to 'every individual and every organ of society' instead of the member states and governments. The Universal Declaration, short of demanding legal codification by governments, became merely an emancipatory educational tool which would strengthen the future campaign for global human rights culture.[166] In stipulating 'a common standard of achievement' the drafters were relying primarily on the historical precedent of the French Declaration of 1789, which was intended to politically educate ordinary people. The French Declaration served as a benchmark for the citizen to judge whether the government fulfilled its proper function, namely to serve in the interest of the people and to uphold their civil and political rights.[167] It was with this historical precedent in mind, as Morsink explains, that the drafting committee "changed the title of the document (from 'international' to 'universal') for the same reasons, namely, to shift the focus of the document away from the delegates and nations that did the drafting to the ordinary men, women, and children to whom it was primarily addressed. It is these ordinary men and women the drafters had in mind when they stressed the educational goal of their proclamation."[168] Yet, precisely because the Universal Declaration was addressed to ordinary women and men across the globe, the fact that the document merely represents a vague and remote ideal causes confusion. In view of the wording of the Declaration, Akehurst's points out that: "many laymen imagine that states are under a legal obligation to respect the rights listed in the Declaration."[169] The difference between the Universal Declaration and what would constitute a genuine international bill of rights is explained by Kelsen: "If 'rights' are to be conferred on individuals by an international agreement, the latter must impose upon the states parties to the agreement the obligation

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[165] Quoted in Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 15, n. 49

[166] Morsink, The Universal Declaration of Human Rights, p. 331

[167] The insertion of the phrase 'a common standard of achievement' was instigated due to Lebanese and U.S. proposals intended to acknowledge the necessity of a universal human rights mandate, with the former proposal having related the term primarily to the necessity of human rights education and the latter as a reminder that the Charter pledge on human rights should lead to their peremptory legal status in the long run. See Morsink, The Universal Declaration of Human Rights, p. 324

[168] Morsink, The Universal Declaration of Human Rights, p. 324, Morsink's parenthesis

[169] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 213

to recognize the jurisdiction of a tribunal to which the individuals have access in case of a violation of the rights on the part of the state, as well as the obligation to comply with the decision of the tribunal. It may be a national or an international tribunal; but the rights are guaranteed more effectively when the states are subjected to an international tribunal. Without subjecting the state to the jurisdiction of a tribunal, no 'rights' of individuals in relation to the state are established."[170]

With the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights this situation initially appeared to have changed significantly. These treaties, which came officially into force only as late as 1976, were intended to remedy the vagueness of the principles listed in the Universal Declaration by transforming these into concrete peremptory rules of law.[171] In view of this intention to create legal obligations with the 1966 Covenants, Sohn argues that: "Where the Covenants go beyond a domestic law in protecting a particular right, the state concerned has the duty to adopt any additional legislative or other measures that may be necessary to give effect to the right recognized in the Covenants."[172] Yet, it is important to point out that if any positive legal obligations do in fact arise, then these would apply only to the Covenant on Civil and Political Rights, for the Covenant on Economic, Social and Cultural Rights merely demands that each signatory member 'take steps, individually and through international assistance and co-operation especially economic and technical, to the maximum of its available resources'.[173] As Sohn explains, this meant, in practice, that the Covenant on Economic, Social and Cultural Rights "contained a loophole: because a state's obligation was limited to the resource available to it, a poor state could proceed slowly, progressing only as fast as its resources permitted".[174] However, as Sohn asserts, in principle the Covenant on Civil and Political Rights "permits no such excuses" because it combines obligations of result and means.[175] The first paragraph of Article 2 of the U.N. Covenant

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[170] Hans Kelsen, Principles of International Law (New York: Rinehart & Company, 1959), pp. 143-145
[171] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 215
[172] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 21
[173] From the first paragraph of Article 2 of the Covenant on Economic, Social and Cultural Rights.
[174] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 19. See also Schachter, International Law in Theory and Practice, pp. 352-353
[175] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 20, p. 19

on Civil and Political Rights imposes an obligation on each signatory member state 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized'. This paragraph creates an obligation of result, as it does not explicitly define by which means or actions the specified result should be achieved.[176] The stipulation of an 'obligation of result' was intended to express that it was not mandatory for the Covenant to be explicitly incorporated into domestic law, by virtue of special legislation or constitutional amendments, provided the Covenant's legal rules were assured by similar provisions in the domestic law.[177] The Covenant was intended to coexist with domestic law and would only come into force in the event of the latter's defects concerning civil and political rights. As Sohn says "The Covenants do not supersede any constitutions or laws that provide more protection to individuals."[178] Yet, to ensure that the Covenant on Civil and Political Rights would become operative in the case of inferior domestic human rights protection, the second paragraph of Article 2 importantly supplements the 'obligation of result' in demanding that each State Party furthermore implement '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'. The second paragraph of Article 2 thus creates an additional obligation of means. As Schachter explains: "The words 'as may be necessary' are reinforced by the opening phrase of the paragraph, 'where not already provided by existing measures'. The effect is to impose a conditional obligation as to means, but an obligation nonetheless. Paragraph 3 of Article 2 adds additional obligations of means. It requires that an effective remedy be ensured to any person whose rights are violated. It also requires that the right to such a remedy be determined by a competent authority 'provided for by the legal system of the State' and that remedies granted be enforced by the state authorities. There is a specific obligation in subparagraph 3 (b) that the state 'develop the possibilities of judicial remedy'."[179]

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[176] Schachter, 'The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights', p. 462

[177] Schachter, 'The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights', p. 462, n. 2

[178] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 21

[179] Schachter, 'The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights', p. 462.

The assertion that the Covenant on Civil and Political Rights should indeed create binding obligations is correct as a matter of legal principle.[180] Yet, it cannot diminish the fact that the provisions of the Covenant are wholly unenforceable under current international law. Indeed, the only means which tentatively approximates legal compulsion is created by Article 40's stipulation of a reporting system according to which states are obliged to provide a five-yearly account of their domestic human rights situation. The Human Rights Committee may, upon study of these reports, demand further information, but the Committee can only comment on these reports and wholly lacks compulsory jurisdiction. Article 41 provides a complaints procedure which allows states to allege human rights violations in other states, but this procedure must have been accepted by the state which allegedly violated human rights and the procedure can only be initiated when domestic legal remedies in the accused state have been exhausted. By 1996 this procedure had been accepted by a mere forty-five states. [181] Although this procedure is politically not insignificant, as Akehurst's points out, it "lacks teeth because it can ultimately only lead to a conciliation attempt and there is no reference to a judicial body which could take a binding decision."[182] The primary reason why the Covenant does not create binding legal obligations in spite of this being its express aim is the fact that it is a voluntarist treaty in the first place. As Simma and Alston point out: "treaty law on its own provides a rather unsatisfactory basis on which to ground the efforts of international institutions whose reach is truly universal... The prospects for developing an effective and largely consensual international regime depend significantly on the extent to which those institutions are capable of basing their actions upon a coherent and generally applicable set of human rights norms. Reliance upon treaty law is likely to be even less rewarding in relation to domestic legal argumentation in the courts, legislatures and executives of countries which have ratified few if any of the major international

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[180] Brownlie concurs with such an assessment saying that the Covenant on Civil and Political Rights is "stronger in statement of the obligation to respect the rights specified", Ian Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 1990), p. 572-573

[181] The Covenant's Human Rights Committee consists of 18 members chosen by the state parties. In distinction to the U.N. Human Rights Commission these 18 members are voted for as individuals and not governmental representatives. See Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 215

[182] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 215

treaties."[183] As a voluntarist human rights treaty the Covenant on Civil and Political Rights is stifled by 150 reservations asserted by the 127 signatory states intended to weaken their obligations to effectively implement the Covenant's provisions.[184] Furthermore, as Schachter points out, "the fact that the International Covenants and other conventions were adopted specifically to give legal effect to the rights enumerated in the Declaration remains a plausible reason to deny obligatory force to the Declaration."[185] Thus, voluntarist human rights treaty law at this point in time undermines the postulated supreme moral authority of the Universal Declaration and "provides an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many states untouched."[186]

Indeed, under current international law domestic violations of human rights can be conducted almost with impunity due to Article 2 of the U.N. Charter. The fourth paragraph of Article 2 states that: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' And the seventh paragraph of Article 2 states that: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter ...'.[187] Article 2 of the Charter creates a clear ambiguity in view of the positive legal obligations which arise due to the Covenant on Civil and Political Rights, as well as the spirit of the Charter, of which the third paragraph of Article 1 explicitly states that it is a Purpose of the United Nations 'to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for

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[183] Bruno Simma and Philip Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', Australian Yearbook of International Law, Vol. 12, 1988-1989, pp. 82-83

[184] As of November 1994. See Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 215, Akehurst's parenthesis

[185] Schachter, International Law in Theory and Practice, p. 337

[186] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 82

[187] The paragraph continues to say, 'but this principle shall not prejudice the application of enforcement measures under Chapter VII', which concerns 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression' and thus essentially matters divorced from domestic jurisdiction.

human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. As Lauterpacht says: "the effect of that clause is to reduce to a minimum or to render altogether nugatory the protection of human rights in pursuance of the Charter."[188] Ironically, the sanctity of the domestic jurisdiction has been further entrenched by the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Article 1 of both covenants asserts that: 'Each state has the right *freely* to choose and develop its political, social, economic and cultural systems.'[189] This legal principle was also reasserted by the U.N. General Assembly when it unanimously adopted the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States' of 1970, which declares 'the importance of ... developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development', and that states 'have a duty to co-operate with one another, irrespective of the differences in their political, economic and social systems'.[190] The same document also asserts that no single state or group of states 'has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State'.[191]

The unenforceability of human rights by the U.N. was clearly foreseeable from the very inception of the organization.[192] It was a consequence of the founders' well intentioned aim to create a powerful collective security mechanism. In order to ensure the governmental support of the Great Powers, the novel enforcement system necessitated a strict demarcation of organizational competence between matters of security and social and economic issues.[193] The latter set of problems was to be dealt with exclusively by the egalitarian General Assembly, which however lacks sufficient strength to enforce

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[188] Lauterpacht, International Law and Human Rights, p. 166
[189] My italics.
[190] General Assembly Resolution 2625, 1970, quoted in Prosper Weil, 'Towards Relative Normativity in International Law?', The American Journal of International Law, Vol. 77, no. 3, July 1983, p. 419, n. 22
[191] General Assembly Resolution 2625, 1970, quoted in Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 9. My italics.
[192] That the enforcement of universal human rights would remain illusory had already become clear at Dumbarton Oaks, because the Soviets, as Soviet delegate Alexei Roschin states, were "strongly against" charging the collective security organization with any other competency, such as an economic or social mandate. Quoted in Krasno, 'The Founding of the United Nations', p. 15
[193] See Brierly, The Basis of Obligation in International Law, p. 317

decisions reached. Yet, the General Assembly's lack of power was the prevalent reason why the Great Powers agreed to allow egalitarian membership and equal voting in the first place. In their effort to provide the organization with sufficient force to effectively uphold a system of collective security the Great Powers wanted to clearly demarcate their sphere of hegemonic influence from that influence which the smaller states could exert in the General Assembly by virtue of their greater number and an equal voting system. In contrast, the League Covenant allowed for such an overlap of matters of security and social and economic issues in that Articles 3 and 4 allowed the egalitarian League Assembly and the hegemonic League Council respectively to 'deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.' The Charter's clear demarcation did ensure unanimous Great Power cooperation in the organization, but in its relegation of social and economic problems the scheme, as Brierly points out, "unfortunately, disregards the important fact that these problems are often the causes of international friction and so are not really separable from questions of security, and it also makes it more difficult than it need have been for the Security Council, with little or no work of a constructive character to do, to develop that corporate spirit which was found so valuable in the League."[194] In the end, we should remind ourselves that the primary purpose and function of the U.N. is its role as a collective security organization and the fulfilment of social and economic ends, in spite of lip service to the idea, remains, at this point in time, at best a secondary aim of the organization.

However, Sohn insists that the Universal Declaration remains authoritative by virtue of the fact that members had pledged to realize the obligations contained in Articles 55 and 56 of the Charter, but that "methods of enforcement are still deficient".[195] This assertion is echoed by Lauterpacht who insists that the question of enforcement "must be distinguished from that of the legal obligation of the Members of the United Nations to respect human rights and fundamental freedoms. Even if the United Nations had no power at all to enforce it, directly or indirectly, the legal duty itself would still remain in full vigour. Any member disregarding that obligation would be acting contrary to one of

[194] Brierly, The Basis of Obligation in International Law, pp. 317-318
[195] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 12

the fundamental purposes of the Charter."[196] Alston argues also that the Universal Declaration does rest on a "firm legal foundation" because the members have accepted the General Assembly's authority to explicate what constitutes human rights, as well as the Assembly's mandate, as outlined in Article 13 of the Charter, to 'initiate studies and make recommendations for the purpose of ... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.[197] Yet, the assertion that the Universal Declaration as a whole has become binding on all states, though plausible, is a rather optimistic assessment of its peremptory status, and as Schachter points out, "only a few scholars have taken this position".[198] Strictly speaking, Sohn paints an ideal picture of the status of the Universal Declaration in international law, which should be considered as a proposition concerning international law *de lege ferenda*, but it is not easy to reconcile this picture with the reality of international law *de lege lata*. This distinction serves to identify "law as it currently stands" as opposed to "law as it may be, or should be, in the future", and accordingly helps to separate "binding law from legally non-binding other social or moral norms".[199] Schachter explains the current status of the Universal Declaration in international law *de lege lata* in saying: "It is not inconceivable that in time they (proponents of human rights advocacy) will carry the day for the Declaration to be treated as obligatory. However, for the present, their reach exceeds their grasp. Neither governments nor courts have accepted the Universal Declaration as an instrument with obligatory force. Many have, of course, lauded its principles as standards to be achieved and in specific instances have rhetorically relied on the Declaration as a touchstone of legality. ... courts and international bodies have also referred to the Declaration in condemning particular acts as violative of human rights. But these particular references fall short of recognizing the Declaration as obligatory in law. It remains difficult to do so in the face of the clear intention of the governments to consider it as non-binding."[200]

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[196] Lauterpacht, International Law and Human Rights, pp. 166-167

[197] Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', The American Journal of International Law, Vol. 78, No. 3, 1984, p. 609

[198] Schachter, International Law in Theory and Practice, p. 337

[199] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 35

[200] Schachter, International Law in Theory and Practice, p. 337, my parenthesis. Brownlie also asserts that: "The Declaration is not a legal instrument, and some of its provisions ... could hardly be said to represent

# II Conceptual Revision

## II.i Natural Law Revision

The ideas of secular and liberal natural rights arguably represent a parochial cultural development, and, problematically, this parochialism is the foundation of the universality of the rights articulated by the Universal Declaration. One need not look further than the Preamble of the document for an assertion of a belief in natural rights.[201] The Preamble provides an epistemological foundation for human rights by speaking of 'recognition' and a 'common understanding', and thus with a belief in a deeper moral nature which is discernible by every reasoned individual. The Preamble's ontological grounding is its belief in a 'human family', in our common humanity despite superficial cultural diversity. The problematic epistemic and ontological dimension of the human rights postulated by the Universal Declaration is a consequence of their intimate affiliation with secular and liberal ideas of 'natural rights' which were brought to prominence during the Enlightenment.

It was in view of the totalitarian annihilation of the individual which the drafters had experienced that this remedial function of the idea of natural rights was reasserted with vigour as "the unmistakeable result of the urge to find a spiritual counterpart to the growing power of the modern state."[202] After all, it was the systematic suspension of civil and political rights by fascist regimes which had allowed them to gain absolute power. As Morsink points out, the drafters of the Declaration were all too aware that Hitler had even compelled all lawyers and judges to swear oaths to uphold his will, and this usurpation and aberration of the German legal system by the totalitarian ideology of the Nazis was so profound that it is disputable whether one can speak of a genuine German 'legal' system during the Nazi era.[203] Accordingly, the drafters felt it necessary to explicitly stipulate and explicate all those civil and political rights which had become firmly

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legal rules." Yet he qualifies his judgement in saying: "but the indirect effect of the Declaration should not be underestimated". See Brownlie, Principles of Public International Law, p. 570

[201] See Brownlie, The Rule of Law in International Affairs, p. 66

[202] Lauterpacht, International Law and Human Rights, p. 112

[203] Morsink, The Universal Declaration of Human Rights, p. 43

entrenched aspects of the legal systems of all civilized states.[204] Motivated by the future avoidance of the horrors perpetuated by Hitler's totalitarian regime the drafters felt it also necessary to declare such rights as inalienable. The assertion of inalienability served to "make clear that the individual was not being regarded as subordinate to the State ... The case of Hitlerite Germany had shown that a state which placed its interests above those of its individual citizens entered upon a path which led to war. The Declaration should be a weapon with which to oppose and combat that concept."[205] For Lautepracht this return to the "rationalist foundation" of the Enlightenment's natural rights doctrine in the wake of the Second World War was a healthy counterbalance to the denial of human freedom caused by the mystically inspired totalitarian "revolt against reason".[206] As Lauterpacht says: "Only so can we explain why, at the very time when international recognition of human rights has become to a substantial extent part of positive law and when attempts are made, through an International Bill of Human Rights and otherwise, to make that recognition more effective, there is no inclination to jettison the appeal to the natural rights of man and to the law of nature conceived as the justification and the measure of all man-made law."[207]

One critique of the universality of the natural rights articulated by the Universal Declaration argues that the notion of natural justice has problematic "religious overtones" which have become untenable in a scientific age.[208] Yet, as infamously asserted by Grotius, the association between religion and natural law is not a necessary association.[209] Its origins may have been religious and it is correct that even during the Enlightenment's emphatic propagation of secular politics the idea of divinity was often merely substituted with the sublimity of 'Nature' or 'Reason'. However, this association is now primarily historical and not intrinsic to the conception. In modern legal reasoning it has become increasingly obsolete and the emphasis lies not on 'Nature', but either on our 'nature' as a

[204] Morsink, The Universal Declaration of Human Rights, p. 43
[205] The Costa Rican representative Canas of the drafting committee quoted in Morsink, The Universal Declaration of Human Rights, p. 49
[206] Lauterpacht, International Law and Human Rights, p. 113
[207] Lauterpacht, International Law and Human Rights, p. 113
[208] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 16
[209] See Lauterpacht, International Law and Human Rights, p. 100

rational and social being, or pertaining conceptually to the 'nature of law'."[210] As Fouillée said: "Nature knows nothing of rights; they exist only in the thought of man."[211] This distinction between 'Nature' and 'nature' was also considered by the drafters of the Universal Declaration and they avoided the use of the term 'natural' in the document only so as to avoid confusion and so as to preserve the essentially secular character of the document. As Morsink explains: "the drafters severed all connections between God and nature and voted for a thoroughgoing secular document, one in which no value is allowed to trickle down from above. In a bargain to avoid any reference to God in the Declaration the drafters deleted a reference to nature that had been part of Article 1 until almost the end."[212] It is also of interest that the intention to adhere to secularism by the overwhelming majority of delegations involved in the drafting process was underpinned by the very same remedial function which secularism has exerted throughout history – to facilitate coexistence in spite of divergent beliefs and so as to preserve the individual's "independent access to the basic truths of morality".[213] As Morsink explains: "The only exception at that time - which today would be more widespread – was the Saudi abstention ... which was inspired by a fundamentalist Muslim theology. The drafters considered this fundamentalist perspective and found it to be in conflict with the goal of universality."[214] In its final outcome, there is no doubt that the Universal Declaration is an intrinsically secular document. The drafters' outright secularism was intended to avoid the ambiguity of the Enlightenment's indirect affiliation with religion, and it is precisely this secularism which many religious fundamentalist critiques of the document find unpalatable.[215]

The epistemological and ontological natural law foundation of the Universal Declaration is also open to the criticism that the apparent universality of the rights articulated fails to

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[210] Schachter, International Law in Theory and Practice, p. 54
[211] Quoted in Brierly, The Basis of Obligation in International Law, p. 6
[212] Morsink, The Universal Declaration of Human Rights, p. 283
[213] Morsink, The Universal Declaration of Human Rights, p. 285. Amendments opting for references to God were only brought forward by the Brazilian and Dutch delegations and these proposals were voted against by all delegations which, directly or indirectly, representative of all mainstream religions. Saudi Arabia abstained from voting.
[214] Morsink, The Universal Declaration of Human Rights, p. 285
[215] Morsink, The Universal Declaration of Human Rights, p. 289

explain their historical and cultural particularity in view of the cultural diversity which characterizes the human situation. This objection would be a moot point if the rights postulated by the Universal Declaration do indeed constitute a universally validatory ethics. It could be argued that the there is indeed an underlying morality, a natural law to be recognized, but that the 'human family' has hitherto progressed rather slowly towards this realization. This stance was fervently defended by Charles Malik, a prominent member of the original drafting committee of the Universal Declaration.[216] As Malik asserted: "Thus it is not an accident that the very first substantive word in the text is the word 'recognition': 'Whereas recognition of the inherent dignity and of the equal and inalienable rights, etc.' Now you can 'recognize' only what must have been already there, and what is already there cannot, in the present context, be anything but what nature has placed there."[217] The eminent jurist Lauterpacht points out that the idea of natural law has served a remedial function throughout human history as "the bulwark and lever of the idea of the natural rights of man".[218] As Lauterpacht says: "Legal and political theories are not, as a rule, leisurely speculations of philosophers unrelated to human needs and aspirations; nor are they in the same category as the calm and detached generalisations through which the scientist masters the phenomena of the physical world. They are pragmatic and teleological; they serve a purpose. That purpose of the theory of the law of nature, to which it owed its origin to a large extent, its sustenance throughout the centuries, and its periodic revivification, has been the vindication of the rights of man."[219] Similarly, Vincent appeals to our "deeper" human nature, not to "our physical nature but to our moral nature" and says that: "It is in this context that human rights are sometimes called 'inalienable'."[220] Vincent believes in a "core of basic rights that is common to all

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[216] Malik was President of the U.N. Economic and Social Council and Rapporteur of the Commission on Human Rights

[217] From a 1946 speech by Charles Malik. He gave this address at a luncheon of The Committee on International, Political, and Social Problems of the U.S. Chamber of Commerce at The Waldorf Astoria in New York. See UN website: http://www.udhr.org/history/

[218] Lauterpacht, International Law and Human Rights, p. 111

[219] Lauterpacht, International Law and Human Rights, pp. 111-112

[220] R. J. Vincent, Human Rights and International Relations (Cambridge: Cambridge University Press, 1986), p. 14. One could also mention Henry Shue's defence of basic rights which arise from our physical human nature, without which the enjoyment of other rights, regardless of cultural particularity, could not be enjoyed. On this account, rights to subsistence and security are universally validatory rights. See Henry Shue, Basic Rights: Subsistence, Affluence and US Foreign Policy (Princeton: Princeton University Press, 1980), pp. 18-22, pp. 35-46 and pp. 51-64

cultures despite their apparently divergent theories", a kind of "lowest common denominator", which exposes "the internal regimes of all the members of the international society to the legitimate appraisal of their peers."[221]

Rorty's human rights critique has influentially questioned whether a universalist foundation for human rights can be coherently asserted in the first place: "But now suppose we ask: is there this sort of knowledge? What kind of question is that? On the traditional view, it is a philosophical question, belonging to a branch called 'meta-ethics'. But on the pragmatist view I favour, it is a question about efficiency: a question about how best to grab hold of history – how best to bring about the utopia sketched by the Enlightenment. If the activities of those who attempt to achieve this sort of knowledge seem of little use in actualizing this utopia, that is a reason to think there is no such knowledge."[222] Rorty simply bypasses the epistemological and ontological dimensions of human rights foundationalism in saying: "In short, my doubts about the effectiveness of appeals to moral knowledge are doubts about efficacy, not about epistemic status. My doubts have nothing to do with any of the theoretical questions discussed under the heading of 'meta-ethics': questions about the relation between facts and values, or between reason and passion, or between the cognitive and the noncognitive, or between descriptive statements and action-guiding statements. Nor do they have anything to do with questions about realism and antirealism. The difference between the moral realist and the moral antirealist seems to pragmatists a difference that makes no practical difference."[223] Rorty's stance is however not an outright denial of human rights universalism. Unlike many postmodernists and cultural relativists, he does not contradictorily assert the universal non-existence of universal human rights. Instead he believes in the meta-narrative of sentimental education as a means of propagating human rights universally. Rorty says that his pragmatist view is concerned with efficiency, for he doubts that we can achieve "a quick reversal of fortune" and instead we must tread slowly but steadily on the path towards the utopia of human rights.[224] Rorty believes that

[221] Vincent, Human Rights and International Relations, pp. 48-49, and p. 152
[222] Richard Rorty, Truth and Progress (Cambridge: Cambridge University Press, 1999), p. 172
[223] Rorty, Truth and Progress, p. 172
[224] Rorty, Truth and Progress, p. 182

the only sound and convincing argument which can be put forward in relation to human rights is "the sort of long, sad sentimental story that begins, 'Because this is what it is like to be in her situation – to be far from home, among strangers', or 'Because she might become your daughter-in-law', or 'Because her mother would grieve for her'. Such stories, repeated and varied over the centuries, have induced us, the rich, safe and powerful people, to tolerate and even to cherish powerless people – people whose appearance or habits or beliefs at first seemed an insult to our own moral identity, our sense of the limits of permissible human variation."[225] In emphasizing the conducive importance of safety and security for tolerance, and in pointing to the "astonishingly rapid progress of sentiments, in which it has become much easier for us to be moved to action by sad and sentimental stories", Rorty wants us to make the most appealing emotive case for human rights. According to Rorty, the search for a human rights foundation misses the point: "We are much less inclined to ask the ontological question 'What are we?' because we have come to see that the main lesson of both history and anthropology is our extraordinary malleability. We are coming to think of ourselves as the flexible, protean, self-shaping animal rather than as the rational animal or the cruel animal."[226] Rabossi is a further thinker who believes that the search for a foundation pertaining to human rights culture has become obsolete, because he thinks that "the world has changed, that the human rights phenomenon renders human rights foundationalism outmoded and irrelevant."[227] Akin to Rorty, it becomes futile for Rabossi to ask the ontological question 'What is our nature?' in the hope of an affirmative answer, and instead we should ask 'What can we make of ourselves?'[228]

In the end, it is difficult to deny that the idea of human rights is intrinsically linked to natural law foundationalism. As Chris Brown asserts: "To establish human rights, a different kind of law is necessary; some version of *natural law*".[229] And because human rights as critical standards also demand a parochial political desire, ultimately grounded

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[225] Rorty, Truth and Progress, p. 185
[226] Rorty, Truth and Progress, p. 169-170
[227] Quoted in Rorty, Truth and Progress, p. 170
[228] Quoted in Rorty, Truth and Progress, p. 170
[229] Chris Brown, 'Universal human rights: a critique', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 106, Brown's italics

in sentimental education, to protect and foster human agency, Brown argues that the "ontological status" of natural law should be considered as "unsatisfactory".[230] In contrast, he argues: "Rights associated with positive law are associated with particular jurisdictions and thus are not, as such, *human rights* – but, on the other hand, their ontological status is secure."[231] Brown's assessment is however not necessarily accurate for two reasons. The first reason becomes clear in view of Sohn's interpretation which sees the Universal Declaration as authoritative. If the Universal Declaration is authoritative then human rights need not be viewed as natural law in the first place. As Richard Bilder pointed out bluntly: "in practice a claim is an international human right if the United Nations General Assembly says it is."[232] The mere circumstance that the Universal Declaration is not considered as obligatory by governments, does not diminish its status as positive law. The situation can be compared to a bank robber who does not comply with laws prohibiting robbery. His breach of the law does not make the law any less authoritative or positive. As Sohn asserts: "It is not the law that is soft, but the governments."[233] The second reason is that Brown considers the ontological status of positive law as necessarily secure to begin with. As Lauterpacht says cynically: "it would be better if there were less complacency in comparing the fanciful law of nature, which - it is said – is a matter of bare and arbitrary assertion, with positive law said to be clear and undisputed. For positive law is not always clear and undisputed. If it were, the function of the judges would be purely automatic."[234] Brierly confirms this in saying: "The act of the court is a creative act, in spite of our conspiracy to represent it as something less. Moreover, though it is not an arbitrary or capricious act, it is one in which different minds equally competent may and often do arrive at different and equally reasonable results."[235] It is in view of this creative aspect of law making that, in the end, as Brierly points out: "Natural law, or some principle like natural law by whatever name it may be called, never is excluded in fact, and never can be excluded in principle, either

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[230] Brown, 'Universal human rights: a critique', p. 108
[231] Brown, 'Universal human rights: a critique', p. 107, Brown's italics
[232] Richard Bilder, 'Rethinking International Human Rights: Some Basic Questions', Wisconsin Law Review, No. 171, 1969, p. 173
[233] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 13
[234] Lauterpacht, International Law and Human Rights, p. 103
[235] Brierly, The Basis of Obligation in International Law, p. 98

from the theory or the administration of law, however resolutely the jurist may banish it from his formal creed. It is the indispensable element of growth in law."[236]

There is thus no precise demarcation between what constitutes positive and natural law in international law, and accordingly the pursuit of a "strict positivism is a chimerical goal".[237] As Schachter points out: "the idea of an inductive, factual positive science of international law may be characterized more as a myth than a reality."[238] That "legal dogmatism" which saw international law during its early period as a pure jus dispositivum has been subjected subsequently to further critical analysis.[239] In a departure from the voluntarist tradition, the idea of positive law in a modern context accommodates also "the idea of law 'in force' and that of law 'effectively applied and caused to be observed'".[240] As Ago points out, "this idea, that there must be no other law besides that which has been positively formulated, has provoked and partly justified modern reactions in favour of natural law against positivist theories."[241] Even the staunch defender of positivism Weil, who asserts "the necessity of envisaging international law as positive law", accepts this mitigation of positive dogmatism in saying that in modern international law, the term "positivism..., of course, is not meant to imply that it should be regarded as an essential characteristic of international law that all its norms be 'posited' by 'formal sources' or result from precise normative facts without ever being the fruit of 'spontaneous formation'."[242] This mitigation of the legal dogmatism was intended, as Ago explains, "to complete the view of the legal phenomenon by bringing back into the field of law the part that had been arbitrarily separated from it and consigned to a vague kind of limbo. This return to the field of law of the part which seems to be the product of spontaneous germination and not of will or of a 'laying down', must be carried out with the full knowledge that this law, although differently expressed, actually appears no less clearly and really existing and operating than that which was laid down by special

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[236] Brierly, The Basis of Obligation in International Law, p. 8
[237] Schachter, International Law in Theory and Practice, p. 46
[238] Schachter, International Law in Theory and Practice, p. 37
[239] On the influence of legal dogmatism in relation to positive law, see Robert Ago, 'Positive Law and International Law', American Journal of International Law, Vol. 51, No. 4, Oct. 1957, pp. 703-704
[240] Ago, 'Positive Law and International Law', p. 710
[241] Ago, 'Positive Law and International Law', p. 728
[242] Weil, 'Towards Relative Normativity in International Law?', p. 421, Weil's italics

productive organs, and that it is therefore perfectly capable of being specified and known by legal science which is not a science for nothing."[243] Ross also affirms this need for a mitigation of positive dogmatism in saying that: "While the positivist theories prevailed in the 19th century, an even stronger reaction against them has set in the 20th century. The renaissance of natural law is often mentioned. Besides the two traditionally recognised sources, the existence of a 'third source' has been asserted as an expression of the natural principles of law ('general principles of law', 'the idea of justice' and the like). ... there is undoubtedly something right in this reaction. There are sources of law other than those positively formulated. Insofar one must agree with the naturalist theories."[244] However, in commenting on the mitigation of positive dogmatism Ago cautions: "if these reactions have been well received in their criticism of positivism because of its mistake, there is no need to loose sight once more of something that had been usefully specified, to confuse law with non-law, thus making legal science take a step backwards instead of forwards in order to correct this mistake."[245] Such a step backwards would be created, as Ross explains, by insisting on "'natural' (supersensual, a priori) sources of law."[246] It is the assertion of such sources which the epistemological and ontological critique of human rights foundationalism correctly questions. A reasonable mitigation of positive dogmatism should merely express, as Ross explains, "the socio-psychological reality that judicial decisions ... are also determined by spontaneous free factors of many kinds. There is an ambiguity in the term 'positivism'. It can be defined as 'what is based on experience' and 'what is formally established'. The reaction against positivism is formally justified with respect to the latter, but not with respect to the former meaning. A realistic doctrine of the sources of law is based on experience but recognises that not all sources are positive in the sense that they are 'formally established'."[247]

The inaccuracy of maintaining a dogmatic distinction between positive and natural law in relation to human rights becomes evident by considering the sources of international law as outlined in Paragraph I of Article 38 of the Statute of the International Court of Justice,

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[243] Ago, 'Positive Law and International Law', p. 729
[244] Alf Ross, A Textbook of International Law (London: Longmans, Green & Co., 1947), p. 95
[245] Ago, 'Positive Law and International Law', p. 729
[246] Ross, A Textbook of International Law, p. 95, Ross' parenthesis
[247] Ross, A Textbook of International Law, p. 95

namely treaties, custom, general principles and subsidiary means, such as judicial decisions and the teachings of legal scholars.[248] Custom and treaty have been historically grounded in legal positivism and voluntarism.[249] Yet, in the sources of general principles of law and judicial decisions, the idea of natural justice still holds sway. Schachter explains this intrinsic relation between general principles and natural justice in saying: "'Natural justice' in its international legal manifestation has two aspects. One refers to the minimal standards of decency and respect for the individual human being that are largely spelled out in the human rights instruments. We can say that in this aspect, 'natural justice' has been largely subsumed as a source of general principles by the human rights instruments. The second aspect of 'natural justice' tends to be absorbed into the related concepts of equity which includes such elements of 'natural justice' as fairness, reciprocity, and considerations of the particular circumstances of the case. The fact that equity and human rights have come to the forefront in contemporary international law has tended to minimize reference to 'natural justice' as an operative concept, but much of its substantive content continues to influence international decisions under those headings."[250] The continuing importance of natural law is also confirmed by Judge Sir Fitzmaurice's argument that there exists a "strong current of opinion holding that international law must give effect to principles of natural justice" and that "this is a requirement that natural law in the international field imposes *a priori* upon States, irrespective of their individual wills or consents".[251]

Ultimately though, Brown's emphasis on the intrinsic relation between human rights and natural law is correct, because in order to exercise a critique of 'the whole way of life of a

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[248] See also infra p. 97ff.

[249] As Kelsen says: "The custom by which international law is created consists in acts of states.", Kelsen, Principles of International Law, p. 418. For Kelsen the customary foundation of international law also explains the obligatory nature of treaty law, with the latter being merely a derivative: "That a treaty is a law-creating fact, that by a treaty obligations and rights are established, or, in other terms, that a treaty has binding force, is due to a rule of customary international law which is usually expressed in the formula pacta sunt servanda. This rule is the reason for the validity of treaties, and hence the 'source' of all the law created by treaties, the so-called conventional international law in contradistinction to customary international law. With respect to its reason of validity, the conventional international law is inferior to the customary international law. The latter represents a higher level in the hierarchical structure of the international legal order than the former.", ibid., p. 314

[250] Schachter, International Law in Theory and Practice, p. 55

[251] Sir Gerald Fitzmaurice, from his 'The Future of Public International Law' of 1973, quoted in Schachter, International Law in Theory and Practice, p. 55, Fitzmaurice's italics

society', "it is necessary to bring to bear the natural law position that general moral standards exist independently of the practices of any particular society."[252] Brown explains this intrinsic conceptual character of human rights by saying: "Rights established by positive law may be critical in the sense that they may allow one to argue that a particular social institution is not working in the way that it ought to, but they are less useful when, as is too often the case, a social institution is working exactly as intended, but the intention is itself oppressive. Positive legal rights provide no basis for an argument that the whole way of life of the society in which they exist may be oppressive, because, by definition, they are based on that way of life."[253] Yet, although the U.N. General Assembly arguably has transformed the natural law aspirations of the drafters of the Universal Declaration into positive international law, thus giving human rights a secure ontological status, and although the distinction between positive and natural law is difficult to maintain in international law, due to the continuing importance of natural law, Brown would nevertheless maintain that: "the international regime which attempts on a global scale to promote decontextualised human rights is engaging in a near impossible task."[254] On his view, it would be an international regime which is ill conceived. He is deeply sceptical of the effectiveness of the U.N.'s human rights project and believes that this failure relates to overambitious standard setting and a blithe unwillingness of human rights proponents to accept the political and philosophical difficulties which are inherent in the project. He asserts that: "Proponents of universal human rights are, in effect, proposing the delegitimation of all kinds of political regimes except those that fall within the broad category of 'liberal democracy'."[255] He questions whether "a majority of societies are actually capable of becoming liberal societies, at least in the medium run, and it is equally unclear on what moral authority those who require them to take this step can rely."[256] In echoing Walzer's notion of a thin universal morality, he thinks that we can at best assert a minimally conceived set of rights in a global context which may be prohibitive of "Hitler's Germany, Pol Pot's Cambodia, Amin's Uganda", but it would be vainglorious to assert more substantive hopes for global

[252] Brown, 'Universal human rights: a critique', p. 108
[253] Brown, 'Universal human rights: a critique', p. 108
[254] Brown, 'Universal human rights: a critique', p. 120-121
[255] Brown, 'Universal human rights: a critique', p. 121
[256] Brown, 'Universal human rights: a critique', p. 121

human rights proliferation.[257] Ultimately he thinks that we must acknowledge that the decision about what constitutes human rights is intrinsically connected to the particularity of a society: "Rights have no separate ontological status".[258] Akin to Rorty, he thinks that the human rights project has failed to realize that rights are intrinsically tied to their socio-cultural context. In our aspiratory projection of secular and liberal human rights values onto non-Western cultures we are not only imposing our values on cultures which do not necessarily appreciate them, but we are also acting incoherently in that we fail to grasp why human rights have been successful in the West to begin with. Thus, he asserts that human rights "are a symptom of this civilization and security, not a cause."[259] Beyond the confines of our parochial Western safety and freedom, Brown agues, we must resign ourselves to Rorty's method of telling sad stories.

Rorty's and Brown's ontological human rights critiques appear to undermine the mandate of human rights culture, though I shall go on to argue that Rorty's epistemological critique can also be used to support the idea of human rights. Let me first try to address Rorty's arguments before turning briefly to Brown's addendum which overlaps significantly with Rorty's critique. What unites both critiques is their denial of the legitimacy of the inherently partisan mandate of human rights as universally validatory critical rational standards. As Rorty says: "The bad peoples' problem is, rather, that they were not as lucky in the circumstances of their upbringing as we were. Instead of treating all those people out there who are trying to find and kill Salman Rushdie as irrational, we should treat them as deprived."[260] According to this line of argument, we could speculate that if only Rushdie's persecutors would have been fortunate enough to have read Rushdie's novels, or sad and sentimental stories, ideally about misunderstood novelists, then he wouldn't have anything to worry about. I doubt that an appeal to sentimental education makes Rushdie feel more secure. In view of Rorty's ontological human rights critique we appear to be left without a clinching rational argument against violators of human rights. Instead, we must paradoxically see the violators as 'victims' too, as

[257] Brown, 'Universal human rights: a critique', p. 108
[258] Brown, 'Universal human rights: a critique', p. 120
[259] Brown, 'Universal human rights: a critique', p. 120
[260] Rorty, Truth and Progress, p. 180

'victims' of their own cultural misfortune and their inadequacy of sentiment. Surely, sentimental education is of tremendous importance, but its progress is painstakingly slow and of little use for all those real victims which will have accumulated before sentiment will have permeated the minds of all those 'unfortunate' deprived violators. His relativist appeal to universal sentiment lacks immediate practical consequence. It resembles, as Wilson says, "a car without seat-belts; on hitting the first bump with ontological implications, the passenger's safety is jeopardized."[261] Rorty's relativism ends up pandering to that view which sees the traditional cultural community as the exclusive locus and generator of ethical rationality. Yet, as Booth says: "Why should 'culture' have primacy?"[262] Booth points out that a universal foundation for the rationality of human rights can indeed be coherently established if only we were to sufficiently acknowledge the existence of other often neglected ethical communities, primarily that of the victims which can be found in all cultures: "the ethical community of oppressed women, the ethical community of under-classes; the ethical community of those suffering from racial prejudice; the ethical community of prisoners of conscience; the universal ethical community of the hungry ... and on and on."[263] Rorty's relativism does not sufficiently acknowledge that human rights universalism can be ontologically grounded and rationally defended by acknowledging what Booth calls "the universality of human wrongs".[264] It is not the 'unfortunate' rationality of the violators which denies the humanity of their victims with which we should concern ourselves. Instead we should "ask the victims" everywhere and we will find universal consensus on the irrationality of human rights violations.[265] Only in this is Rorty correct, the idea of the universality human rights is ultimately emotive and grounded in our parochial sentimental education. But this parochialism is that of all those who find it deplorable to inflict wanton pain and hardship, to deny equality before the law, to restrict freedom of conscience and belief, and to stifle human progress. This parochialism is 'universal' in that it will resonate with victims and human rights idealists the world over. Yet, it is evidently also a non-universal

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[261] Richard A. Wilson quoted in Ken Booth, 'Three Tyrannies', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 62
[262] Booth, 'Three Tyrannies', p. 61
[263] Booth, 'Three Tyrannies', p. 61
[264] Booth, 'Three Tyrannies', p. 62
[265] Booth, 'Three Tyrannies', p. 56

parochialism as it is confronted with a fervent opposition to human rights which can be found all over the globe. The parochialism of human rights is opposed by the parochialisms of those who find it 'rational' to violate or deny human rights, or those who argue that we must respect such an outcome in the name of cultural tolerance. Thus in reply to Rorty's relativist objection, we must insist that the belief in human rights is not only served by telling sad stories, but we must also be willing to take a stand and draw a line which demarcates the limits of tolerance. Furthermore, Rorty even acknowledges that the West's liberal and secular culture has more to offer than mere sentimental stories. In commenting on Dewey's pragmatism, which on the whole he admittedly endorses, he writes: "First, *some* of the West's achievements – controlling epidemics, increasing literacy, improving transportation and communication, standardizing the quality of commodities, and so on – are not likely to be despised by anybody who has had experience of them. Second, the West is better than any other known culture at referring questions of social policy to the results of future experimentation rather than to principles and traditions taken over from the past. Third, the West's willingness to go secular, to give up on transcendence, has done much to make this second achievement possible."[266] These improvements and achievements are intrinsically linked to our parochial affirmation and protection of individual agency. In reply to Brown's Rortyan stance which asserts that human rights culture is the product and not the source of the safety and security of the West, it must be asserted that his argument is historically clearly mistaken. To illustrate this one only needs to point to the periods of strife, destitution, revolutionary unrest and social upheaval which have preceded and indeed caused all those constitutional enactments and other moments of legal innovation which have furthered the emergence of human rights in the West. The ideas of religious toleration and secularism emerged as a modus vivendi in the wake of the turmoil and incessant bloodshed caused by the wars which followed the religious schism caused by the Reformation. The French and American Revolutions were revolutions after all and the constitutions which they produced were not the products of safety and security, but rather violent assertions of freedom and independence. Improvements in social welfare across Europe were inspired by the glaring social

[266] Rorty, Truth and Progress, p. 196, Rorty's italics

destitution which the Industrial Revolution had initiated. The emergence of humanitarian rules for warfare during the late nineteenth century by virtue of the Hague Conferences was a result of an increasing weapons modernization causing ever greater casualty numbers and an arms race between the European powers which had taken on hitherto unknown proportions. The minorities provisions of the League of Nations were the product of that cataclysm which was the First World War, and, above all in relation to this enquiry, the Universal Declaration was inspired by the heinous denial of the human dignity and the civil and political rights of the victims of the holocaust and by the ravages of the hitherto biggest conflict witnessed in human history. In every example just mentioned, rights were inspired, enacted or enforced because of a desire and need for peace and security, and not as a consequence thereof.

Yet, Rorty's epistemological critique also strengthens the human rights project. His epistemological anti-foundationalism emphasizes that the idea of natural rights in the course of history has allowed us to become a 'flexible, protean, self-shaping animal' in the first place. Human rights has allowed us to ask Rabossi's question 'What can we make of ourselves?' without being given arbitrary, ignorant and dogmatic answers with which we must comply, and deviations from which have been historically all too often accompanied by brutal coercion. The idea of natural rights may not be philosophically defensible as propagated by the Enlightenment's essentialist beliefs in human nature, or a belief in 'Nature', or absolute truth, but it is defensible on the grounds that it preserves the openness of that social experiment which the totality of human existence represents. In other words, the epistemological 'foundation' of human rights is precisely its fostering of anti-foundationalism. This quasi-foundation, to be precise, protects the progress of human civilization. As Lauterpacht says: "In the fields of philosophy, law and ethics, there are few propositions, if any, which are capable of exact proof."[267] The very concept of liberal and secular human rights allows for the continuing critical discussion of philosophy, law and ethics in spite of all those who profess to know apparently unquestionable absolute answers. The importance of this political function of liberal and secular rights has also been emphasized by Rawls' giving greater importance to politics

[267] Lauterpacht, International Law and Human Rights, p. 103

rather than to metaphysics in his account of justice. In applying "the principle of toleration to philosophy itself", Rawls argues that for any conception of justice to function in a modern democratic society it "must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable conceptions of the good affirmed by the members of existing democratic societies."[268] It is in view of this open progress and toleration which human rights preserve that many academic critics of human rights universalism should remember that their very ability to critically discuss without fear of censorship or persecution is intrinsically dependent on that cultural environment which their comfortable position in a liberal and secular society provides for them. Cultural relativists argue that many people do not want human rights, but tend to forget that governments of oppressive and fundamentalist societies shun and prohibit critical discussion as it intrinsically undermines them, and it is patronizing to assume that inhabitants of these societies actually enjoy and thrive in this state of affairs. Liberal and secular rights promote toleration universally in that they apply to every individual, whereas the demands for tolerance put forward by cultural relativists who see human rights as the imposition of Western values often leave many individuals untouched, particularly the victims of illiberal and fundamentalist societies. That a defence of secular and liberal rights has become synonymous with Western culture is surely correct as a historical observation, but these rights are not necessarily intrinsically Western. To assert that a view of human progress grounded in these rights is exclusively Western misunderstands the contingency of human historical development. Liberal and secular rights merely happened to come to prominence in the West, but their relevance and appeal are surely universal. Rorty's pragmatism, in spite of his anti-foundationalist stance, actually provides us with a foundation for human rights because, in echoing Dewey, he reminds us that we should see "ourselves as just one more product of evolutionary contingencies, as having only (though to a much greater degree) the same sorts of abilities as squids and amoebas. Such a sense makes us receptive to the possibility that our descendants may transcend us, just as we have transcended the squids

[268] John Rawls, 'Justice as Fairness: Political not Metaphysical', Philosophy and Public Affairs, No. 14, 1985, p. 225

and apes."[269] The idea that our inherent nature as progressively evolving rational beings is best preserved and fostered through the political protection of liberal and secular rights is of tremendous importance for the perpetuation of the 'open society', whether domestic or globally. As Popper says: "Freedom of thought, and free discussion, are ultimately Liberal values which do not really need any further justification. Nevertheless, they can also be justified pragmatically in terms of the part they play in the search for truth. Truth is not manifest; and it is not easy to come by. The search for truth demands at least (a) imagination (b) trial and error (c) the gradual discovery of our prejudices by the way of (a), of (b), and of critical discussion." [270] For Popper liberalism was ultimately conducive to the preservation of the heroism of scientific enquiry, it was essential to our continued ability to critically discuss and evaluate philosophic arguments and scientific theories, our willingness to refute them. This allows us not to reach truth as some kind of given absolute, but to edge ever closer towards it, even if it shall forever remain beyond our grasp or comprehension, just as a hyperbola shall never touch the asymptotes. Liberalism allows us to agree and to disagree, and to revise our opinions, in order to "part as wiser men."[271] Thus, to ground the idea of human rights in the nature of our human agency also allows for what Booth calls an emancipatory conception of human rights, and he reminds us that "in Latin *emancipare* meant 'to release from slavery or tutelage'".[272] As Booth says: "Emancipation contains a theory of progress, but also recognizes that life is one thing after another. Because emancipation must be continuously contextual, because material and other conditions change, it has to be an open and flexible vision. In terms of practical politics it is better to use the adjective, as in *emancipatory* policies, which implies movement, rather than the noun *emancipation*, which implies a static state. The reality of emancipation is best likened to a political horizon: something to aim for, something that establishes perspective, but something that by definition can never be reached. Emancipation is not a state of being; it is the condition of becoming."[273]

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[269] Rorty, Truth and Progress, p. 196, Rorty's parenthesis
[270] Karl Popper, Conjectures and Refutations, (London: Routledge, 2002), pp. 473-474
[271] Popper, Conjectures and Refutations, p. 474
[272] Booth, 'Three Tyrannies', p. 40, Booth's italics
[273] Booth, 'Three Tyrannies', p. 41

## II.ii Substantive and Consensus-based Revision of Human Rights

A further criticism of the Universal Declaration is the question whether the parochial nature of the human rights conception is compatible with an affirmation of cultural pluralism in the first place. The universality of the Universal Declaration may be misconceived to begin with, which in turn would undermine its apparent supreme legal authority. The critique, which is related to criticisms of the epistemological and ontological foundationalism of natural law defenders, focuses primarily on the circumstance that, in spite of professed universality, the origins of the Universal Declaration were far from 'universal'. Many states, almost entire continents, were excluded from the drafting process and, arguably, their cultural perspectives were ignored. The charge can thus be made that the Universal Declaration is essentially a vehicle for the promotion of Western values. The charge also alleges that the human rights provisions of the Charter and the Universal Declaration must be seen as a historically contingent manifestation of the specific political aims of those powers which had just defeated the fascist Axis, but that these aims are hardly representative of all cultures and for all times.[274] Indeed, the Universal Declaration spells out rather unambiguously that the specific mandate of human rights culture is grounded in Western values. Nickel summarizes this mandate in saying: "In effect the Universal Declaration asserts that all humans have inalienable rights to freedoms and benefits that are enjoyed in the most developed and humane democracies. Its assertion is not merely that providing these things to all is a desirable goal or ideal; it is rather the much stronger claim that making these things available to all is obligatory."[275] Yet, Best points out, defenders of the Universal Declaration's value system and mandate must acknowledge the "extent to which humanitarian and human rights law fall short of arousing universal applause and acceptance", and that "resistance to human rights progress and even a confident counter

[274] For a discussion of the contingent nature of the Universal Declaration in view of the Second World War see Johannes Morsink, 'World War II and the Universal Declaration', Human Rights Quarterly, Vol. 15, No. 2, 1993

[275] James W. Nickel, 'Are Human Rights Utopian?', Philosophy and Public Affairs, Vol. 11, No. 3, 1982, p. 246

attack against it have been unmistakable".[276] Objections to the political and cultural values inherent in the Universal Declaration have been raised by Islamic leaders on the grounds that the current list of human rights is not representative of a large part of humanity. According to this critique, often voiced by populist or revolutionary Islamic leaders, the Universal Declaration promotes secularism in spite of the deep seated religious affinity of Islamic communities, and the Declaration's civil and political rights, they argue, are representative of an irresponsible materialism and the moral decay of Western individualism. The Asian critique focuses on the fact that communal values and societal harmony must be deemed to be of superior importance than the rights of the individual. The defenders of Asian values assert that a defence of Western individualism is incompatible with notions of state authority held across Asia. Similar arguments have been voiced by African leaders, who argue that the values inherent in the Universal Declaration do not represent African cultures and their long established traditions of political representation, decision making and social cohesion. The apparently universal values which the Universal Declaration aims to promote are primarily parochial secular and liberal ideals which in their contingent historical emergence were initially an exclusively Western cultural and intellectual development. Indeed, the very idea of the individual as an inherently rational, autonomous and possessive agent has emerged historically primarily in the Western hemisphere, and, as Donnelly points out, the ensuing "conception of human dignity, well-being or flourishing is, in a broad cross-cultural and historical perspective, extremely unusual."[277] Best provides an example of non-Western critiques of human rights in asking the question: "Will a decent Indian peasant paterfamilias really bless the bundle of rights which will enable his family to watch soap operas made in California and sex films from Holland?"[278] Best concludes that: "In the light of these trends, the universal reign of justice, so far as human rights go, seems immeasurably remote."[279]

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[276] Geoffrey Best, 'Justice, International Relations and Human Rights', International Affairs, Vol. 71, No. 4, Special Royal Institute of International Affairs 75th Anniversary Issue, Oct. 1995, p. 793
[277] Donnelly, 'The Social Construction of International Human Rights', p. 81
[278] Best, 'Justice, International Relations and Human Rights', p. 793
[279] Best, 'Justice, International Relations and Human Rights', p. 793

In view of these uncertainties, the "controversial part" of the human rights debate consists, as Bell argues, of a need "to specify the content of universal human rights".[280] To settle the controversy over what constitutes genuinely universal human rights appears to be of great importance for the human rights culture project, and, indeed, a significant part of the academic debate focuses, in line with this argument, on a conceptual revision of the notion of human rights. One can schematize this general pursuit of conceptual revision aimed at overcoming the inherent cultural parochialism of human rights into two influential strands: substantive revision and consensus-based revision. In essence, all revisionist projects argue that an improved theory and definition of the human rights conception could become conducive to a more widespread, even global, pragmatic acceptance and implementation of human rights culture. What differentiates these critiques and projects from the human rights agnosticism of Rorty, which eschews foundationalism, is their search for a 'foundation' of sorts, yet one which avoids the problematic epistemological and ontological dimension of the Enlightenment view of human rights underlying the Universal Declaration.

Substantive revision relates to the search for "a substantive account of human rights" which, in Griffin's words, "adds enough content to the notion of 'human' in the term 'human rights' to tell us, for any proposed right, whether it really is one – one that thereby supplies ... 'existence conditions' for a human right."[281] Yet, the inherent abstraction of substantive revision becomes politically inexpedient for the political mandate of human rights culture due to two reasons. Firstly, it is questionable whether a political organization such as the United Nations is pragmatically conducive to the search for a substantive account of human rights. The rational and objective decision making which would have to underlie the search for a genuinely substantive account of human rights transcends the limits of the United Nations as a political forum. As Alston points out: "the normative validity of rights recognized by the General Assembly cannot be made dependent upon their validity in terms of philosophical or any other supposedly

[280] Daniel A. Bell, 'Which Rights Are Universal?', Political Theory, Vol. 27, No. 6 (Dec., 1999), p. 849
[281] James Griffin, 'First Steps in an Account of Human Rights', European Journal of Philosophy, Vol. 9, No. 3, 2001, p. 307

'objective' criteria."[282] Secondly, and more importantly, substantive revision endangers the intrinsic partisan mandate of human rights culture. As Beitz says: "To hold that a substantive doctrine of human rights should be consistent with the moral beliefs and values found among the world's conventional moralities is to say something both more and different, and potentially subversive, of the doctrine's critical aims."[283] Substantive revision is politically vague because it is highly questionable whether concrete legal rights can be formulated in accordance with the necessary abstraction of this approach. As a consequence, in the absence of a consensus on criteria for substantive human rights, substantive revision also becomes politically obfuscatory for human rights proliferation. For example, Brown Jr.'s analysis of inalienable rights led him to conclude that the only kind of right which could indeed be described as fulfilling the criterion of universal inalienability, which could not be forfeited or overridden, was a general "right to protection".[284] Brown Jr. defines a 'general right to protection' as an "unconditional and inalienable right to institutions which provide general protection to all high-order goods and permit each individual member of the community to place the burden of proof upon those who would deny him his good or interfere with his pursuit of it."[285] It becomes apparent that, firstly, a right to 'general protection' thus defined is not necessarily reflective of the social practices of many non-liberal and non-democratic societies and governments, particularly in regards to the stipulated 'burden of proof' against arbitrary interference, and secondly that, abstract notions such as 'high-order goods' or 'primary social goods', to use the Rawlsian term, allow for radically different cultural interpretations regarding their content and priority in relation to each other. Cuba is an apt example of a country with a government which prides itself on the, apparently, successful provision of medical care which can be interpreted to constitute a 'high-order good'. Yet, at the same time the Cuban government violates civil and political rights, which allow for the enjoyment of other high-order goods in the first place, and which, from a liberal and democratic perspective, may well be deemed as more fundamental

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[282] Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', p. 617
[283] Beitz, 'Human Rights as a Common Concern', p. 274
[284] S. M. Brown Jr.., 'Inalienable Rights', Philosophical Review, 64, No. 2, 1955, p. 192-211. Shue's notion of basic rights is also of relevance here, though his defence of basic rights as a prerequisite for liberal rights differentiates him from substantive revisionists.
[285] Brown Jr.., 'Inalienable Rights', p. 210

than, or at least equal to, decent state-funded medical care. This leeway of interpretational divergence is a result of the circumstance that any substantive account of human rights has to be formulated in a highly abstract manner as long as the facts of cultural, ethical and political particularity remain predominant features of the human situation.
The necessary abstraction which any substantive account of human rights creates, becomes potentially obfuscatory to any legalistic mandate, because, as Nickel points out, "very abstract rights such as a 'right to protection' or a 'right to equal consideration' admit of radically different interpretations and hence are not of much use in political criticism".[286]

More problematic is consensus-based revision, which corresponds to the search for "an unforced consensus on universal human rights", because, to use Bell's words, "the interpretative approach – one that engages with different cultural traditions – is necessary for forging a desirable and feasible international human rights regime."[287] Such a revision could become detrimental to the politically parochial and partisan mandate of human rights culture which is grounded in a desire to protect individual agency. Is it not very doubtful that a cross-cultural consensus-based revision could lead to an 'unforced consensus' on legal human rights, due to an inability to accommodate either the perspectives of non-liberal and non-democratic societies and governments, or the views of, what Rawls terms, "decently hierarchical societies", or perhaps even the arbitrary postulates of outlaw governments and "non-decently hierarchical societies"?[288]
According to Bell, "parties engaged in a cross-cultural dialogue on fundamental human rights need to recognize that the final outcome may differ from their own starting points".[289] For Bell this is the price we have to pay for "the quest for a truly universal human rights regime".[290] However, what happens to a cross-cultural normative consensus on legal human rights when the parochial and partisan standards of human rights culture simply do not share sufficient common ground, and are at times wholly incompatible,

[286] Nickel, 'Are Human Rights Utopian?', p. 255
[287] Bell, 'Which Rights Are Universal?', p. 853
[288] This schematization of societies is based on Rawls' 'The Law of Peoples'. Rawls would obviously draw the line at decent hierarchical societies. See John Rawls, The Law of Peoples (Cambridge: Harvard University Press, 2002), pp. 59-77
[289] Bell, 'Which Rights Are Universal?', p. 852
[290] Bell, 'Which Rights Are Universal?', p. 852

with the archaic standards and practices of certain cultures? A further thinker urging us along the hazardous path of consensus-based revision is Taylor, who demands that we learn from the "moral universe" of other cultures and that we try to establish an "overlapping consensus", because only this approach will lead to a "genuine unforced consensus" on human rights.[291] According to Taylor, such an approach does not aim to "transcend cultural particularity", but rather it should make the participants "agree on the norms while disagreeing on why they were the right norms, and we should be content to live in this consensus, undisturbed by the differences of profound underlying belief."[292] According to this argument, those norms which are not conducive to an "overlapping consensus" and a "genuine, unforced agreement" cannot be termed human rights. There is, however, very little tacit agreement with the liberal and democratic rights postulated by human rights culture by non-liberal and non-democratic governments. As Ignatieff points out, the "syncretic fusion" of cultural values, has "never been entirely successful: agreement by the parties actually trades away what is vital to each side."[293]

The problematic consequences of the pursuit of cross-cultural consensus-based revision can be illustrated with the example of female genital mutilation. As Beitz argues, genital mutilation "is still practiced on as many as two million girls, at or before puberty, each year", and this practice "is entrenched in local cultures and permitted or required by local moral codes."[294] However, from a human rights perspective, as Beitz points out, "it would be hard to argue that interference to curtail female genital mutilation constitutes the application of a culturally neutral standard."[295] The standards of human rights culture are indeed far from neutral in relation to such practices, for when it comes to the routine mutilation of juvenile individuals then what is there to engage with, to consent to, or to be interpreted? The problematic impact of cross-cultural and consensus-based revision can also be aptly illustrated with the segregation and subjugation of women in many Islamic

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[291] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', in Joanne R. Bauer and Daniel A. Bell (eds.), 'Which Rights Are Universal? (New York: Cambridge University Press, 1999), p. 124

[292] Taylor, 'Conditions of an Unforced Consensus on Human Rights', p. 124

[293] Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton: Princeton University Press, 2003), p. 59

[294] Beitz, 'Human Rights as a Common Concern', p.272

[295] Beitz, 'Human Rights as a Common Concern', p. 272

societies. There is dispute over whether this cultural practice is intrinsic to Islamic doctrine, but it is undisputable that this practice is being asserted as legitimate by many authoritative modern interpretations of Islam.[296] As Beitz argues: "There is, for example, no presumption of equal treatment or equal protection of law, no protection against forced marriage, and either required or permitted forms of gender discrimination (e.g., mandatory veiling and sexual seclusion and segregation). To the extent that these elements are embodied in the public law and legally sanctioned practices of Islamic states, such as Iran and Pakistan (or for that matter Saudi Arabia), there is clear conflict with the requirements of international human rights doctrine, and pressure to conform to these requirements will be considered partisan."[297] From a human rights perspective which aims to protect individual agency from arbitrary governmental or social interference, what kind of 'common ground' is there to be found on the issue of the subjugation of women which certain Islamic traditions view as ordained by God? Once human rights are espoused, then such practices must be judged immoral and illegal.

The argument is often made that we must tolerate such practices because to prohibit them would violate other human rights norms devoted to privacy, such as freedom of association, freedom or religion, the right to raise a family, etc.. It could also be argued that societal gender discrimination and practices such as female genital mutilation are not violations of human rights by the state, and that human rights are primarily rights addressed against violations by the state. Accordingly, it is questionable to which extent wide spread and deep seated societal practices of the subjugation or mutilation of women fall within the purview of international law. Under current international law, certain prohibitons which are entailed by human rights provisions, such as laws against genocide, laws against racial non-discrimination, laws against crimes against humanity, and laws against trade in slaves and piracy, are generally considered to impose a binding legal responsibility on all states to ensure that these prohibitions are observed by every citizen, whereas prohibitions of gender discrimination do concurrently not impose such

[296] Beitz, 'Human Rights as a Common Concern', p. 271
[297] Beitz, 'Human Rights as a Common Concern', p. 272

obligations.[298] One could argue that gender discrimination is a violation of Article 5's prohibition that no individual "shall be subjected 'to torture or to cruel, inhumane or degrading treatment', but this human rights provision is generally understood to be explicitly directed against governmental action and it does not mandate a state's responsibility to prohibit private acts in violation of this human rights provision.[299] However, as Schachter points out: "Yet, even in a case of this kind, the State's responsibility to prevent private acts of torture may be implied under a duty of due diligence."[300] Furthermore, under the 1979 Convention on the Elimination of All Forms of Discrimination against Women the parties agreed in Article 2 to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination'. And Article 5 obliges the parties '(a) To modify the social and cultural patters of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either sexes or on stereotyped roles for men and women.'[301] In view of the internationally ratified conventions against gender discrimination, as Schachter explains: "it is hard to maintain that a State which is legally obliged to act against gender discrimination is not under a duty to take appropriate preventive and remedial action against non-State offenders."[302] In principle, states are thus clearly under an obligation to remedy societal discriminatory practices, but in actual practice, as Best points out: "Less good news is that those acceptances were accompanied by a mass of reservations, wherein states indicated their true feelings and practical intentions."[303]

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[298] See Brownlie, Principles of Public International Law, p. 515
[299] See Schachter, International Law in Theory and Practice, pp. 340-341
[300] Schachter, International Law in Theory and Practice, p. 341
[301] 1979 Convention on the Elimination of All Forms of Discrimination against Women; http://www.unhchr.ch/html/menu3/b/e1cedaw.htm
[302] Schachter, International Law in Theory and Practice, p. 341
[303] Best, 'Justice, International Relations and Human Rights', p. 790

In view of the political and partisan mandate of the Universal Declaration, the case would perhaps appear differently if educated adult and compos mentis women would choose to have their genitals mutilated, or if educated adult and compos mentis women would choose Islamic gender oppression voluntarily as a matter of religious conviction or as their personal and private 'life style'. I venture to guess that a large majority of educated, adult and compos mentis women would not choose to abide by such practices, provided that they were given the opportunity to form an educated choice. However, in reality such practices are seldom the consequence of a conscious and voluntary contractual decision by consenting educated female adults, but rather a direct accumulative consequence of an often traditional institutionalized gender inequality before the law and an unequal protection under the law. From the perspective of the parochial and partisan liberal mandate of the human rights conception, is it not presumptuous to argue that a women has been treated with the kind of respect which we deem human agency to deserve, when she has been subjected to discrimination since birth, when she has been denied equal access to education and political participation throughout her development, and when she has been relentlessly taught and conditioned to accept her subjugation as divinely preordained, even as rational and reasonable? How could we possibly tolerate or consent to arbitrarily depriving the females of our species of access to education, of the means to develop economic independence, of political participation, of the fundamental means to become an autonomous individual and the critical capacity to reach independent and educated decisions? Any social practice which denies the autonomous moral personality and the critical capacity for political membership of the females of the human species is clearly arbitrary and deplorable from the perspective of the mandate of human rights culture. As Best says: "human rights philosophy regards women as no less individually distinctive, unique and mentally capable than men. Human rights law asserts the equality of the sexes."[304] It is also of interest to observe how the U.N. appeared united in its condemnation of, opposition to and sanctioning of racial discrimination in South Africa, whereas the organization appears inert on gender discrimination. Are they not both arbitrary forms of discrimination and equally repugnant in their violation of human rights? And is gender discrimination as condoned by many states not a gross and

[304] Best, 'Justice, International Relations and Human Rights', p. 790

systematic violation of human rights, and thus even a violation of that minimal consensus which exists of human rights norms in customary and general international law?

Do human rights advocates share sufficient common ground with cultures which not only condone but also fervently adhere to such non-liberal and undemocratic practices so as that we can conduct "an open-minded cross-cultural dialogue".[305] Parekh, for example, believes that: "It is both possible and necessary to develop a body of non-ethnocentric universal values. This is best done by means of an open-minded cross-cultural dialogue in which participants rationally decide what values are worthy of their allegiance and respect."[306] Parekh aims to steer clear of the epistemological and ontological difficulties of human rights foundationalism which, he argues, is implicit in defences of the notions of dignity, agency and other assertions of "the moral evolution of the human race".[307] Questioning the attainability of a lowest common denominator agreement on what constitutes human dignity, he grounds his optimism instead on the possibility of procedural political agreement and in an attempt to reach a "regulative universalism".[308] Parekh asserts that: "Respect for human dignity requires that we should not humiliate or degrade others or require them to do demeaning work. What constitutes humiliation, degradation or demeaning work, however, varies from society to society and cannot be universally legislated."[309] Parekh asserts that our concern "is not to discover values, for they have no objective basis, but to agree on them. This is not a matter of teasing out the lowest common denominator of different cultural traditions, for such a commonality might not exist or be morally unacceptable. Values are a matter of collective decision, and like any other decision it is based on reasons. Since moral values cannot be rationally demonstrated, our concern should be to build a consensus around those that can be shown to be rationally most defensible."[310] Yet in the context of cultural relativism, the question arises: 'Rationally most defensible' according to whose rationality? Let us not forget that what may seem rational from the parochial perspective of human rights may not appear

[305] Bikhu Parekh, 'Non-ethnocentric universalism', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 158
[306] Parekh, 'Non-ethnocentric universalism', p. 158
[307] Dunne and Wheeler, 'Introduction', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 7
[308] Parekh, 'Non-ethnocentric universalism', p. 158
[309] Parekh, 'Non-ethnocentric universalism', p. 151
[310] Parekh, 'Non-ethnocentric universalism', p. 140

rational to differing parochialisms of other cultures or world views of different particularity. For example, amputating the right hand of a thief appears as perfectly 'reasonable' to many Muslim societies, for the severity of punishment is based on the 'rational' argument that, as An-Na'im says, "it is in fact extremely lenient and merciful in comparison to what the offender will suffer in the next life should the religious punishment not be enforced in this life".[311]

From the secular perspective of human rights it is crystal clear that such practices are not only abhorrent but also unforgivably irrational.[312] Once we start to consider this or that vision of divinity or the afterlife, of which there are quite a few, as a rational criterion for the assessment of the nature and severity of legal punishment, then any kind of punishment could be made to appear as 'rational'. Once we abandon the intrinsically secular character of the human rights conception, then we might as well sacrifice virgins so as to avert natural disasters. Yet, An-Na'im argues that there is no necessary discrepancy between the practice of amputation for theft by Muslim governments and the prohibitions against such practices as set out in Article 5 of the Universal Declaration and Article 7 of the International Covenant on Civil and Political Rights, that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment'.[313] In the end, from the perspective of orthodox Islam the practice is perfectly rational and neither cruel, nor inhuman or degrading. It is actually 'beneficial' for the offender. However, as Dunne and Wheeler point out: "But if the amputation of limbs is consistent with universal human rights norms, then where does concession to cultural diversity stop? If the regime is to have any normative force, it must provide an independent moral standard which is not

[311] Abdullahi Ahmed An-Na'im, 'Towards a cross-cultural approach to defining international standards of human rights: the meaning of cruel, inhuman or degrading treatment or punishment', in Abdullahi Ahmed An-Na'im (ed.), Human Rights in Cross-Cultural Perspectives: A Quest for Consensus, (Philadelphia: Philadelphia University Press, 1992), p. 35

[312] A similar case could be made against the death penalty, though I wonder whether such a case could be made on the grounds that it constitutes cruel and unusual punishment. Surely stoning or hanging adulterous women is more cruel than sentencing a vicious cold killer to death. Yet, in the end, the death penalty must be opposed on epistemic grounds, for it is an all too final judgement not taking sufficient account of human fallibility. Bearing in mind possible miscarriages of justice and falsity of evidence such a final judgement must be opposed. Even in the U.S. where all death sentences are automatically submitted to an appeals court, there is nothing which absolutely rules out two successive miscarriages of justice, or the surfacing of evidence after an execution.

[313] An-Na'im, 'Towards a cross-cultural approach to defining international standards of human rights', p. 41

reducible to cultural particularism. The case of Koranic punishments challenges advocates of cross-cultural dialogue. Whilst such a dialogue would provide an opportunity for Islamic societies to justify their legal practices as being in accord with internationally agreed human rights standards, conversation requires that the participants be open to changing their practices. However, states endorsing Islamic law have been reluctant to reflect critically on their religious practices and this has prevented any meaningful cross-cultural dialogue."[314] In the opinion of this student, the 'reluctance to reflect critically on religious practices' by sharia practicing governments and cultures is a result of the circumstance that such practices would have to seize upon sound rational and critical reflection, at least when viewed from the perspective of that parochial rationality which deems the protection of individual agency through human rights as a worthwhile end. And 'the opportunity to justify their legal practices' has not been taken up because such practices cannot possibly be coherently justified under any currently ratified international agreement on civil and political rights. Human rights, as Best says: "are incompatible with any religion which equates the rule of law with the rules of religion, and denies to those born into that religion the rights to question it and to depart from it. This right was first formulated precisely to protect persons against that sort of spiritual dictatorship in Christian lands and there are obvious difficulties (to put it no more strongly) about its acceptability in some Muslim lands now."[315]

Should we then jettison all those basic liberal and democratic rights which do not comply with the restrictive and obfuscatory criteria of an 'overlapping, genuine and unforced consensus'? What would remain of the partisanship of the human rights conception? Consensus-based revisionists would make us think that an insistence on liberal and democratic rights, as Bell says, "is disrespectful, because it treats nonliberal cultures as mere means for the promotion of liberal views and forecloses the possibility of learning from other cultures. More pertinently, perhaps, members of nonliberal cultures will not take kindly to the proposal that their views should be subordinated to Western liberal

[314] Dunne and Wheeler, 'Introduction', p. 12-13
[315] Best, 'Justice, International Relations and Human Rights', p. 790. Best's parentheses

(more precisely, American) ideas about the content of fundamental human rights."[316] In my opinion, Bell's stance, though surely not intended as such, could even be used to excuse all those cruelties in spite of which the human rights conception has been postulated and fought for. Slave traders and masters did not take kindly to proposals that they should abandon their horrific practice, nor did the colonial powers take kindly to proposals that they should relinquish their material exploitation, nor did the Nazis take kindly to proposals that they should stop killing millions of 'sub-humans', nor did nor did the South African or Rhodesian proponents of apartheid take kindly to proposals that non-whites should be granted equal status. Bell's insistence that "the attempt to bring the rest of the world around to American-style civil and political rights will be doomed from the start" can only be countered with the selfsame partisan defiance which has liberated individuals historically the world over due to an international insistence on liberal values.[317]

In their aim of trying to establish a normative universalism whilst steering clear of both foundationalism and an unashamed defence of liberal and secular parochial values, consensus-based revisionists, I believe, embark on a forlorn venture. This can be demonstrated with Parekh's insistence that we ought to "generate a rational consensus that can be fed into international gatherings"[318]. Parekh believes that a cross-cultural rational debate would allow us to focus on certain "human universals or universal human constants" which can be established by virtue of "critical reflection on the beliefs and practices of different societies".[319] Yet, does not the assumption of our being able to 'generate' human 'universals' or 'constants' imply a foundation of sorts? Parekh however insists that he avoids the foundationalist pitfall because "human universals form the basis of our conception of what human beings are like, which is not the same as a conception of human nature".[320] He claims that his supposed "universals do not entail values, for that is a matter of decision", but he problematically maintains that: "Like all decisions, our

[316] Bell, 'Which Rights Are Universal?', p. 852, Bell's parenthesis.
[317] Bell, 'Which Rights Are Universal?', p. 852
[318] Parekh, 'Non-ethnocentric universalism', p. 140
[319] Parekh, 'Non-ethnocentric universalism', p. 142
[320] Parekh, 'Non-ethnocentric universalism', p. 142

decisions as to what values to live by involves a choice between different values."[321] Parekh's insists on cross-cultural 'critical reflection', but for any process of critical reflection on culture to function it needs to be grounded in some kind of value system, some kind of notion of right and wrong. The very notion of critical reflection necessitates judgement, which is not the same as mere consensus. His ambiguous and unsuccessful denial of foundationalism in the name of cultural tolerance becomes evident in his discussion of some non-Western critiques of human rights. On the one hand, he asserts that "since every society enjoys the moral freedom to interpret and prioritise the agreed body of universal values, we cannot condemn its practices simply because they are different from or offend against ours."[322] On the other hand, he insists that some "practices might not be so easily explained and justified, and then we should ask the society concerned to justify itself."[323] Does not Parkeh adopt the very foundationalism and parochialism which he desires to eschew when he judges some forms of Islamic punishment as "deeply flawed"?[324] Similarly, he asserts that: "we should not ask the abstract and misleading question as to whether East Asians have a right to live by their values, but rather what these values are and if and how they offend against the kinds of universal values discussed earlier."[325] He concludes that some East Asian objections should be allowed to influence the conceptual revision of human rights, whereas others, in particular the Chinese objections, are "self-serving and suspect".[326] Thus, in the end Parekh's venture becomes contradictory as he will have to subscribe to either some kind of foundation or a parochial defence in spite of his desire to avoid both. In my opinion, Parekh's stance could only be coherently maintained if the consensus-based search for human rights would become the mere result of an inter-cultural equal voting procedure on an acceptable content of human rights, the outcome of which may well spell doom for the intrinsic partisan, liberal and secular mandate of human rights as critical standards.

[321] Parekh, 'Non-ethnocentric universalism', p. 142
[322] Parekh, 'Non-ethnocentric universalism', p. 153
[323] Parekh, 'Non-ethnocentric universalism', p. 153
[324] Parekh, 'Non-ethnocentric universalism', p. 153
[325] Parekh, 'Non-ethnocentric universalism', p. 155
[326] Parekh, 'Non-ethnocentric universalism', p. 158

The approaches of substantive and consensus-based revision fail to sufficiently acknowledge the inherently political, parochial and partisan nature of the human rights conception's aim of protecting and fostering individual agency. As Best says: "the core of our idea of human rights is in some sense individualist" and, as a consequence, "the value affirmed in the heart of our idea of human rights is a universal one".[327] Best summarizes this core idea with clarity: "This scheme of rights and freedoms is to enable individuals to become and to be fully themselves – to fulfil capabilities, exercise talents, and so on – by motion from inside, not pressure from without. The assumption is that each of us is a moral being, essentially distinctive and unique. When the human rights instruments speak (as they repeatedly do) of the 'human being', they mean the unique human individual (not exclusively a 'Western' concept, I hasten to say) and what they are doing is to follow the path cleared in (what historically is a Western phenomenon) Anglo-American constitutional history: they are liberating adult individuals from compulsion as to what they shall believe in the way of religion, they are freeing those supposedly moral beings to believe as much or as little as they may choose, they are affirming that society and the state can hold together without religious and ideological uniformity, and they are siding with the political philosophies which admit the principle that the state is made for human individuals, not vice versa. They constitute the individual human person as the basic building block of society and politics."[328] This belief which is essential for the individualist core of our idea of human rights, however, is currently certainly not of a global inter-cultural and inter-governmental nature. The hope for a successful consensus-based and cross-cultural revision which does not push to a breaking point the intrinsic secular and liberal mandate of human rights is currently rather ill founded. As Howard says, international political aspirations necessitate "a degree of mutual confidence, a homogeneity of values and a coincidence of perceived interest."[329] The circumstance that

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[327] Best, 'Justice, International Relations and Human Rights', p. 789

[328] Best, 'Justice, International Relations and Human Rights', pp. 789-790. Best's parentheses. Equally, Donnelly argues that: "The core of the human rights commitment to individual equality leads 'naturally' to an emphasis on individual autonomy. If one is equal to others, they have no right to force you to comply with their ideas of what is right and proper – or more precisely, they may not force on you ideas of right that treat you as less than an equal moral agent. In fact, it is difficult to separate the 'natural' moral equality of individuals from the autonomy of these equal persons.", Donnelly, 'The Social Construction of International Human Rights', p. 97

[329] Michael Howard, The Invention of Peace – Reflections on War and International Order (London: Profile Books, 2001), p. 132

these factors are currently not of a global inter-cultural and inter-governmental nature when it comes to human rights does not bode well for the Universal Declaration's role as a common standard of achievement. Yet, this assessment should not make our pursuit of global human rights proliferation turn towards compromises which could detrimentally undermine the critical and partisan mandate of human rights, but instead it should motivate us to pursue the politics of human rights with greater vigour. As Beitz explains: "Whether a standard should be accepted as a ground of action, and a fortiori as a ground of international action, does not turn on whether the standard is a part of, or implied by, existing conventional moralities. Actual agreement is too strong a condition to impose on any critical standard, and I believe it misrepresents the motivating idea of human rights. To say that human rights are universal is not to claim that they are necessarily either accepted by or acceptable to everyone, given their other political and ethical beliefs. Human rights are supposed to be universal in the sense that they apply to or may be claimed by everyone."[330] Universality, thus understood, is a logical and necessary conceptual consequence of human rights. And in asserting the inalienability of certain rights, the conception by its very essence sets a limit which must not to be transgressed, and because individuals possess these rights qua individual the conception is by definition universal in scope.

The necessary level of abstraction according to which any substantive account of human rights would have to be formulated renders it inexpedient as a pragmatic political remedy against the inertia of human rights implementation, and the irreconcilability between the parochial and partisan standards of human rights culture and certain non-liberal and non-democratic cultures renders any consensus-based accounts detrimental to the central aim of human rights, the protection and fostering of individual agency. The imposition of substantive and consensus-based criteria on the human rights conception would not lead to increased conceptual soundness, but, in the case of the former approach, towards political obfuscation, and in the case of the latter, towards a distortion of the conception beyond recognition. In view of these difficulties, I argue that, the human rights project as a politics should not pander to the philosophic pursuit of substantive revision. And in

[330] Beitz, 'Human Rights as a Common Concern', p. 274

view of the irreconcilability of human rights with non-liberal and non-democratic pursuits of the 'Good Life', we should firmly oppose consensus-based revision. This stance, however, is not intended to suggest that the philosophical challenge of trying to provide an ever more substantive account of human rights is not commendable from a heuristic perspective, or that we should not practice the greatest amount of possible cultural and political tolerance, or that there is nothing to be learnt from non-liberal cultures. Indeed, my critique of substantive and cross-cultural revision is merely of a contingent nature, because the 'core of our idea of human rights' may one fine day have become so widespread as that human rights adherence will become practiced by a large majority, or perhaps even all governments and peoples, as opposed to the current political situation in which the routine violation of human rights is practiced by many governments and many cultures. The global 'community' may well one fine day achieve sufficient harmony so as to reach a truly common normative and procedural conviction which would allow for a successful substantive account of and a cross-cultural consensus on human rights. For now though, these projects must be deemed as politically inexpedient for the achievement of global human rights proliferation and implementation due to their obfuscation and undermining of the human rights mandate.

### II.iii International Law Revision

The idea of human rights was arguably alien to the field of international law until the middle of the twentieth century. Just as human rights evolved initially to ensure a tolerant pluralist domestic society, so the Westphalian state system evolved initially to ensure a tolerant pluralist international society. Yet, whereas the former's function was best ensured by the formation of a strong hierarchical and constitutional legal system, the latter's function was historically primarily ensured by the formation of an essentially decentralized and voluntarist legal system. Before discussing the impact of the U.N. Universal Declaration of Human Rights on international law, it will serve us well to emphasize those functional characteristics which international law has acquired in the

course of its historical formation. As Perassi says, "the necessity which determined it is the first and original source of all law".[331]

International law has evolved as a horizontal and voluntarist legal system because the emergence of sovereign independence and equality in the wake of Westphalia necessitated an "instrument for the regulation of a pluralistic, heterogeneous society".[332] This requirement has from the onset delineated the primary purpose of international law, namely "to ensure the coexistence - in peace, if possible; in war, if necessary – and the cooperation of basically disparate entities composing a fundamentally pluralistic society."[333] As Weil says, coexistence and cooperation are the "twin roots of international law". [334] Accordingly, the dual necessity of international law was firstly "to enable these heterogeneous and equal states to live side by side, and to that end to establish orderly and, as far as possible, peaceful relations among them", and secondly "to cater to the common interests that did not take long to surface over and above the diversity of states"[335] This dual necessity also delineated its "two essential functions: on the one hand, to reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states …; on the other hand, to serve the common aims of members of the international community."[336] On the newly established pluralist plane after Westphalia there emerged several "general principles derived from the specific character of the international community" which are considered to constitute "necessary principles of coexistence".[337] These principles are "*pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of nations."[338] In essence, these rules are a logical consequence of the pluralist state system established by the Westphalian Peace. Yet, from a realist perspective it was primarily the notion of a balance of power which served to reduce anarchy whilst preserving the independence of newfound sovereignty. In addition, the global increase in commercial relations and a

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[331] Perassi quoted in Ago, 'Positive Law and International Law', p. 703, n. 27
[332] Weil, 'Towards Relative Normativity in International Law?', p. 418
[333] Weil, 'Towards Relative Normativity in International Law?', p. 418
[334] Weil, 'Towards Relative Normativity in International Law?', p. 418
[335] Weil, 'Towards Relative Normativity in International Law?', p. 418
[336] Weil, 'Towards Relative Normativity in International Law?', pp. 418-419
[337] Schachter, International Law in Theory and Practice, p. 53
[338] Schachter, International Law in Theory and Practice, p. 53, Schachter's italics

corresponding need for global infra-structure lead to an increase in treaty law and paved the way for pragmatic internationalism in order to allow for the fulfilment of the common aims of sovereign states. It was in view of these essential functional principles of international law that the legalized hegemony of the Concert of Europe proved contentious, but arguably this hegemony also furthered the progress of international institution building. In the end, the Concert's hegemony could not be sustained in view of the essentially pluralist and horizontal character of international law and the Westphalian principles resurfaced with vigour during the late nineteenth century. As opposed to the short-term advantages of the pragmatic expediency of legalized hegemony, the Westphalian tenets of equality and sovereign independence appeared to be fundamental and necessary for the long-term preservation of pluralist international relations and cooperation, which as Lande says, "conforms with the essential character of our international society".[339] Yet, bearing in mind the uneven power distribution on the international plane, the period of the Concert also demonstrated that international institution building necessitates the benediction of the Great Powers, and the formation of the League and the Charter systems were heavily influenced by this realization. However, in contrast to the 'legal usurpation' of the Concert, after The Hague the Great Powers had to accommodate the principles of the equality and independence of states. The formation of the League and the U.N. were marked by this tension between legal equality and legalized hegemony, and this circumstance also delineated the structure of both organizations. Thus, by the twentieth century, the instrumental nature of the Westphalian principles for the preservation of coexistence and common aims was a firmly established aspect of international law and this was confirmed by the Permanent Court of International Justice's influential dictum in the S.S. Lotus case of 1927.[340] In explicating the "very nature and existing conditions of international law", the Court stated that

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[339] Adolf Lande, 'Revindication of the Principle of Legal Equality of States, 1871-1914, II', Political Science Quarterly, Vol. 62, No. 3. (Sep., 1947), p. 417

[340] The case concerned the collision between the French steamer S.S. Lotus and the Turkish steamer Boz-Kourt at high sea and resulted in the loss of the latter and eight Turkish lives. The Turkish government initiated criminal proceedings against both captains when the S.S. Lotus arrived in Constantinople. As the ship was at high sea, the criminal proceeding against the French captain Demons under Turkish criminal law were contended by the French to be in violation of the principles of international law and reparations for Demons were sought. It was in this context that the Court explicated the principles of international law. The Court decided in favour of Turkey.
See http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/

international law was established "in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[341]

With the idea of an authority above states having been gradually rejected during the historical formation of international law since the Treaty of Westphalia, voluntarism emerged as an important safeguard for the preservation of pluralist independence. The voluntarist nature of international law is "a logical consequence of sovereignty", and, arguably, without this feature "there could be no durable operative system of law".[342] In the absence of a superior authority in the international legal system "acceptance of the system is in itself a plausible basis for the obligation to abide by the particular rules valid in that system".[343] It is in this sense that "'formal sources' do no exist in international law. As a substitute, and perhaps equivalent, there is the principle that the general consent of states creates rules of general application."[344] In contrast to the legislative, judicial and coercive mechanisms which characterize constitutional legal systems, as Brownlie points out, "no such machinery exists for the creation of rules of international law".[345] In international law, as explained in Akehurst's, there exists "no authority to adopt universally binding legislation and no compulsory jurisdiction of international courts and tribunals without the consent of states. In this system the same subjects of international law that are bound by international rules and principles have created them themselves."[346] That voluntarism is a fundamental principle of international law was also confirmed by the S.S. Lotus dictum: "International law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will".[347]

In view of the circumstance that voluntarism and decentralization constitute important functional aspects of the international legal system intended to preserve the equality and

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[341] http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/, p. 14
[342] Schachter, International Law in Theory and Practice, pp. 10-11
[343] Schachter, International Law in Theory and Practice, p. 11
[344] Brownlie, Principles of Public International Law, p. 2
[345] Brownlie, Principles of Public International Law, pp. 1-2. See also Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 3
[346] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 35
[347] http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/, p. 14

independence of its subjects, we must also acknowledge that "religious and ideological neutrality are inherent in the concept of international law" and "necessary to guarantee the coexistence of heterogeneous entities in a pluralistic society."[348] This requirement was expressed famously in Vattel's assertion that: "Nations treat with one another as bodies of men and not as Christians or Mohammedans."[349] Equally, Guggenheim argued that international law is "lay, secularized of necessity; it cannot be otherwise, considering the variety of moral and religious conceptions featured by the different societies making up the international community."[350] Once these necessities are acknowledged, then the functional nature of the legal positivism of international law becomes also apparent. The emerging international law after Westphalia was considered to be composed of natural law as well as the express will of states, and the idea of positivism served initially primarily to ensure the preservation of voluntarism, and thus independence. The departure from natural law towards an exclusively positive international law was initiated during the nineteenth century by "a new school of thought, which quarrelled with the possibility of considering any principle of jus naturale as law or, at any rate, deduced by reason, came to see positive law as the only true law and therefore the only legitimate object of study for legal science."[351] It is in this spirit that Austin asserted: "The matter of jurisprudence is positive law..."[352] As Schachter explains: "the competing ideas of natural law based on moral and philosophic conceptions were increasingly perceived as irrelevant to the political order of sovereign States. It had become evident to international lawyers as it had to others that States, which made and applied law, were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual method used by States to give effect to their 'political wills'. In this way, the powerful ideas of positive science and State sovereignty were harnessed to create a doctrine for removing subjectivism and morality from the 'science' of international law. It was intended to make international law realistic and definite. It satisfied those concerned with the realities of State power and

[348] Weil, 'Towards Relative Normativity in International Law?', p. 420
[349] Quoted in Weil, 'Towards Relative Normativity in International Law?', p. 420
[350] Quoted in Weil, 'Towards Relative Normativity in International Law?', p. 420
[351] Ago, 'Positive Law and International Law', p. 696. Importantly, Ago also states that: "The idea that it is derived from the philosophical school of the same name is not correct, and it even expressly denied any link with that school.", p. 696
[352] Quoted in Ago, 'Positive Law and International Law', p. 696, n. 14

the importance of sovereignty. It also met the intellectual requirements of the analytical theorists of law who sought to place jurisprudence on scientific foundations."[353] Legal positivism, as De Visscher confirms, "was an idea calculated to endow legal techniques with a high degree of security, all external relations being focused at one point of imputation – a condition eminently favourable to the precise definition of obligations and to the organization of responsibilities."[354] It constituted a "reaction against a deformed and sterile law of nature", and to this extent the theory "had the indisputable merit of offering a clear and generally true picture of international relations".[355] Historically, this intellectual shift towards an exclusively positive international law also chimed with and was perpetuated by the rising force of nationalism. As De Visscher says: "Voluntarist positivism attained its full rigor and its narrowness only in the course of the nineteenth century when national movements had multiplied tenfold the power and exclusiveness of sovereign States. ... Doctrine not only made the State sole subject of all norms, but regarded the will of the State as their exclusive source."[356] Thus, the positive aspect of international law serves two important functions. One the one hand, it preserves the intellectual vigour of a scientific approach to international law in contrast to natural law. The latter, as Akehurst's states, "being incapable of verification ... is suspect in a scientific and secular age."[357] On the other hand, legal positivism fulfils an important social function in that it preserves voluntarism and as a consequence the pluralism of the international society. As Weil asserts, without a strict adherence to positivism "the neutrality so essential to international law *qua* coordinator between equal, but disparate, entities would remain in continual jeopardy."[358]

The fact that international law did evolve as a voluntarist, positive and horizontal legal system also explains why it is not centrally concerned with the domestic justice of governments. Indeed, as Franck says, "legitimacy is the dominant and perhaps sole factor

[353] Schachter, International Law in Theory and Practice, p. 36
[354] De Visscher, Theory and Reality in Public International Law, p. 21
[355] De Visscher, Theory and Reality in Public International Law, p. 55
[356] De Visscher, Theory and Reality in Public International Law, p. 21
[357] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 16
[358] Weil, 'Towards Relative Normativity in International Law?', p. 421, Weil's italics

in the international system capable of creating a genuine sense of obligation."[359] In international law a government is legitimate when it has effective control over its territory and when it is capable of compliance with legal rules established by treaty or custom. As Franck says: "In the *domestic* legal system of nations, justice is seen to join legitimacy in exerting a pull towards voluntary compliance. That is, persons tend to be more willing to obey laws when those laws have been enacted, applied and interpreted legitimately, in accordance with agreed notions of right process and *when the rules are seen to promote fairness in the distribution of rights, entitlements, benefits and duties*. By contrast, the *international* system differs from the domestic legal order of states not only because of the former's relative lack of institutionalized rule-supportive coercion, but because in the international community, justice does not seem to exert a pull to compliance on states comparable to its effect on individuals in national communities."[360] The self-congratulatory celebration of, as well as the enormous amount of lip service paid to, the Universal Declaration have created the illusion that international law has introduced firm legal criteria for the just domestic treatment of the individual. Yet, an assessment of the introduction of the Universal Declaration and the Human Rights Covenants must avoid undue optimism or triumphalism, for in spite of the apparently revolutionary impact of these legal instruments the essential functional features of international law remain unchanged. The idea of legal human rights as an intrinsic aspect of the international legal system has not transformed international law, but, at best, achieved a tentative inroad. As Weil points out: "there could be no greater error than to contrast 'modern' or 'present day' international law with 'classic' international law in this respect."[361] The domestic treatment of the individual remains largely beyond the purview of international law and individuals, qua individual, generally lack *locus standi* in international law.[362] As Oppenheim asserted: "Since the Law of Nations is based on

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[359] Thomas M. Franck, 'Is Justice Relevant to the International Legal System?', Notre Dame Law Review, 64, 1989, p. 945

[360] Franck, 'Is Justice Relevant to the International Legal System?', p. 945. Franck's italics

[361] Weil, 'Towards Relative Normativity in International Law?', p. 419

[362] It is generally accepted that the individual is not a subject of international law and that an individual has no rights but only benefits in international law which arise from effective nationality. See Malanczuk (ed.), Akehurst's Modern Introduction to International Law, pp. 91-92, and pp. 100-104. See also Brownlie, Principles of Public International Law, pp. 553-559, and Ian Brownlie, 'The Place of the Individual in International Law', p. 435. Interestingly, aliens and diplomats as representatives of states aside, pirates, as opposed to ordinary individuals, do have locus standi in international law. As expressed by the dissenting

the common consent of individual States, and not the individual human beings, States solely and exclusively are the subjects of International Law."[363]

Human rights treaty law has certainly promoted and paid lip service to human rights implementation, yet, as it is grounded in voluntarism, its enforcement mechanisms are lacking substance. Many states are either not party to the treaties or they have imposed significant reservations. However, if the Universal Declaration constitutes either customary law or general principles international law, then the prospects for its effective domestic implementation would become much brighter. As Simma and Alston explain: "a growing number of modern constitutions not only incorporate customary international law automatically as part of the law of the land but also grant it a rank superior to that of domestic statutes. ... As a consequence, international human rights prescriptions derived from customary law or ... from a general rule (or principle) of international law, would be protected against derogation by a conflicting domestic statute much more effectively than provisions of human rights treaties. Apart from such worst case scenarios, customary or general international law is allowed by modern constitutions to have a persuasive normative impact on municipal law."[364] Thus, the debate whether the Universal Declaration is compatible with sources other than treaty law is of great practical significance not only due to its potential impact on domestic jurisdictions, but also because human rights as customary law or general principles "allows not only the treaty non-parties, but also the parties to have recourse to international law remedies provided for in treaties."[365]

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opinion of Judge Moore in the 1927 Lotus case, piracy "is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish.", quoted in Brownlie, Principles of Public International Law, pp. 238-239, Brownlie's italics. As Wight says, this "paradox of international law" ironically "emancipated" the pirate to the status of a subject of international law, which the ordinary individual lacks. See Martin Wight, 'Why is there no International Theory?', p. 21

[363] Quoted in James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), pp. 13-14

[364] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', pp. 85-86. Simma and Alston's parenthesis

[365] Schachter, International Law in Theory and Practice, p. 335

In view of the distinct nature of the international legal system as a horizontal and voluntarist legal system, the doctrine of the sources of international law, as Schachter says, was intended to meet "in principle at least, the requirement of a 'positive science of international law' based on the verifiable manifestation of the wills of the States concerned. The theory appeared realistic and practical. By and large, it seemed to be the dominant theory accepted by governments in their legal arguments, by tribunals and, to a large degree, by international lawyers."[366] Paragraph I of Article 38 of the Statute of the International Court of Justice lists the following as sources of international law:

'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'[367]

As Brownlie says, the sources listed are generally considered "as a complete statement of the sources of international law".[368] Akehurst's largely concurs with this statement by pointing out that although this list of sources has been subject to criticism "none of the alternative lists which have been suggested has won general approval."[369] The sources listed "are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word 'successively' appeared. In practice the Court may be expected to observe the order in which they appear".[370] There is general agreement that treaties and custom are "the important sources", though with some difference of agreement in the

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[366] Schachter, International Law in Theory and Practice, p. 37

[367] Quoted in Brownlie, Principles of Public International Law, p. 3; and Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 36. Article 59 states that 'The decision of the Court has no binding force except between the parties and in respect of that particular case.', see Brownlie, Principles of Public International Law, p. 3. These exact sources were also listed by International Court of Justice's forerunner established under the League, the Permanent Court of International Justice.

[368] Brownlie, Principles of Public International Law, p. 3

[369] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 36

[370] Brownlie, Principles of Public International Law, p. 3

order of their importance.[371] Brownlie for example gives priority to treaties as they constitute a "source of mutual obligation", followed by custom and, "perhaps", general principles as formal sources, and judicial decision and teachings as a material source due to the "reference to subsidiary means".[372] Akehurst's points out that the "most important source of international law for centuries was customary law" but that this predominance may have become weakened due to the rise of treaty law, which can also point to the formation of customary law.[373] Yet, according to Akehurst's customary law "has still retained its predominance over treaty law or other sources" in view of state immunity or state responsibility.[374] This junction of sources is representative of the entire history of the functional formation of international law and it is here that the lines in the ideological battle for the future of human rights are being drawn.

Let us firstly assess the status of human rights law within the context of that source which has historically been given priority, custom, before turning our attention to the more elusive source of the general principles. Kelsen's influential explanation of this source is characteristic of its traditional understanding: "Customary law is created by custom. Custom is a usual or habitual course of action, a long established practice; in international relations, a long established practice of states. But the frequency of conduct, the fact that certain actions or abstentions have repeatedly been performed during a certain period of time, is only one element of the law-creating fact called custom. The second element is the fact that the individuals whose conduct constitutes the custom must be convinced that they fulfil, by their actions or abstentions, a duty, or that they exercise a right. They must believe that they apply a norm, but they need not believe that it is a legal norm which they apply. They have to regard their conduct as obligatory or right. If the conduct of the states is not accompanied by the opinion that this conduct is obligatory or right, a so-called 'usage', but not a law-creating custom, is established. The basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave. If this principle assumes the character

[371] Brownlie, Principles of Public International Law, p. 3
[372] Brownlie, Principles of Public International Law, p. 3
[373] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 36
[374] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 36

of a norm, custom becomes a law-creating fact. This is the case in the relations between states. Here custom, i.e., a long-established practice of states, creates law. Custom creates law just as legislation does."[375]

According to this traditional view, customary international law has emerged due to an empirically verifiable historical process of state interaction delineated by the precepts of voluntarism and decentralization. The traditional practice based view of customary international law conforms with the non-purposive approach to international law, as defended by Weil, according to which the primary function of the international legal system is its ability to ensure the coexistence and common aims of a fundamentally pluralist international society.[376] This account coincides with the historical evolution of the Westphalian state system and the corresponding emergence of a horizontal international legal system allowing for the preservation of sovereign independence and equality. As Weil says: "the heterogeneity of the components of international society, far from being an obstacle to the formation of international law, is on the contrary its *conditio sine qua non*".[377] The advantage of a practice based account of the formation of customary international law lies in its strong theoretical underpinning which explains how international law differs from national legal systems by virtue of voluntarism and decentralization, yet it is nevertheless law in the proper sense. As Kelsen says: "The binding force of customary international law rests in the last resort on a fundamental assumption: on the hypothesis that international custom is a law-creating fact. This hypothesis may be called the basic norm. It is not a norm of positive law; it is not created by acts of will of human beings; it is presupposed by the jurists interpreting legally the conduct of states."[378] Instead of the coercive mechanisms which characterize national legal systems, international law's coercive sanctions have historically arisen from a propensity for self-help by states. The strength of this approach to custom lies in its compatibility with and verifiability of historical state practice and thus also its reliability

[375] Kelsen, Principles of International Law, pp. 307-308
[376] As Kelsen says: "In establishing a custom, men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law. The rule of law is the effect and not the purpose of their activity.", Kelsen, Principles of International Law, p. 308
[377] Weil, 'Towards Relative Normativity in International Law?', p. 420, Weil's italics.
[378] Kelsen, Principles of International Law, p. 314

in assessing the grounds for future state practice. As Kelsen asserts: "The basic norm of international law, therefore, must be a norm which countenances to custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved. Customary international law, developed on the basis of this norm, is the first stage within the international legal order. The next stage is formed by the norms created by treaties. The validity of these norms is dependent upon the norm *pacta sunt servanda*, which itself is a norm belonging to the first stage of general international law, which is customary law. The third stage is formed by norms created by organs which are themselves created by treaties, as for instance decisions of the Security Council, of the United Nations, or of the International Court of Justice, or tribunals of arbitration."[379]

Sohn's assertion that the Universal Declaration has become customary law is a marked departure from this long established traditional practice based view of legal custom. [380]

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[379] Kelsen, Principles of International Law, pp. 417-418

[380] There are other prominent legal scholars, Sohn aside, who maintain that the Universal Declaration as a whole must be considered to be customary law. Humphrey says: "In the more than a quarter of a century since its adoption, however, the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and is therefore binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.", John P. Humphrey, 'The International Bill of Rights: Scope and Implementation', William and Mary Law Review, Vol. 17, 1975-1976, p. 529. Chen says: "The Universal Declaration has acquired the attributes of authority in two ways. First, it is widely accepted as an authoritative specification of the content of the human rights provisions of the U.N. Charter. Second, its frequent invocation and application by officials, at all levels of government and in many communities around the world, have conferred on it those expectations characteristic of customary international law.", Lung-chu Chen, 'Protection of Persons (Natural and Juridical)', Yale Journal of International Law, Vol. 14, 1989, pp. 546-547. Nayar says: "There is thus strong evidence suggesting that the principles embodied in the Universal Declaration of Human Rights have become customary international law or general principles of law recognized by nations. It follows that the Declaration, as an authoritative interpretation of the Charter, strengthens the legal force of the human rights clauses of the Charter and thereby acquires the binding character of the Charter itself.", M. G. Kaladharan Nayar, 'Introduction: Human Rights: The United Nations and United States Foreign Policy', Harvard International Law Journal, Vol. 19, No. 3, 1978, p. 817. In commenting on Iranian human rights implementation Galindo Pohl, the Special Rapporteur of the U.N. Commission on Human Rights, said in 1986: "The rights and freedoms set out in the Universal Declaration have become international customary law through State practice and *opinio juris*. Even if the strictest approach is adopted to the determination of the elements which form international customary law, that is, the classical doctrine of convergence of extensive, continuous and reiterated practice and of *opinio juris*, the provisions contained in the Universal Declaration meet the stringent standards of that doctrine. Of course, they also meet the more liberal standards of contemporary doctrines on the constitutive elements of international customary law.", quoted in Simma and

Sohn's authoritative interpretation of the Declaration turns the historically established inductive formation of customary law into a deductive legal exercise. The authority of the Charter and the General Assembly provide a sufficient legal foundation and their proclamations constitute legal precepts with which state practice will have to conform in order to retain its legal validity. As Simma and Alston explain: "This new, radical customary law has lost the element of retrospection; if its protagonists look back at the past it is a look back in anger, full of impatience with the imperfections and gaps of the old rules. Such impatience also extends to the process of treaty-making, a filed in which delay or a lack of consent simply cannot be argued away by theoretical constructs. Thus the flight into a new 'progressive', more or less instant custom. The elevation of the Universal Declaration of 1948 and of the documents that have built upon its foundation to the status of customary law, in a world where it is still customary for a depressingly large number of States to trample upon human rights of their nationals, is a good example of such an approach."[381] In view of this departure from the time honoured practice based approach, Judge Jennings of the International Court of Justice argues that instant custom "is not only not customary law: it does not even faintly resemble a customary law."[382] Equally, van Hoof argues that it is misconceived "to denaturate the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all".[383] Cassese also maintains that from the perspective of customary law, "in formal terms" the Universal Declaration "is not legally binding, but possesses only moral and political force."[384] And Simma and Alston argue that: "instead of further manipulating the established concept of customary law based on an effective requirement of concrete practice, we ought to look for a different – and less damaging – way to explain the legal force of universally recognised human rights".[385] They agree with the

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Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 90, Pohl's italics.

[381] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', pp. 89-90. Simma and Alston's italics

[382] Quoted in Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 83

[383] Quoted in Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 85

[384] Antonio Cassese, International Law in a Divided World (Oxford: Clarendon Press, 1986), p. 299

[385] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 98. For Simma and Alston the authoritative approach "appears to rest on somewhat more solid legal

urgency of a "need for additional sources of human rights law" in view of the unsatisfactory basis which discretionary treaty law provides, but question whether it is wise to satisfy this "appetite by resorting to a progressive, streamlined theory of customary law, more or less stripped of the traditional practice requirement", which "through this dubious practice is able to find a customary law of human rights wherever it is needed."[386]

In assessing the status of the Universal Declaration as customary law, one must acknowledge that the established criteria which form the basis for the formation of customary law do not necessarily apply. States have proceeded only very rarely to argue violations of human rights erga omnes before the International Court of Justice and as a consequence there is little practice related opinio juris.[387] The evidence usually put forward for considering human rights as customary is not based on an inductive assessment of established international state practice, but rather includes arguments such as that human rights have been affirmed by constitutional enactments in the national legislation of many civilized states, or that some national courts have relied on the Universal Declaration as a basis for their judicial decisions. The incorporation of the Universal Declaration in national constitutions and legislation must however be confirmed by actual practice in order to become valid as genuine evidence of customary law formation. As Schachter says: Constitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice".[388] Evidence is also often asserted to be found in state declarations according to which states ought to fulfil their obligations to observe the spirit of the Charter's human rights provisions and the Universal Declaration, as well as U.N. resolutions and various other international declarations of human rights. Yet, such declarations are often simply that, mere declarations. In view of the current unenforceability of the Universal Declaration, due to its status as a mere declaration, lip service to an ideal does not amount

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foundations", or, alternatively, it may be possible to ground human rights in the general principles source as this approach is "grounded in a consensualist conception of international law", see ibid., p. 100 and p. 105

[386] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 107

[387] Schachter, International Law in Theory and Practice, p. 336

[388] Schachter, International Law in Theory and Practice, p. 336, The quote made by Schachter refers to the Universal Declaration of Teheran

to tangible evidence of actual practice. A further argument made is that corroborated statements by national officials which condemn gross human rights violations in other countries constitute evidence of state practice. However, as Simma and Alston point out, accepting statement's made by officials as concrete evidence of practice would take us "back to that school of thought which is prepared to accept diplomatic pronouncements as sufficient evidence for the existence of a customary rule of law."[389] In view of the established practice based view of international customary law it is safe to say that the Universal Declaration as a whole cannot be considered to constitute customary law and bestowing this attribute upon it may be a vainglorious exercise. As Simma and Alston point out: "It makes a big difference whether we are in the presence of a case where customary law has been gradually built up, through state practice of the traditional material kind and where subsequent instances of inconsistent conduct occur, or whether claims to the existence of a rule of customary law are voiced amidst – or against - a real world which all too often continues to behave as if it were totally unimpressed by such claims".[390]

Yet, although practice based custom cannot accommodate the Universal Declaration as a whole, and though human rights treaty law is unenforceable due to the voluntarist reservations of the parties, there is nevertheless growing consensus among authoritative legal scholars that certain human rights have gained the status of customary international law. This scholarly consensus is strengthened by the fact that certain fundamental human rights provisions either are deemed as peremptory norms of customary law by the great majority of states, or that no government dares to declare its outright opposition to the peremptory nature of these norms. The problem is the lack of consensus about the precise identity of those fundamental provisions which could find universal agreement.[391] An influential attempt to clearly define those human rights which may be considered to

[389] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 95

[390] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 97

[391] Brownlie, The Rule of Law in International Affairs, p. 72; also Schachter, International Law in Theory and Practice, p. 337

constitute customary law was made by the American Law Institute. It defined the following rights as belonging to customary law:

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

(1) genocide,

(2) slavery or slave trade,

(3) the murder or causing the disappearance of individuals,

(4) torture or other cruel, inhuman or degrading treatment or punishment,

(5) prolonged arbitrary detention,

(6) systematic racial discrimination, or

(7) a consistent pattern of gross violations of internationally recognised human rights."[392]

The Restatement's commentary defines the following rights as relevant to clause (7): "systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave the country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and individous racial or religious discrimination."[393] Meron even suggests to extend this listing so as to explicitly include due process rights in customary law, as they are included in the majority of national constitutions as well as the Covenant on Civil and Political Rights. He suggests to supplement the American Law Institute's list with the following: "the right to be tried by a competent, independent and impartial tribunal established by law, the right to presumption of innocence, the right of everyone not to be compelled to testify against himself or to confess guilt: the right of everyone to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her won

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[392] 'Restatement of the Law, the Third, the Foreign Relations of the United States, 1987', quoted in Brownlie, The Rule of Law in International Affairs, p. 73. See also Schachter, International Law in Theory and Practice, pp. 338-339; also Theodore Meron, 'On a Hierarchy of International Human Rights', The American Journal of International Law, Vol. 80, No. 1, Jan, 1986, p. 15

[393] Quoted in Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 94

choosing, the right to examine witnesses against him or her and the right to have one's conviction and sentence reviewed by a higher tribunal according to law."[394]

The American Law Institute's list of customary rules and Meron's suggested extension have been criticized on the grounds that they promote exclusively the liberal values and civil and political rights enumerated by the U.S. Bill of Rights. Simma and Alston argue that these lists must be seen as a "striking instance of assuming that American values are synonymous with those reflected in international law."[395] Furthermore, in view of the fact that the American Law Institute's Restatement was based on a Resolution by the U.N.'s Economic and Social Council which the Council explicitly stated to be of relevance to first and second generation rights, Simma and Alston question the omission of the "right to freedom from hunger, the right to adequate housing, the right to access to basic health care, the right to freedom of association, the right to form trade unions and the right to primary education".[396] They conclude that the Restatement's list, particularly clause (7), is "suspiciously convenient" for U.S. foreign policy because the stipulated customary law rights coincide with those "which recent U.S. governments have been prepared to criticize other governments for violating".[397] They question "whether any theory of human rights which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms of both of the theory of human rights and of the United Nations doctrine."[398] Simma and Alston's critique of the Restatement's enumeration of rights, which detects a "normative chauvinism, albeit of an unintentional or sub-conscious variety", does not sufficiently acknowledge that the rights listed form a coherent

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[394] Meron quoted in Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 94

[395] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 94

[396] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 94

[397] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 95

[398] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 95

delineation of the fundamental basis necessary for the protection of individual agency.[399] The fact that the rights thus enumerated coincide with Western democratic constitutions merely illustrates that these constitutions are intended to safeguard human agency. Simma and Alston correctly stress the inconsistency which arises from the omission of gender discrimination from this list, but I venture to guess that the inclusion of such a right was avoided on the pragmatic grounds that including it would probably represent a significant obstacle to foreign policy goals aimed at human rights enforcement as gender discrimination is lamentably firmly entrenched in many cultures globally. Yet, that the rights listed are conducive to foreign policy goals aimed at human rights enforcement must be seen as a strength of the Restatement's enumeration, bearing in mind, on the one hand, a dire need to enforce human rights, and, on the other hand, the U.S.'s instrumental role as a military power in this venture. The alleged lack of integration of social, economic and cultural rights actually furthers this enforcement potential in that it is divorced from overambitious considerations of the availability of resources. Indeed, some gross and systematic violations of fundamental human rights are wholly divorced from considerations of resources. No resources are needed not to kill, merely restraint is needed. It need not cost a government anything to refrain from torture, or to allow the distribution of food aid, or to adhere to judicial fairness. Simma and Alston are however correct in that there is a strong case to be made for the most elementary considerations of basic subsistence. A government which forcibly deprives its population of international food aid in the wake of a famine, caused by drought for example, is surely acting in violation of fundamental human rights. Whereas to hold a government to account for, for example, a lack of primary health care or adequate housing assumes a level of resources which would render any enforcement potential illusory.

In the problematic determination of customary human rights law, as Schachter points out, the "essential test is whether there is a general conviction that a particular conduct is internationally unlawful."[400] With scant evidence for established practice based legal custom, the evidence for a general conviction must be confined to the 'practice' and

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[399] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 94

[400] Schachter, International Law in Theory and Practice, p. 338

opinio juris of international forums. This may well represent a departure from the traditional view of customary law, but in view of the novel character of human rights law as an essential aspect of international law, which was practically non-existent prior to the formation of the United Nations, it is difficult to locate evidence of actual practice elsewhere. It is primarily in the United Nations, whether the Security Council or the General Assembly, and other regional bodies that human rights are actually being discussed and it is here that some evidence for general consensus and opinio juris can be found. In surveying inter-governmental positions on specific and general conduct in these forums, in the widespread condemnation of certain acts and practices, we can identify a basis for the assessment of which fundamental human rights norms have gained the status of customary law.[401] It is in view of such evidence that Schachter concludes that the rights listed by the Restatement are in general conformity with his 'essential test'. Schachter even cautiously accepts the "well-intentioned" desire to declare due process rights as customary law. [402] Schachter grounds his acceptance of due process rights not so much in the fact that they have become incorporated into the national constitutions of many states, for he cautions that: "Even where they are on the books, they are often honoured in the breach, not the observance."[403] Instead he finds evidence of a general conviction about due process rights in the circumstance that "recent developments in various parts of the world indicate that certain human rights have penetrated deeply into the consciousness of peoples in many countries. Violations are more and more resented in places where previously they had been ignored or seen as unavoidable."[404] To assert evidence for an international general conviction on unlawfulness is however fraught with difficulty bearing in mind the extent of political and cultural diversity and divisions, not to mention their fluctuations throughout prolonged periods of human history. It is in view of cultural diversity that Simma and Alston argue that Schachter's proposed test "would surely yield dramatically different results when viewed from the perspective of many Third World diplomats or jurists than from that of their Western, or more particularly

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[401] Schachter, International Law in Theory and Practice, p. 338. Schachter's italics
[402] Schachter, International Law in Theory and Practice, p. 339
[403] Schachter, International Law in Theory and Practice, p. 339
[404] Schachter, International Law in Theory and Practice, p. 339. In this context, Schachter points to the strong shift towards democratic civil and political rights which occurred in the former Soviet Union, Eastern Europe, Central America and South Africa; see ibid., pp. 339-340

American counterparts. Moreover, at least for the foreseeable future, the evidence that will be called in support of any particular application of the test will be almost exclusively Western in origin except for the evidence produced on those occasions on which Third World governments have been encouraged to pronounce themselves in a United Nations or related forum."[405] Western liberal and secular values surely represents the driving force behind human rights culture at this point in time. Yet, this conclusion need not make us jettison the partisan liberal and secular mandate of the human rights conception, for it primarily points to the fact that, genuine cultural differences aside, many Third World governments are corrupt and despotic and these governments see demands for the implementation of civil and political rights as an unwelcome critical threat which could endanger their narrow political interests. Nevertheless, in view of political and cultural divisions, a cautious and sober assessment must surely come to the conclusion that general international conviction on unlawfulness remains fragile and that the resulting list of human rights would be rather limited. A list so limited that one wonders whether it represents an adequate basis for that emancipatory dream which human rights culture strives to achieve. Thus, to ground hopes for the effective implementation of the Universal Declaration as a whole in its status as customary law may well be a forlorn hope.

In spite of the difficulty of anchoring human rights norms in customary law, there remains the possibility of considering human rights as 'general principles of law recognized by civilized nations', in line with Article 38, paragraph I, (c). The intention to include general principles as a source of international law served two functions. On the one hand, as Oppenheim explains, paragraph I, (c) was intended "to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States."[406] The reservation, 'in so far as they are applicable', implies that international tribunals were authorized with this mandate due to the inherent difficulty which voluntarist state practice faces in evolving the rules of procedure and evidence which are necessary for the functioning of a judicial process. It is

[405] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 95

[406] Quoted in Brownlie, Principles of Public International Law, p. 16

in view of this inherent difficulty that international law as a primitive legal system selects and adopts rules from domestic law as a better developed legal system.[407] As Brownlie emphasizes, this mandate must not be understood as "a mechanical system of borrowing from domestic law after a census of domestic systems" and in actual practice "tribunals show considerable discretion in the matter."[408] On the other hand, paragraph I, (c) also served to emphasize a natural law foundation inherent in all legal systems. Thus, in the idea of the general principles of law recognized by civilized nations we see a resurfacing of natural law and a blurring of the distinction between positive and natural law. Indeed, this was the primary intention of the original proposal put forward for its inclusion. As Judge Tanaka explained in his dissenting opinion in the South Africa cases of 1966: "The original proposal made by Baron Descamps referred to 'la conscience juridique des peuples civilisés', a concept which clearly indicated an idea originating in natural law. This proposal met with the opposition of the positivist members of the Committee, represented by Mr. Root. The final draft, namely Article 38, paragraph 1 (c), is the product of a compromise between two schools, naturalist and positivist, and therefore the fact that the natural law idea became incorporated therein is not difficult to discover."[409] Brownlie explains how this compromise between naturalists and positivists was achieved: "Root considered that governments would mistrust a court which relied on the subjective concept of principles of Justice. However, the committee realized that the Court must be given a certain power to develop and refine the principles of international jurisprudence. In the result a joint proposal by Root and Phillimore was accepted and this is the text we now have. Root and Phillimore regarded the principles in terms of rules accepted in the domestic law of all civilized states."[410] According to the positivist interpretation of pargraph I, (c), only principles which have been developed and firmly established in

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[407] Brownlie, Principles of Public International Law, p. 16

[408] Brownlie, Principles of Public International Law, p. 16

[409] Judge Tanaka, International Court of Justice, South West Africa cases (joined proceedings Ethiopia and Liberia v. South Africa), Judgement of 18 July 1966, p. 299.
http://www.icj-cij.org/docket/files/46/4945.pdf
Ethiopia and Liberia argued that they had legal standing by virtue of their membership in the League of Nations and consequently charged South Africa with the violation of human rights. In essence, Ethiopia and Liberia asserted a legal interest in the vindication of the human rights violation of the South African community. In the end, the court did not uphold their contention. The Court's vote was a tie and a decision was ultimately reached due to the President's vote against the applicants.

[410] Quoted in Brownlie, Principles of Public International Law, p. 16

domestic fora, and only if they have been explicitly accepted by states either through consent or treaty, can become general principles of international law. This stance was often employed by jurists of the former Soviet Union, and some of the Third World, who argued that because legal systems are reflective of the parochial nature of a given society the acceptance of general principles must be grounded in voluntarist acceptance.[411] Yet, as Schachter points out: "The fact that the subparagraph was distinct from those on treaty and custom indicated an intent to treat general principles as an independent source of law, and not as a subsidiary source. As an independent source, it did not appear to require any separate proof that such principles had been 'received' into international law."[412] However, Schachter stresses that, due to the inherently voluntarist character of international law, caution must be exercised in "in inferring international law from municipal law, even where the principles of national law are found in many 'representative' legal systems."[413] This is why paragraph 1, (c) as an appeal to a natural law foundation has been used only very rarely by the International Court of Justice and on those occasions mostly as an implicit aspect of judicial reasoning.[414] Nevertheless, Article 38, paragraph 1, (c) can be reasonably understood as a mitigation of positivist voluntarism and this source represents a significant inroad for human rights into the positivist voluntarist bastion of sovereignty. Indeed, the inclusion of the phrase 'general principles of law recognized by civilized nations', as Brierly confirms, "is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which States have given their consent."[415] Similarly, Waldock says: "customary law enormously predominates and most of the law applied by the Courts falls within it. But paragraph (c) adds to this corpus – very much in the way intended by its authors – a flexible element which enables the Court to give greater completeness to customary law

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[411] See Schachter, International Law in Theory and Practice, p. 51

[412] Schachter, International Law in Theory and Practice, p. 50, Schachter quotes Waldock. Schachter also mentions that the Soviet scholar Tunkin argued that a significant change in meaning occurred at San Francisco through the inclusion of the outlining phrase of paragraph I of Article 38, namely that court's 'function is to decide in accordance with international law such disputes as are submitted to it'. According to Tunkin, this phrase changed subparagraph (c) so as to include generally accepted "legal postulates", quoted in ibid., p. 62, n. 7

[413] Schachter, International Law in Theory and Practice, p. 52

[414] Brownlie, Principles of Public International Law, p. 17

[415] From his 'The Law of Nations', quoted by Judge Tanaka, South West Africa cases 1966, p. 299

and in some limited degree to extend it."[416] It is in view of this aim that human rights could be anchored in international law as 'general principles of law recognized by civilized nations', for, as Judge Sir Fitzmaurice said, human rights are grounded in "the very nature of man as a rational and social being."[417]

A significant instance of progressive judicial discretion exercised in the name of human rights was Judge Tanaka's influential interpretation of Article 38, paragraph 1, (c). In his dissenting opinion, which must be quoted at length, Judge Tanaka reasserted the natural law connection of subparagraph (c) in saying: "The unified national laws of the character of *jus gentium* and of the law of human rights, which is of the character of *jus naturale* in roman law, both constituting a part of the law of the world community which may be designated as World Law, Common Law of Mankind (Jenks), Transnational Law (Jessup), etc., at the same time constitute a part of international law through the medium of Article 38, Paragraph 1 (c). But there is a difference between these two cases. In the former, the general principles are presented as common elements among diverse national laws; in the latter, only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and co-ordination. This distinction between the two categories of law of an international character is important in deciding the scope and extent of Article 38, paragraph 1 (c). ... The said provision, however, does not limit its application to cases of analogy with municipal, or private law which has certainly been a most important instance of the application of this provision. We must include the international protection of human rights in the application of this provision. It must not be regarded as a case of analogy. In reality there is only one human rights which is valid in the international sphere as well as in the domestic sphere. The question here is not of an 'international', that is to say, inter-State nature, but is concerned with the question of the international validity of human rights, that is to say, the question whether a State is obliged to protect human rights in the international sphere as it is obliged in the domestic

[416] Quoted in Schachter, International Law in Theory and Practice, p. 52. Indeed, the sources of international law must be understood to overlap. Brownlie too emphasizes that: "What is clear is the inappropriateness of rigid categorization of the sources.", Brownlie, Principles of Public International Law, p. 19

[417] Judge Sir Fitzmaurice, from his 'The Future of Public International Law' of 1973, quoted in Schachter, International Law in Theory and Practice, p. 50

sphere. The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory."[418]

Judge Tanaka's dissenting opinion in the South West Africa cases of 1966 was vindicated four years later when the International Court delivered its verdict in the Barcelona Traction case.[419] The relevant passages of the Barcelona Traction verdict must be quoted at length: "33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by

[418] Judge Tanaka, South West Africa cases 1966, pp. 296-297, Tanaka's italics and parentheses
[419] On the particulars of the South West Africa cases, see supra p. 109, n. 408

international instruments of a universal or quasi-universal character."[420] A further prominent judgement by the International Court of Justice which is commonly understood to link human rights to general principles of international law was made in the Teheran Hostage case. The judgement stated that: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."[421]

The judgements which declared human rights as jus rationale, obligations erga omnes, or fundamental principles confirm Baron Descamps' intention to instil 'la conscience juridique des peuples civilisés' into international law. These judgements by the International Court of Justice referring to general principles were intended to emphasize the human rights obligations incumbent on all states which were articulated by the Charter and the Universal Declaration. Thus, Judge Tanaka's assertion that human rights must be considered to be general principles stresses that human rights obligations are imposed not only on states parties to the 1966 Covenants, but on all states. As Judge Tanaka says: "the recognition of a principle by civilized nations ... does not mean recognition by all civilized nations, nor does it mean recognition by an official act such as a legislative act; therefore the recognition is of a very elastic nature."[422] In the specific context of the South West Africa cases Tanaka observed how equality before the law was

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[420] International Court of Justice, Case Concerning the Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain, Second Phase, Judgement of 5 February 1970, p. 32, italics and parenthesis of the original.
http://www.icj-cij.org/docket/files/50/5387.pdf
Schachter points out how the Court's earlier decision in the South West Africa cases "was strongly criticized in the United Nations and by many legal commentators. When the Court declared some four years later that *erga omnes* obligations could be vindicated by any State, it was generally surmised that this dictum was the judges' response to the criticism of the earlier decision. The changed composition of the Court made it possible to adopt this implicit reversal of doctrine.". Schachter, International Law in Theory and Practice, p. 344, Schachter's italics.

[421] International Court of Justice, Case Concerning United States Diplomatic and Consular Staff in Teheran, United States of America v. Iran, Judgement of 24 May 1980, p. 42. The case concerned the occupation of the U.S. embassy by Iranian militants and the failure of the Iranian authorities to oppose the armed attack of the militants. The Embassy staff were held hostage by the militants for several months.
http://www.icj-cij.org/docket/files/64/6291.pdf

[422] Judge Tanaka, South West Africa cases 1966, p. 299

a fundamental judicial principle recognized by "most of the civilized countries"[423] But he argued further that the recognition of this general principle and an obligation to implement it "does not need to be limited to the act of legislation".[424] For Judge Tanaka evidence of recognition of equality before the law "may include the attitude of delegations of member States in cases of participation in resolutions, declarations, etc., against racial discrimination adopted by the organs of the League of Nations, the United Nations and other organizations which ... constitute an important element in the generation of customary international law."[425] Judge Tanaka's argument was that certain fundamental human rights have been firmly recognized in the conventional law of the majority of civilized nations, and that there is ample evidence which asserts that these rights must be seen as customary law, but also that this conventional and customary recognition was bolstered because fundamental rights also constitute general principles of international law. As Judge Tanaka said: "the alleged norm of non-discriminations and non-separation, being based on the United Nations Charter, particularly Articles 55 (c), 56, and on numerous resolutions and declarations of the General Assembly and other organs of the United Nations, and owing to its nature as a general principle, can be regarded as a source of international law according to the provisions of Article 38, paragraph 1 (a) – (c). In this case three kinds of sources are cumulatively functioning to defend the above mentioned norm: (1) international convention, (2) international custom and (3) the general principles of law. Practically, the justification of any one of these is enough, but theoretically there may be a difference in the degree of importance among the three."[426]

Judge Tanaka's dissenting opinion expressed a desire to instil in international law an element of coercion for the fulfilment of the Charter's human rights mandate intended to remedy the inexpediency of its firmly entrenched nature as a voluntarist and decentralized legal system. Accordingly, for Judge Tanaka the general principles serve a remedial function and in view of this character of the general principles he even asserts,

[423] Judge Tanaka, South West Africa cases 1966, p. 299
[424] Judge Tanaka, South West Africa cases 1966, p. 299
[425] Judge Tanaka, South West Africa cases 1966, p. 300
[426] Judge Tanaka, South West Africa cases 1966, p. 300

in a radical departure from the established classic doctrine, their greater importance as a source of international law: "From a positivistic, voluntaristic viewpoint, first the convention, and next the custom is considered important, and general principles merely occupy a supplementary position. On the contrary, if we take the supra-national objective viewpoint, the general principles would come first and the two others would follow them. If we accept the fact that convention and custom are generally the manifestation and concretization of already existing general principles, we are inclined to attribute to this third source of international law the primary position vis-à-vis the other two."[427] This conclusion chimes with Sohn's authoritative interpretation which sees the Universal Declaration not only as customary law but also as jus cogens. Judge Tanaka had made the jus cogens nature of human rights explicit: "If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to positive law'. Provisions of the constitutions of some countries characterize fundamental human rights and freedoms as 'inalienable', 'sacred', 'eternal', 'inviolate', etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance. If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to *jus cogens*."[428] Judge Tanaka was perfectly aware that the assertion of a human rights jus cogens could be criticized on the grounds that it perpetuates erroneous natural law dogma. Yet, he countered such a critique by insisting that "it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent."[429] Indeed, he considered this aspect as an important remedial function because it "extends the concept of the sources of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the

[427] Judge Tanaka, South West Africa cases 1966, p. 300
[428] Judge Tanaka, South West Africa cases 1966, p. 298, Tanaka's italics
[429] Judge Tanaka, South West Africa cases 1966, p. 298

consent and auto-limitation of the State."[430] For Tanaka, the inclusion of paragraph 1 (c) in line with the aim of the original proposal by Baron Descamps was clearly intended to overrule the traditional understanding of international law as an exclusively voluntarist and positivist legal system. He insisted that this source of law was established explicitly regardless of consent and recognition by states, and states which do not recognize or rebut this source as valid principle of international law "are nevertheless subject of its rule".[431] Thus, with the idea of the 'general principles of law recognized by civilized nations' the human rights project "could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character."[432]

According to Judge Mosler's influential definition, the notion of jus cogens consists of "the very principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic; the law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law."[433] Yet, the notion of jus cogens was initially highly disputed bearing in mind the entrenched voluntarist nature of international law. The International Law Commission's investigation of the concept during the preparation of the draft on the Law of Treaties made this clear in commenting: "some jurists deny the existence of any rules of jus cogens in international law, since in their view even the most general rules still fall short of being universal."[434] In contrast, the Commission argued that: "The view that in the last analysis there is nor rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain".[435] In the end, the Commission "concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty

[430] Judge Tanaka, South West Africa cases 1966, p. 298
[431] Judge Tanaka, South West Africa cases 1966, p. 298
[432] Judge Tanaka, South West Africa cases 1966, p. 298, Tanaka's italics
[433] Judge Mosler quoted in Meron, 'On a Hierarchy of International Human Rights', p. 19
[434] Yearbook of the International Law Commission, 1966, Vol. II, p. 247
http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf
[435] Yearbook of the International Law Commission, 1966, Vol. II, p. 247

arrangement, and which may be changed only by another rule of the same character."[436] Accordingly, the Commission adopted Article 50, which declared that: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[437] Based on this draft article the Vienna Convention on the Law of Treaties adopted Article 53 which declared that: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[438]

However, to assert the jus cogens nature of human rights is a problematic legal venture. The first problem is the legal technicality that the notion of jus cogens is strictly speaking a matter of treaty law, and few treaties have direct human rights consequences.. As Meron points out: "As a matter of fact, states do not conclude agreements to commit torture or genocide or enslave peoples. Many of the examples of *jus cogens* commonly cited in literature are really *hypotheses d'école*. Moreover, states are not inclined to contest the absolute illegality of acts prohibited by the principles of *jus cogens*. When such acts take place, states deny the factual allegations or justify violations by more subtle or ingenious arguments. Thus, while the principle of *jus cogens* has moral and potential value, its immediate practical importance is still limited."[439] One exception are extradition treaties, and the Institute of International Law adopted a resolution on 'New problems of the international legal system of extradition with special reference to

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[436] Yearbook of the International Law Commission, 1966, Vol. II, p. 247

[437] Yearbook of the International Law Commission, 1966, Vol. II, p. 247. Article 61 declares: "If a new peremptory norm of general international law of the kind referred to in Article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.", ibid., p. 261

[438] See p. 18, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
The same provision was also adopted as Article 53 by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, pp. 23-24. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf

[439] Meron, 'On a Hierarchy of International Human Rights', p. 14, Meron's italics. See also Schachter, International Law in Theory and Practice, p. 343

multilateral treaties' in 1983, in which Article IV states: "In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting state, extradition may be refused."[440] It is of interest that the Institute of International Law felt it necessary to employ the term 'fundamental human rights' in its 1983 resolution on extradition, although an earlier proposed draft of this resolution used the term 'human rights'. In the end, the term 'human rights' was felt to be too ambiguous because it could be seen to refer to the U.N.'s 1966 Covenants on Human Rights.[441] Judge Mosler pointed out that "obligations to protect human rights as jus cogens did not go so far".[442] This argument led to the initial suggestion to replace the term 'human rights' with "the basic rights of the human person". This term, as Judge Mosler explained, "though lacking a well defined content, took account of the dignity of the human person and the needs closely linked with the development of man as a human being", and, as a consequence, "the protection that this basic human position justified might prevail over treaties as a norm of *jus cogens*."[443] In the end, the phrase 'fundamental human rights' was adopted so as to create concordance with the Barcelona Traction judgement.[444] Nevertheless, according to the prevailing consensus, the notion of jus cogens must be understood to apply primarily to treaty law. As Meron reminds us, a significant number of members of the International Law Commission's drafting committee were reluctant "to apply the concept of jus cogens outside of the framework of the Vienna Convention".[445] Similarly, Schachter points out that the question of whether fundamental human rights "are jus cogens has not received any judicial answer nor has a decision to that effect been made by any authoritative official body."[446] At this point in time, the application of jus cogens to human rights law is thus a further instance of lex ferenda, or the law is it ought to be, but not an instance of hard law. Yet, as Schachter emphasizes, even though concrete consensus on whether the principle of jus cogens is

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[440] Quoted in Meron, 'On a Hierarchy of International Human Rights', p. 18. See also Schachter, International Law in Theory and Practice, p. 344
[441] See Meron, 'On a Hierarchy of International Human Rights', p. 18
[442] Quoted in Meron, 'On a Hierarchy of International Human Rights', p. 18
[443] Quoted in Meron, 'On a Hierarchy of International Human Rights', p. 18, Mosler's italics
[444] Quoted in Meron, 'On a Hierarchy of International Human Rights', p. 1
[445] Quoted in Meron, 'On a Hierarchy of International Human Rights', p. 23, n. 87
[446] Schachter, International Law in Theory and Practice, p. 343

applicable to human rights remains concurrently elusive, it is "likely to occur in the future if States become more sensitive to human rights concerns."[447]

If sufficient consensus on the principle of jus cogens being applicable to human rights can be mustered in the first place, then the second problem facing a human rights jus cogens is the question of specifying those fundamental human rights which could find universal acceptance as peremptory norms. The International Law Commission argued that there exists "a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are - unlike the others – obligations in whose fulfilment all States have a legal interest."[448] It is safe to say that the Universal Declaration as a whole is neither in conformity with Article 38, paragraph I, (c), nor can it be considered to be jus cogens as a whole. Indeed, the precise classification of which human rights merit jus cogens status has hitherto "not had much success".[449] Indeed, as Meron points out: "The International Law Commission, which prepared the draft of the Vienna Convention, has prudently refrained from suggesting a catalog of peremptory rules. Few attempts have been made to identify such rules in the field of human rights."[450] One major problem facing the human rights jus cogens project, as Brownlie makes clear, is that: "more authority exists for the category of *jus cogens* than for its particular content, and rules do not develop in customary law which readily correspond to the new categories."[451] As Brownlie says: "The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy."[452] Furthermore, as Schachter explains,

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[447] Schachter, International Law in Theory and Practice, p. 344, Schachter's italics
[448] Yearbook of the International Law Commission, 1976, Vol. II, part two, p. 99
[449] Brownlie, Principles of Public International Law, p. 512
[450] Meron, 'On a Hierarchy of International Human Rights', p. 14. Judge Verdross argues that the concept of jus cogens should cover "all rules of general international law created for a humanitarian purpose"; Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law', American Journal of International Law, 1966, Vol. 60, No. 53, p. 59. McDougal, Lasswell and Chen state that: "many of the policies about human rights would appear to be so intensely demanded that they are acquiring ... not merely the status of 'international concern', but in addition that of jus cogens or of a global bill of rights."; McDougal, Lasswell and Chen, Human Rights and World Public Order (New Haven: Yale University Press, 1980), p. 185
[451] Brownlie, Principles of Public International Law, pp. 514-515, Brownlie's italics
[452] Brownlie, Principles of Public International Law, p. 515

from a practical perspective at this point in time to declare "obligations *erga omnes* adds only marginally to the rights of States to criticize infringements in the international organs" beyond those already provided for by the U.N..[453]

Article 53 of the Vienna Convention stipulates that whether a norm is accepted and recognized as peremptory norm of jus cogens must be decided by the 'international community as a whole'. In its Commentary on State Responsibility the International Law Commission explained that this provision "certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an 'international crime', not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community."[454] This would confirm Tanaka's judgement that a human rights jus cogens need not be recognized by all civilized nations. Yet, if one considers the U.N. and the Universal Declaration as 'essential components of the international community', then no such recognition of all the human rights listed by the Universal Declaration as peremptory norms can be found. Nevertheless, the implication that unanimous recognition is not necessary leaves open the possibility of an actio popularis on behalf of human rights, which would allow states to declare a legal standing and interest in the vindication of human rights in the event of domestic violations. In principle, a significant majority of states could decide to not only condemn but also to seek either a judicial or an effective remedy against human rights violations based on their legal interest and standing as parties to the Charter and its human rights provisions.[455] Yet, it was precisely this notion of an actio popularis on human rights which the International Court of Justice prudently ruled out in the South West Africa cases. Indeed, Schachter cautions: "The doctrinal foundation has been laid but ... I suspect States will hesitate to open a Pandora's box which would allow every member of the now numerous community of States to become a prosecutor in judicial proceedings

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[453] Schachter, International Law in Theory and Practice, p. 345, Schachter's italics
[454] Yearbook of the International Law Commission, 1976, Vol. II, part two, p. 119 http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1976_v2_p2_e.pdf
[455] Schachter, International Law in Theory and Practice, p. 345

on behalf of the human rights of all persons. A consequence of extending 'standing' to all States will probably make States more hesitant to accept jurisdiction of the Court or arbitration. States are always mindful that noble concepts may be used by other States for political advantage and with hostile intent."[456]

## II.iv Structural Revision of Human Rights

Faced with an urgent need to overcome the political inertia of human rights culture, we must structurally revise the conception and prioritize those human rights which are fundamentally necessary to preserve the 'individualist core idea of human rights'. This approach may appear to be akin to consensus based revision. It differs however significantly in that the structural revisionist project merely prioritizes human rights norms in relation to each other so as to effectively address those violations of rights, subject to proportionality and reasonable expectation of outcome, which we deem to be fundamental, but it jettisons none.[457] The current list of rights articulated by the Universal Declaration is problematically ambiguous, for, although the rights articulated can all be coherently defended as being necessary for the fostering and protection of individual agency, the weight and priority of the rights listed remains unspecified, whether in relation to each other, or in relation to the diversity of political and cultural values which characterize the human situation, or in relation to the scarcity of resources which undermine the effective implementation of certain rights listed.[458] The project must strive towards the concrete realization in positive international law of that tentative foundation which has been prepared for the jus cogens status of fundamental human rights norms. The notion of a fundamental human right is of primary importance for a structural revision of the human rights conception because in view of the fact that even routine domestic violations of human rights remain on the whole unpunished it has become politically imperative to realize "a graduated normativity in international human

[456] Schachter, International Law in Theory and Practice, p. 345
[457] I say subject to proportionality and reasonable expectation of outcome as there is little pragmatic hope to remedy each and every instance of violation, but there is sufficient consensus that those gross and systematic violations which we have the means to confront must be confronted.
[458] Nickel, 'Are Human Rights Utopian?', pp. 246-247

rights".[459] As Meron explains, "quality labels are a useful indication of the importance attached to particular rights. They strengthen the case against violation of such rights. Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights."[460] It was precisely this intention to demarcate limits of the legitimacy of state conduct in relation to all individuals that jurisprudence by the International Court of Justice employed the terms 'basic rights of the human person' and 'fundamental human rights' as principles of law erga omnes. However, without effective institutional procedures under the U.N. and with sufficient consensus remaining elusive, we need to remain clear about the circumstance that a human rights jus cogens arguably constitutes a parochial and partisan mandate. Yet, this parochialism and partisanship is that of human civilization. As mentioned, the notion of jus cogens need not be based on an absolute universal normative consensus, for mere consensus by a large majority of civilized states is sufficient. Furthermore, although primarily established as applicable to treaty law, the applicability of jus cogens could in principle become extended to human rights. The International Law Commission made this clear in saying: "It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of jus cogens."[461] To declare human rights as jus cogens would clearly establish their peremptory nature as general principles of international law which are instrumental in ensuring the "public order of the international community".[462] This assertion of a correlation between human rights and international order and security was a clearly identifiable aim of the Charter vision. The notion of jus cogens is better suited to anchor peremptory human rights norms in positive international law than practice oriented customary law, and, as mentioned, the legislation by the International Court of Justice has on the whole grounded the peremptory nature of fundamental human rights as positive law in their status as a general principle of international law. This view is also in conformity with human rights jurisprudence generated by domestic courts, for, as Simma and Alston explain: "the German *Bundesverfassungsgericht*, in a decision rendered in

[459] Meron, 'On a Hierarchy of International Human Rights', p. 3. Meron's parentheses
[460] Meron, 'On a Hierarchy of International Human Rights', p. 22
[461] Yearbook of the International Law Commission, 1966, Vol. II, p. 248
[462] Judge Mosler quoted in Meron, 'On a Hierarchy of International Human Rights', p. 19

1977, considered a minimum standard of human rights to be part of 'general international law', while the *Bundesverwaltungsgericht* considered grave infringements of human rights, such as official torture, to be prohibited by 'general principles of international law'. The Swiss *Bundesgericht* has viewed the prohibition of torture as a rule of *jus cogens*. None of these decisions spoke of customary law in this regard."[463]

To ensure that a human rights jus cogens receives the constitutional status it deserves in international law, we must insist that certain rights are 'fundamental human rights' and strive to uphold their peremptory nature. What is needed is a revision of the Universal Declaration so as to explicitly articulate those fundamental human rights which are recognized by the majority of civilized nations. Such a project would partially vindicate Sohn's authoritative interpretation approach by agreeing that the Universal Declaration is authoritative indeed but it must also be acknowledged that it is inconceivable at this point in time that the Universal Declaration as a whole could be seen as having peremptory status. As Simma and Alston say: "Indeed, there are strong grounds for arguing that States parties to the Charter, having in good faith undertaken treaty obligations to respect 'human rights', are subsequently bound to accept, for the purposes of interpreting their treaty obligations, the definition of 'human rights' which has evolved over time on the basis of the virtually unanimous practice of the relevant organs of the United Nations. ... Nevertheless, at a certain point there must be limits to this approach which would require an individuated analysis in order to determine whether *all* of the rights in the Universal Declaration, as well as the new rights such as the right to development which the U.N. has subsequently proclaimed, can be said to fall within the ambit of the original Charter provision."[464] Such an individuated analysis should serve to crystallize those rights which, on the one hand, establish the minimal moral core necessary for the protection of individual agency, and, on the other hand, are instrumental in ensuring the public order of the international community. As Meron points out, the need to attribute jus cogens status to certain fundamental human rights arises because of "the decisive importance of certain

[463] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 106, Simma and Alston's italics
[464] Simma and Alston, 'The Source of Human Rights Law: Custom, Jus Cogens, and General Principles', p. 101, Simma and Alston's italics

norms and values to the international community, they merit absolute protection and may not be derogated from by states, whether jointly by treaty or severally by unilateral legislative or executive action."[465]

In my opinion, those rights listed by the American Law Institute's Restatement deserve exalted status, as opposed to other rights, e.g. Article 24's right to periodic holidays with vacation pay, which can be reasonably deemed as less important when faced with the human suffering caused by ignorant, corrupt and despotic government. Yet, as Meron reminds us, we must be cautious "in resorting to a hierarchical terminology. Too liberal an invocation of superior rights such as 'fundamental rights' and 'basic rights', as well as *jus cogens*, may adversely affect the credibility of human rights as a legal discipline."[466] The rights enumerated by clause (7) of the Restatement may well be too extensive to warrant the exalted jus cogens status. As mentioned, Simma and Alston have criticized the Restatement's list for omitting welfare rights, and their assessment is surely correct in relation to wilful governmental denial of minimum subsistence. Great care must however be taken in the postulation of welfare rights as jus cogens or else we devalue the partisan mandate of a peremptory jus cogens by confusing fundamental rights with other human rights norms which represent less urgent idealist aspirations?[467] As Nickel says: "When one attempts to formulate human rights standards for the whole world one must assume some representative level of resources and institutional adequacy."[468] Yet, Nickel too concludes that: "the levels of resources now available to most countries would at least allow one to assert rights to satisfaction of people's basic physical needs".[469] However,

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[465] Meron, 'On a Hierarchy of International Human Rights', p. 19
[466] Meron, 'On a Hierarchy of International Human Rights', p. 22
[467] Cranston argued that welfare rights should not be considered human rights in the first place, because he feared that the evident lack of resources and organization needed to implement welfare rights on a global scale would make their legal enforcement impossible. Cranston's cautioned that to turn assumptive idealist aspirations into legal rights will remain a deeply confused project as long as the necessary representative level of resources and institutional adequacy remain illusory. Maurice Cranston, What are Human Rights? (London: Bodley Head, 1973), p. 65-71. Rawls argues, the 'human right to life' must be construed so as to include a "human right to the means of subsistence" in order to allow "minimum economic security". Rawls, The Law of Peoples, p. 65 and p. 65, n. 1.
[468] Nickel, 'Are Human Rights Utopian?', p. 259
[469] Nickel, 'Are Human Rights Utopian?', p. 260. Nickel does however point out that this assessment may be "optimistic", ibid., p. 264. He also warns "that insistence on respect everywhere for all the rights in the Universal Declaration may rule out trade-offs that are essential to the progress of many countries", ibid., p. 247

from a foreign policy perspective aimed at human rights intervention, I think the Restatement's omission of welfare rights is largely coherent. Welfare considerations are surely important, perhaps even essential, for the wider mandate of human rights culture, but in my opinion they are less important than the urgent need to try to prevent, for example, slavery, massacres, or systematic torture, or ethnical cleansing. To postulate welfare rights as jus cogens would also go significantly beyond the already rather minor consensus on the status of human rights as general principles of international law as well as the related jurisprudence of the International Court of Justice. "If things fell from heaven like manna", then it would make sense to argue for a welfare rights jus cogens, perhaps even to assert that a human right to vacation with periodic holiday pay constitutes jus cogens.[470] Until we are that fortunate, to insist that a human rights jus cogens must necessarily include extensive welfare rights becomes obfuscatory to its political mandate. Human rights are primarily a remedial politics and, accordingly, its mandate must prioritize fundamental norms.

## II.v Jus ad bellum

We have pointed out that some thinkers think the human rights project ill conceived and they question the inter-cultural compatibility of a partisan project which desires to promote an allegedly parochial Western culture which celebrates individual agency. They question whether all individuals really want these rights. Against this view, I have argued that the secular and liberal parochialism of human rights may have been primarily Western in its historical origin, but in an ever more interconnected and modernized world it has transcended its historical ancestry. The parochialism of human rights has come to represent the parochialism of civilized humanity. Human rights observation is representative of a standard and goal in the fulfilment of which the international civilized community as a whole ought to be interested. The question then arises, which will be dealt with in this part, how and to which extent should we address human rights abuses? As Ignatieff says: "If human rights are universal, human rights abuses everywhere are our

[470] Robert Nozick, Anarchy, State, and Utopia (Oxford: Blackwell, 2002), p. 198

business."[471] We have observed that human rights violations are 'our' business, indeed everyone's business, for in spite of the difficulty of anchoring the peremptory nature of fundamental human rights norms in customary and treaty law, the International Court of Justice has upheld that fundamental human rights constitute obligations erga omnes as general principles of international law. Fundamental human rights constitute jus cogens for the totality of humanity. One could argue, as does Brownlie, that the "classical and still general method of enforcement is by means of the duty of performance or treaty undertakings imposed on the State parties."[472] Yet, self-censorship functions notoriously poorly, and volutarist human rights treaties are often either not effectively implemented or have weakened status due to reservations, and obviously do not involve states not parties thereto. In view of these shortcomings, should either the United Nations, or a substantial coalition of civilized nations for that matter, remedy gross or systematic violations of fundamental human rights by intervening in the domestic affairs of violating states? If we wish to uphold fundamental human rights as international 'rights', then the conception does surely intrinsically necessitate law enforcement, or else the conception becomes incoherent as a legalistic term. One could assert that the Charter prohibitions on interference in domestic affairs become void if a state violates peremptory human rights norms constituting jus cogens. As mentioned, no such allowances for intervention exist in the Charter. Indeed, domestic intervention is illegal. It is in view of this dilemma that two strands of thought can be discerned. There is a group of scholars, though a rather small one, which believes that we should judge the internal politics of states in the name of human rights. States which do not effectively implement human rights are then deemed as illegitimate. Where these scholars differ is only in their assessment of the extent with which we should be allowed to address or remedy this illegitimacy. Accordingly, this group can be further divided into what I will call inconsistent and consistent approaches. This group of scholars is opposed by a majority which questions whether it is either legitimate or feasible to intervene in the internal politics of states in the name of human rights. The former group of scholars aims to promote secularism and liberalism on the level of the human individual as principles erga omnes, whereas the latter group aims to

[471] Ignatieff, Human Rights as Politics and Idolatry, p. 40
[472] Brownlie, The Rule of Law in International Affairs, p. 71

promote pluralism on the international level. I shall call the former group individualist pluralists, and the latter international pluralists.[473]

Firstly, let us assess an example of inconsistent individualist pluralism. A prominent exponent of this approach is Slaughter who envisions a world which "is neither a utopia nor a panacea".[474] The thrust of her argument is that we need to overcome the traditional realist view of international relations according to which, she argues, "power is the currency of the international system. States interact with one another within that system like billiard balls: hard, opaque, unitary actors colliding with one another."[475] For Slaughter it is necessary to render the opaqueness of states transparent, because "the primary actors in the system are not States, but individuals and groups represented by State governments".[476] Accordingly, she argues that a new liberal approach is needed which "permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology."[477] However, Slaughter's distinction is not intended to advocate forceful intervention, but rather a gradual conversion of illiberal states so as to draw them into liberal ranks. As Slaughter points out: "Exclusionary norms are unlikely to be effective."[478] Instead of exclusion and coercion, she envisages "a world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions – courts, legislatures, executives and administrative agencies – enmeshed in transnational society and interacting in multiple configurations across borders; of double-edged diplomacy and intergovernmental agreements vertically enforced through domestic courts."[479] Slaughter argues that her vision of a liberal world order is far from "a purely hypothetical exercise.

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[473] Simpson calls the first group mild and strong "liberal anti-pluralists", and the latter "Charter pluralists". Yet, in the context of this enquiry on human rights I find this appellation misleading. Simpson acknowledges that his "choice of language in relation to 'pluralism' also will strike some people as peculiar", Simpson, Great Powers and Outlaw States, p. 81, n. 71. Simpson is perfectly correct in his appellation in as far as his scholarship is primarily concerned with international law and the relations between states.

[474] Anne-Marie Slaughter, 'International law in a World of Liberal States', European Journal of International Law, Vol. 6, 1995, p. 538

[475] Slaughter, 'International law in a World of Liberal States', p. 507

[476] Slaughter, 'International law in a World of Liberal States', p. 504

[477] Slaughter, 'International law in a World of Liberal States', p. 504

[478] Slaughter, 'International law in a World of Liberal States', p. 506

[479] Slaughter, 'International law in a World of Liberal States', p. 538

The principles and postulates of classical international law have long been subject to numerous exceptions and modifications that reflect departures from the underlying positive assumptions of unitary and functionally identical States. Contemporary human rights law, for instance, was founded on the recognition that domestic political conditions have consequences for international security."[480] Slaughter finds confirmation of and evidence for the international social utility of human rights in the 'liberal peace' and accordingly she argues that "international law will take the first step toward an explicit distinction among States based on their domestic regime-type."[481] In the end, Slaughter hopes that the distinction between regime types grounded in the conduciveness of human rights to international peace "could lead to the adoption of a new model of the international system, normatively applicable to all States even if positively descriptive of only some."[482]

The strength of Slaughter's approach is her attempt to provide a substantive foundation and framework for a liberal world order, but from a human rights perspective her proposal hardly transcends the status quo of international relations. Distinctions between regime types are already commonplace. We already know largely which governments fall into which categories and these distinctions are voiced by governments in their foreign policy statements as well as in those fora which international organizations provide. These distinctions are also already operative to a significant extent in international law. In their decision making international organizations, such as the International Monetary Fund and the World Bank, as well as the U.N.'s election monitoring programs, acknowledge effectively that they are dealing with different types of government. It is in this context that I have termed Slaughter as inconsistent, for if human rights are seen as legal entitlements for all individuals, qua individual, and if Slaughter's standard of legitimacy implies governmental observation of human rights, then I wonder whether her

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[480] Slaughter, 'International law in a World of Liberal States', p. 538

[481] Slaughter, 'International law in a World of Liberal States', p. 538. Slaughter, like Tesón, adopts Doyle's theory on the liberal peace. The claim is not that liberal states categorically do not go to war, but rather that "a variety of factors converge to reduce the likelihood of military conflict between them.", see ibid., p. 509. See also Michael W. Doyle, 'Liberalism and World Politics', American Political Science Review, Vol. 80, 1986, p. 1151 and p. 1162; and his 'Kant, Liberal Legacies, and Foreign Affairs, II', Philosophy and Public Affairs, Vol. 12, 1983, p. 323

[482] Slaughter, 'International law in a World of Liberal States', p. 538

theory sufficiently acknowledges the implicit consequences of her distinction. Slaughter appears unwilling to bite the bullet in that she does not endorse a consistent application of her principles which should demand the exclusion of governments which are deemed to be in violation of her standards of legitimacy and also holding these governments effectively to account. Thus, Slaughter's standard of legitimacy becomes rather a standard of idealism. Although Slaughter insists that her normative theory "applies to *all* States", she appears to err on the side of caution and is unwilling to endorse punitive measures for States which defy the very norms she sees as mandatory.[483]

Yet, in a legal context, if we assert a normative distinction which sees human rights observation as an essential element of governmental legitimacy in international law, but are unwilling to uphold this distinction as a component of justice, then we might as well abandon the term 'right' altogether. We could replace the term 'human right' with, for example, 'ideal standards of human treatment' or 'parochially assumptive aspiratory expectancy of political behaviour towards all humans'. To merely declare governments as illegitimate or to hold them in contempt without actual attempts to remedy their illegitimacy is a purely hortatory stance, but this hardly amounts to law. Indeed, in light of the current unenforceability of the Universal Declaration the abandoning of the term 'right' could be seen as appropriate. This would lead to a gain in conceptual clarity and an exposure of empty propaganda and hypocritical lip service. It would lay bare, what Ignatieff calls, the "homage that vice pays to virtue".[484] Once human rights are adopted as a legalistic conception, then the conceptual implications must also be defended. It is in view of this conceptual necessity that Luban has forcefully criticized the U.N. Charter system's inability to effectively remedy the very rights which it intends to promote. Under the Charter, as Luban points out, jus ad bellum becomes defined exclusively by two premises, which both contradict the mandate of the Universal Declaration of Human Rights: "A war is unjust if and only if it is not just.", and "A war is just if and only if it is a war of self-defense (against aggression)."[485] However, if we wish to uphold

[483] Slaughter, 'International law in a World of Liberal States', p. 509, Slaughter's italics
[484] Ignatieff, Human Rights as Politics and Idolatry, p. 7
[485] David Luban, 'Just War and Human Rights' in Beitz, Cohen, Scanlon, and Simmons (eds.), International Ethics (Princeton: Princeton University Press, 1985), p. 198

fundamental human rights internationally, then it becomes only a matter of consequence that we also demand, as Luban says: "a universalist politics to implement them, even when this means breaching the walls of state sovereignty."[486] In short, Luban argues that the United Nations ought to revise its collective security mandate and license "nations to wage war to enforce basic human rights."[487] Accordingly, Luban proposes that the Charter adopt a revised definition of jus ad bellum: "A just war is (i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war.", combined with the premise, "An unjust war is (i) a war subversive of human rights, whether socially basic or not, which is also (ii) not a war in defense of socially basic human rights."[488] Accordingly, for Luban the Charter's notion of sovereignty "is morally flaccid, not because it applies to illegitimate regimes, but because it is insensitive to the entire dimension of legitimacy."[489]

Thinkers who endorse individualist pluralism whilst consistently demanding legal sanctions sufficiently acknowledge that the legal human rights conception necessarily demands remedies. A further prominent thinker defending this approach is Tesón, whose stance initially appears to resonate with Slaughter. Tesón also commits himself "to normative individualism, to the premise that the primary normative unit is the individual, not the state. The end of states and governments is to benefit, serve, and protect their components, human beings; and the end of international law must also be to benefit, serve, and protect human beings, and not its components, states and governments. Respect for states is merely derivative of respect for persons. In this way, the notion of state sovereignty is redefined: the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of international justice."[490] Furthermore, for Tesón human

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[486] Luban, 'The Romance of the Nation State', in Beitz, Cohen, Scanlon, and Simmons (eds.), International Ethics, p. 238

[487] Luban, 'The Romance of the Nation State', p. 238

[488] Luban, 'Just War and Human Rights', p. 210. Luban's parentheses

[489] Luban, 'Just War and Human Rights', p. 201

[490] Ferdinand R. Tesón, 'Kantian Theory of International Law', Columbia Law Review, Vol. 53, 1992, p. 54. I am going to stay clear of Tesón's use of Kantian theory, for Kant, although seeing human rights as instrumental to world peace, explicitly rejected forcible intervention in other states. For Kant war was categorically irrational and he denied the existence of a 'just' war between nations. This judgement would also apply to forcible human rights intervention. Tesón admits that his theory is an interpretation of Kant's

rights are a truly universal aspiration and he asserts that there are strong grounds to assume "that every rational person, regardless of historical or cultural circumstance, is apt to value and pursue freedom both as an intrinsic good and as the necessary means to formulate and act upon rational plans of life."[491] Tesón also asserts that the domestic observance of human rights is instrumental in achieving peaceful international relations, when he says that: "There is a strong factual correlation between internal freedom and external peaceful behaviour toward similarly free societies; the causal dynamics that underlie the correlation seem very plausible; and those who disagree with this explanation have failed to provide convincing alternative explanatory hypotheses. The conjecture that internal freedom is causally related to peaceful international behaviour is as safe a generalization as one can make in the realm of political science."[492] Yet, having asserted that human rights observation represents a standard of legitimacy in international law, Tesón demonstrates consistency, as opposed to Slaughter, in explicitly endorsing legal remedies in the event of serious breaches of this standard. Tesón proposes the formation of an International Court of Human Rights as a complement to the International Court of Justice. He argues for an "amendment of the conditions of admission and permanence in the United Nations. Articles 4 and 6 of the Charter of the United Nations should be amended to include the requirement that only democratic governments that respect human rights should be allowed to represent members, and that only democratic states will be accepted as new members." He demands that: "dictators must be disenfranchised for the purpose of expressing the state's consent to be bound by treaty." He argues that: "the law of diplomatic relations should be amended to deny diplomatic status to representatives of illegitimate governments." And he argues that: "the law of recognition should prohibit recognition of illegitimate governments".[493] As a consequence, Tesón also endorses human rights intervention in saying: "citizens in a liberal democracy should be free to argue that, in some admittedly rare cases, the only morally acceptable alternative is to intervene to help the victims of human rights

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thought, and to a certain extent what he considers a correction of the "patent inconsistency" of Kant's universalist thrust. Tesón asserts that Kant's "rejection of the possibility of just wars is not consistent with the normative individualism underlying the rest of his theory of international law.", ibid, p. 93

[491] Tesón, 'Kantian Theory of International Law', p. 101

[492] Tesón, 'Kantian Theory of International Law', p. 81

[493] Tesón, 'Kantian Theory of International Law', p. 100

deprivations."[494] For Tesón "the international community has a right to intervene to uphold basic human rights".[495] Tesón however hesitates to endorse unilateral humanitarian intervention, acknowledging that "opinion is still sharply divided" on this issue, but he expresses optimism in saying that: "most international actors and observers are rallying behind the idea that the United nations Security Council may, in appropriate cases, act forcibly to remedy serious human rights deprivations and their equivalents."[496] In the end though, Tesón, sees the waning of sovereign domestic jursidiction in the name of humanitarian intervention and civil and political human rights not merely as contingent historical phenomena, but rather as a moral duty and an essential means to preserve peace and stability in an ever more interconnected international order[497]

Similarly, Reisman argues that the orthodox acceptance of sovereignty by the U.N. Charter system has become an anachronism because: "Although the venerable term 'sovereignty' continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but – not surprisingly – it is the people's sovereignty rather than the sovereign's sovereignty."[498] Reisman asserts that a revision of the legitimacy of humanitarian intervention is needed, because: "one can no longer simply condemn externally motivated actions aimed at removing an unpopular government and permitting the consultation or implementation of the popular will as per se violations of sovereignty without inquiring whether and under what conditions that will was being suppressed, and how the external action will affect the expression and implementation of popular sovereignty."[499] Reisman justifies his

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[494] Tesón, 'Kantian Theory of International Law', p. 93
[495] Ferdinand R. Tesón, 'Collective Humanitarian Intervention', Michigan Journal of International Law, Vol. 17, 1995-1996, p. 371
[496] Tesón, 'Collective Humanitarian Intervention', p. 323
[497] See Tesón, 'Collective Humanitarian Intervention', p. 371
[498] W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in The American Journal of International Law, Vol. 84, 4, Oct. 1990, p. 869. For Reisman, the term 'peoples' sovereignty' should however not be misunderstood so as to convey the illusion that group rights should be put on a par with the human rights of the individual. That this danger is all too real can be illustrated with the 'African Charter on Human and *Peoples'* Rights', which due to its postulation of 'peoples' rights' becomes juxtaposed to the individualist mandate of the legal human rights conception. It is in this context that, Deschênes, a Canadian expert on the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, has "called for an end to the suppression of individual rights in the name of collective rights.", quoted in Meron, 'On a Hierarchy of International Human Rights', p. 2
[499] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 876

interventionist stance in saying: "Of course, popular sovereignty is violated when an outside force invades and imposes its will on the people. ... But what happens to sovereignty, in its modern sense, when it is not an outsider but some home-grown specialist in violence who seizes and purports to wield the authority of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list (often the only choice)? Is such a seizer of power entitled to invoke the international legal term 'national sovereignty' to establish or reinforce his own position in international politics?"[500] Reisman even goes so far as to argue that: "no serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any state' and hence insulated from international law".[501] For Reisman, our desire to uphold human rights demands that we reassess the notion of sovereignty which is entrenched in the Charter system, because: "Those who yearn for the 'good old days' and continue to trumpet terms like sovereignty without relating them to the human rights conditions within the states under discussion do more than commit an anachronism. They undermine human rights."[502]

Against this group of individualist pluralists there stand the vast majority of scholars who deem the promotion of human rights intervention to be questionable on the related grounds that it is infeasible and potentially disastrous, or irreconcilable with a defence of cultural pluralism, or incompatible with the inherent characteristics of the international legal system. A prominent thinker who is admittedly firmly anchored in the liberal tradition but questions the pragmatic soundness of human rights intervention is Walzer. He argues that: "intervention fails more often than not to serve the purposes of liberty"[503] Walzer's "prudential" warning against intervention asserts that: "If the outcome of political processes in particular communal arenas is often brutal, then it ought to be

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[500] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 870. Reisman's parentheses.
[501] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 869
[502] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 876
[503] Walzer, 'The Rights of Political Communities', in Beitz, Cohen, Scanlon, and Simmons (eds.), International Ethics, p. 179

assumed that outcomes in the global arena will often be brutal too. And this will be a far more effective and therefore a far more dangerous brutality, for there will be no places left for political refuge and no examples left of political alternatives."[504] He questions the pragmatic viability of the "far-reaching license" of human rights intervention on the grounds that we would then be "bound to fight all the wars we are able to fight – up to the point of exhaustion and incapacity" and this would, in the end, "leave us no time to ourselves".[505] Thus, from Walzer's prudential stance, it would indeed be a "large claim" to demand that intervention against outlaws should become automatically permissible, "for countries with tyrannical governments make up the greater part of international society."[506] For proponents of intervention, the prudential argument is perhaps the easiest to deal with. Luban summarizes the prudential objection as follows: "an absolute ban on the initiation of warfare is justified on what we would call rule-utilitarian grounds: regardless of the moral stature of a state, or the empirical likelihood of escalation in a given case."[507] Yet, as Luban points out, the prudential reason against intervention is inadequate, because "by giving absolute primacy to the world community's interest in peace, it does not really answer the question of when a war is or can be just", and "to make this the only factor is to refuse a priori to consider the merits of particular issues, and this is simply to beg the question of *jus ad bellum*."[508] The prudential objection can be countered in that no responsible proponent of humanitarian intervention would recommend intervention without attaching the important reservations of proportionality and reasonable expectation of outcome. In line with the proportionality requirement, an interventionist mandate would not only be confined to remedy only gross violations but it must also be strictly limited to remedial purposes, which would prevent an abuse of intervention for further political purposes. When it comes to reasonable expectations of outcome, then no hard and fast rules can be established, and each case must be assessed on its own merit. Also, the pragmatic failure of particular interventions does neither rule

[504] Walzer, 'The Moral Standing of States', in Beitz, Cohen, Scanlon, and Simmons (eds.), International Ethics, p. 236
[505] Walzer. 'The Moral Standing of States', p. 231
[506] Walzer, 'The Moral Standing of States', pp. 218-219
[507] Luban, 'Just War and Human Rights', p. 200
[508] Luban, 'Just War and Human Rights', p. 200; Luban's italics.

out the soundness of the principle of intervention as such, nor should particular failures be viewed as necessarily predictive of the success of all future interventions.

However, Walzer bolsters his prudential reason against intervention in emphasizing that politics is, by its very nature, a communal process which is grounded in a shared understanding of history, tradition and sentiment. For Walzer, genuine politics can neither be coerced nor externally manipulated. In reminding us of the already tremendous internal problems of political development faced by states, he questions whether we can genuinely speak of a global politics and whether projects aimed at creating such a global politics are actually feasible. As Walzer says: " Break into the enclosures and you destroy the communities."[509] 'Rights' are for Walzer primarily a domestic political issue and he questions whether human rights legislation can be coherently exercised on the international legal plane. He questions with which justification we can reasonably view the arena of international relations as being a legitimate subject of the stringent parochial moralizing of human rights, because rights can only be viably enforced upon having received communal recognition and the proper locus for this process of recognition remains the domestic political arena. For Walzer: "The globe is not, or not yet, such an arena."[510] Walzer sees the global community as inherently pluralist and the idea of a united humanity remains notoriously elusive. In a global context we can at best assert a 'thin' morality, but this hardly amounts to legitimacy of an interventionist mandate. Walzer argues that the globe is a motley of cultural and nationalist allegiances and the rights which regulate the international arena serve as necessary negative safeguards intended to preserve the independence and integrity of this diversity of communities. In explicitly echoing Mill's thoughts on political self-determination, Walzer argues against human rights intervention in saying that: "given what liberty is, it necessarily fails. The (internal) freedom of a political community can be won only by the members of that community."[511] Walzer questions whether we can genuinely speak of freedom when freedom represents a political and cultural value imposed by invasion or intervention. For

[509] Walzer, 'The Moral Standing of States', p. 236
[510] Walzer, 'The Moral Standing of States', p. 234
[511] Walzer, 'The Rights of Political Communities', p. 179. Regarding Mill's defence of political self-determination see his 'A Few Words on Non-Intervention', in Dissertations and Discussions (New York: Holt & Co., 1873), pp. 238-263

Walzer, freedom "does not transfer at the initiative of the foreigners".[512] In quoting Mill, Walzer concludes that: "Self-determination, then is the right of a people 'to become free by their own efforts' if they can, and non-intervention is the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusion of an alien power. It has to be stressed that there is no right to be protected from domestic failure, even against a bloody repression."[513] Walzer asserts that a defence of self-determination and pluralism aims to preserve what Mill called "'the virtues needful for maintaining freedom'", for "'it is during an arduous struggle to become free by their own efforts that these virtues have the best chance of springing up.'"[514] Accordingly, in some communities authoritarian regimes may arise "as it were, naturally". Yet, he is far from endorsing such regimes, but urges us rather to accept this unpalatable outcome as "not necessarily insane", for these regimes are a mere reflection of the human diversity's "protracted struggles" in the ceaseless choice between competing values. Walzer's line of argument serves as a warning against the pitfall of righteous parochial moralizing. Bearing in mind the undeniable and historically entrenched diversity of cultural and political value systems, he questions whether human rights interventionists have a genuine moral high ground allowing them to intervene in political communities which do not conform with those values which have found their approval. This would amount to a sham defence of "a single philosophically correct or universally approved outcome", a perverted propagation of what constitutes freedom, which he argues "would be more like protecting only individuals who had arrived at certain opinions, life styles, and so on."[515] For Walzer the international arena is intrinsically pluralist and this mandates the preservation of cultural pluralism. The judgements put forward in this arena will invariably be tainted by diverse political and cultural notions of the great and the good, and we must recognize and respect these diverse patterns of development and the resulting varying notions of communal integrity. He argues: "That's why states objectively illegitimate are able, again and again, to rally subjects and citizens against invaders. In all such cases, though the 'fit' between government and community is not of

[512] Walzer, 'The Moral Standing of States', p. 222
[513] Walzer, 'The Rights of Political Communities', p. 179
[514] Mill quoted in Walzer, 'The Rights of Political Communities', p. 178
[515] Walzer, 'The Moral Standing of States', pp. 232-233

a democratic sort, there is still a 'fit' of some sort, which foreigners are bound to respect. ... we must act as if they were legitimate, that is, must not make war against them."[516]

As opposed to the prudential objection, the parochialism objection is substantial in that it directly addresses the legitimacy of intervention. Faced with the objections voiced by internationalist pluralists, Téson acknowledges that those who favour liberal criteria of legitimacy and human rights intervention are all too often "regarded as either hopeless idealists, or worse still, as trigger-happy 'moral imperialists'."[517] Walzer's arguments remind us of the difficulties inherent in articulating a universal moral common denominator as a guideline for intervention, because he views moral thickness as a permanent feature of humanity which must be accommodated. This defence of cultural pluralism demands that proponents of a liberal and secular human rights mandate should abandon their interventionist ideas. They can at best appeal to an overlap between their parochial values and a thin morality "for the sake of criticism and for the sake of solidarity"[518] Walzer sees this as an inevitable consequence of the fact that "the crucial commonality of the human race is particularism", and an acknowledgement of this circumstance forces us "to recognize this commonality and begin the difficult negotiations it requires."[519] Yet, should we really stand idly by and remain passive in view of gross violations of fundamental human rights so as to accommodate respect for cultural diversity? Even Walzer acknowledges that "there are cases when sovereignty can be disregarded."[520] Walzer accepts a need for intervention to remedy actions which "shock the moral conscience of mankind".[521] But when does the gross and systematic violation of fundamental human rights become an act that shocks the conscience of mankind? Does it take thousands of lives, or must this criterion be measured in the millions? Must proponents of humanitarian intervention accept Walzer's admittedly "paradoxical" conclusion which asserts that: "people have a right to a state within which

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[516] Walzer, 'The Moral Standing of States', p. 224
[517] Tesón, 'Collective Humanitarian Intervention', p. 323
[518] Michael Walzer, Thick and Thin – Moral Argument at Home and Abroad (Notre Dame: University of Notre Dame Press, 2002), p. 16-17
[519] Walzer, Thick and Thin, pp. 83
[520] Walzer, 'The Moral Standing of States', p. 224
[521] Walzer, 'The Rights of Political Communities', p. 193

their rights are violated", on the grounds that this "is the only kind of state that they are likely to call their own"?[522]

In contrast to Walzers's stance, Ignatieff importantly points out that politics, and particularly the politics of human rights, also sets limits to moral and cultural tolerance. For Ignatieff, deliberation serves an important purpose within the political realm, but it is not the sole means and end of politics, The idea of human rights serves as a moral threshold which must not be transgressed, and when deliberation with violators becomes fruitless, then "human rights as politics becomes a fighting creed, a call to arms."[523] Thus, the ends which are represented by Mill's 'learning the virtues needful for maintaining freedom', or Walzer's demand for 'recognition of diversity and our respect for communal integrity and for different patterns of cultural and political development', or his demand to view even an oppressive relation between a government and a people, provided it is non-egregious, as a 'fit of some sort, which foreigners are bound to respect', these are all ends worthy of defence, yet none, in the opinion of this student, are sufficiently worthy so as to compel us to 'act *as if*' the routine non-egregious violation of human rights on a global scale were 'legitimate'. Luban demonstrates the moral difficulty which the toleration of non-egregious oppressive governments for the sake of political pluralism and self-determination entails by making explicit the kinds of acts which must then become 'tolerated'. Excecution, political imprisonment, and torture are routine practices of such governments, and the population becomes compliant due to fear, but not because it feels that there is a 'fit of some sort' which ought to be respected. This state of affairs furthermore creates a vicious circle in that the executive branches of such governments become reluctant to relinquish or oppose the routine violation of human rights due to fear of reprisals should their government fall. As Luban says, such a government "fits the people the way the sole of a boot fits a human face: after a while the patterns of indentation match with uncanny precision."[524]

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[522] Walzer, 'The Moral Standing of States', p. 234
[523] Ignatieff, Human Rights as Politics and Idolatry, p. 22
[524] Luban, 'The Romance of the Nation State', pp. 241-242

Walzer asserts that non-intervention expresses our respectfulness of the very nature of 'genuine' political process, and as a consequence we must also tolerate that this process all too often entails unpalatable outcomes, even "frequent brutality", [525] Yet, once human rights are pledged, then 'frequent brutality' can neither be respected, nor tolerated, without violating the very spirit of the human rights conception. Similarly, Walzer's assertion that we have "to accept as presumptively legitimate, though not necessarily endorse" a non-egregious oppressive government, can only be countered with a partisan insistence that, once human rights have been espoused, then one can never coherently presume routine violations of human rights as 'legitimate'.[526] Furthermore, if we are to accept Mill's view, as Walzer does, that non-intervention necessarily implies a willingness to let domestic political matters take their course, regardless of failure or success, or peace or bloodshed, then why are we to help at all?[527] Why, for example, are we to share those epistemic and technological advancements which are coterminous with our Western democratic culture with nation-states ruled by benighted, corrupt and violent governments? If there is always, as Walzer asserts, 'a fit of some sort, which foreigners are bound to respect', then do the people living under benighted, corrupt, and violent governments also deserve the often primitive standards of medicine and technology which are coterminous with a corrupt squandering of resources or the suppression of critical and rational discussion? If we are to demand, as Walzer does, 'recognition of diversity' and 'respect for communal integrity and for different patterns of cultural and political development', then why should we help alleviate any kind of humanitarian difficulties which confront these communities? After all, corrupt and despotic governments are rarely at the forefront of that technological and scientific advancement which allows us to, for example, remedy and mitigate humanitarian, medical and ecological 'supreme emergencies' with ever greater rigour, or to help alleviate the developmental pressures of less developed nations. The benefits of epistemological and technological progress which significantly facilitate our humanitarian alleviation of suffering globally are taken for granted all too often by benighted, corrupt and violent governments when they receive foreign aid, yet they rarely contribute intrinsically to

[525] Walzer, 'The Moral Standing of States', p. 237
[526] Walzer, 'The Moral Standing of States', p. 237
[527] Mill quoted in Walzer, 'The Rights of Political Communities', p. 179

these advancements, which are largely coterminous with, one could say the fruits of, a principled devotion towards an open society and a cultural affirmation of critical rational discussion. Thus, if we were to accept Walzer's definition of self-determination as "the right of a people to become free by their own efforts if they can" and his definition of non-intervention as "the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusion of an alien power"[528], then can we not reasonably argue that every form of humanitarian aid rendered to benighted, corrupt and violent governments does also constitute a denial of the very same rights to self-determination and non-intervention which Walzer wants us to preserve with tender loving care? Yet, we must help, or more precisely, due to having been exposed to the open societies' sentimental education and its influence of critical rational discussion, we have come to feel and believe that the world would become a more beautiful place if we were to do so with consistency.

For now though, in view of the palpable unpopularity in many parts of the world of the liberal and secular mandate of human rights, the project must limit its aspirations to the delineation of a minimal moral core in the form of fundamental human rights for the sake of pragmatism, but not because the liberal and secular values of the human rights conception are misconceived. As demonstrated in part ii of this chapter, an acknowledgement of the parochialism of the human rights conception does not need to lead to consensus based revision, which would divorce the conception from its individualist mandate. Cautions reminding us of the parochial nature of human rights urge us, for now, to focus any attempts of intervention on gross violations of only those rights which can be identified to constitute jus cogens. In the end, as Schachter asserts, no government has disputed officially that certain human rights, such as prohibitions against slavery, torture and cruel, inhuman and degrading treatment, have indeed become firmly entrenched peremptory norms which are binding on all states, and not merely those states which have entered treaty obligations in this regard.[529] Furthermore, as no government

[528] Walzer, 'The Rights of Political Communities', p. 179

[529] See Schachter, International Law in Theory and Practice, p. 338. Donnelly's optimism is akin to Sohn's when he says: "Few governments today repudiate rights to life, liberty, security of the person, equality before the law, a fair trial, political participation, social security, work, rest, leisure, education and an

actually dares to repudiate these rights, these norms can also be considered to approximate a neutrality requirement to the greatest possible extent, Human rights which coincide with a neutrality requirement also offer an effective response to objections which see all human rights as a parochial or paternalistic imposition. As Beitz makes clear, an intervention aimed at giving effect to carefully conceived neutral human rights can be justified on the grounds that it would be welcomed by the subjects of intervention as it is likely to coincide with their moral conviction.[530] In the absence of universal normative consensus, to uphold at least the peremptory status of fundamental human rights as jus cogens in a principled manner can thus be seen as a neutral interest of human civilization. It is in this sense that certain human rights can be considered to be incontroversial, and humanitarian intervention on their behalf becomes, what Scanlon calls, "a ground for action that is neutral with respect to the main political and economic divisions in the world".[531]

In echoing Walzer's prudential and philosophic reservations, prominent legal scholars question whether the idea of a higher moral purpose is compatible with the very nature of the international legal system in the first place. The objections voiced by legal scholars are also substantial in that they question whether the functional characteristics of international law as a voluntarist and decentralized system intended to preserve pluralism can be reconciled with humanitarian intervention. Alvarez, for example, argues that human rights observation constitutes an unsound criterion for the assessment of legitimacy in international law. In commenting on Slaughter's work, Alvarez says:

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adequate standard of living; to freedom of thought, conscience, religion, opinion, expression, assembly, association and movement; and to protection against discrimination and torture. And when they do, as in, for example, Iran's persecution of Baha'is as apostates, these states receive little international support and considerable international criticism. There simply is not much international appeal today, as opposed to twenty years ago, to arguments that the list of internationally recognised human rights is either too long or systematically misguided.", Donnelly, 'The Social Construction of International Human Rights', p. 99. Donnelly also believes in a "remarkable international normative consensus on the list of rights", Jack Donnelly, Universal Human Rights in Theory and Practice (Ithaca: Cornell University Press, 1989), p. 23. In contrast, Nickel argues that only the "rights not to be murdered, tortured, or enslaved are absolute or near-absolute", Nickel, 'Are Human Rights Utopian?', p. 258. Nickel also questions enforcement and argues for "bringing human rights down to earth by arguing that most of them must be understood to contain exceptions or qualifications and that few of them are absolute in competition with each other or with considerations such as the preservation of international peace.", ibid., p. 250

[530] See Beitz, 'Human Rights as a Common Concern', p. 273

[531] Scanlon quoted in Beitz, 'Human Rights as a Common Concern', p. 270, n. 4

"Some of the work expounded under the liberal label would exclude where traditional international law would attempt to persuade. Worse still, the liberals' 'badge of alienage', once imposed, tends to put the target beyond reach or leaves the question to be resolved outside the constraints of law. This kind of liberal theory shrinks, rather than expands, the domain of law."[532] Alvarez also questions the normative importance ascribed to the liberal peace as a legal prescription and asks whether it "reflects something more than the transitory experience of a number of post-1945 democracies".[533] In view of the fact that liberal states have engaged in warfare with non-liberal states, Alvarez argues that if "the liberal peace is not an immutable independent variable promoting peace, stability and the rule of law, but merely an endogenic factor", then this "poses serious questions for liberal legal prescriptions".[534] He expresses concern about the feasibility of the liberal theorists' desire "to provide an overarching single 'blueprint' for dealing with all legal problems and all kinds of states", and points out that "a truly liberal (in the dictionary sense) account of how treaties evolve may lead to normative conclusions very different from those suggested".[535] Accordingly, Alvarez sees a strong reason to resist an "invitation to up-end our entire perspective and embrace the liberal 'causal paradigm' emerges from law's normative and expressive functions" and he cautions that "international law at a fundamental level needs to continue to insist that all states be treated as equal – whatever liberals say."[536] Koskenniemi also questions whether human rights intervention is reconcilable with the nature of international law and society. He argues that: "The values of the international system as expressed in public international law are those of liberal individualism transposed to the interstate level. The system denies the existence of an external standard of judgement that is valid regardless of whether it is held by states themselves."[537] For Koskenniemi the "'system' exists only in the formal sense of a shared vocabulary and a set of institutional practices that states use for cooperation or conflict. It

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[532] José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', European Journal of International Law, Vol. 12, No. 2, 2001, p. 241. Alvarez is perhaps uncharitable, for, as mentioned, Slaughter is not intent on exclusion.
[533] Alvarez, 'Do Liberal States Behave Better?', p. 235
[534] Alvarez, 'Do Liberal States Behave Better?', p. 237. Alvarez writes "endogenic", not endogenous.
[535] Alvarez, 'Do Liberal States Behave Better?', p. 245. Alvarez's parenthesis
[536] Alvarez, 'Do Liberal States Behave Better?', p. 246
[537] Martti Koskenniemi, 'The Future of Statehood', Harvard International Law Journal, Vol. 32, No. 2, 1991, p. 404

is an artificial creation, a contrived synthesis of power and ideas. In short, it is not an organism that embodies some autonomous ideal of authentic communal life."[538] Koskenniemi argues that, in view of this nature of the international legal system, the enforcement of human rights "might appear as precisely the kind of authoritarianism against which the system was created".[539] In view of a potential erosion of sovereignty due to the human rights mandate, he asserts that: "Statehood survives and should continue to survive for the foreseeable future because its formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them."[540]

According to this traditional understanding of the system of international law, as Louis Henkin says, the system "is designed to further each state's realization of its own notion of the Good."[541] It is in defence of this international pluralism that Weil sees a potential intrusion into domestic spheres and a departure from voluntarism as unpromising and even dangerous flights of fancy. For Weil international law is not easily amenable to idealist aspirations of global legal human rights, because in its historical development the international legal system has been functionally grounded in the tried and tested precepts of voluntarist positivism and decentralization as these proved to be a lesser cause of friction than any other historical alternatives. Weil asserts that: "Absent voluntarism, international law would no longer be performing its functions."[542] He cautions against a departure from voluntarist positivism and emphasizes "the necessity of envisaging international law as positive law, i.e., as *lex lata*. This means that ... the distinction between *lex lata* and *lex feranda* must be maintained with no abatement of either its scope or its rigor."[543] Similarly, Jennings warns that, although idealism has indeed contributed to the progressive development of international law, any attempts to reform the international legal system must acknowledge the distinction between lege lata and lege ferenda. A failure to sufficiently acknowledge this distinction for the sake of

[538] Koskenniemi, 'The Future of Statehood', p. 404
[539] Koskenniemi, 'The Future of Statehood', pp. 404-405
[540] Koskenniemi, 'The Future of Statehood', p. 407
[541] Quoted in Koskenniemi, 1991, p. 404
[542] Weil, 'Towards Relative Normativity in International Law?', p. 420
[543] Weil, 'Towards Relative Normativity in International Law?', p. 421, Weil's italics

idealism could become self-defeating in that it could lead to an erosion of the established authority of the international legal system, and as a consequence also to an erosion of compliance with this authority.[544] It is in view of the fact that human rights intervention would constitute a grave departure from the long established pluralist nature of the international legal system, that Akehurst's points out that the human rights conception has the "potential to unleash explosive forces".[545] That the pluralist social utility of international law is not only an "inescapable" feature of this legal system but that it was also pragmatically successful is asserted by Brownlie. For Brwonlie, a sober historical comparison between national and international law may lead to the conclusion that the latter is not necessarily less efficacious. When the rules of law are seen as principles of self-limitation with which agents should comply, then, in recent history, the occasions of noncompliance with domestic public law by individuals may well outnumber occasions of noncompliance with international public law by states.[546] Falk too reminds us that: "any sweeping condemnation of Westphalia smoothes out the ups and downs of history, and especially overlooks the extent to which the idea of the secular state was a significantly successful response to the torment of religious warfare in the seventeenth century, and indirectly fostered ideas of self-determination for colonial peoples and co-existence between ideological adversaries in the Twentieth century."[547] Falk grounds his need for a cautious defence of the sovereign and territorial state apparatus in pragmatic concerns, for "reluctance to pass negative judgment on the state arises from the absence in effective political space of any legitimating democratic or cultural mandate for alternative more beneficial arrangements of world order".[548]

In view of the established classical understanding of the international legal system, attempts to implement humanitarian intervention at this stage of the development of this system may well prove to be vainglorious. Weil concedes that if it were feasible to depart from the entrenched Westphalian system towards a genuine international community,

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[544] See Jennings, 'An International Lawyer Takes Stock', p. 528, Jennings' italics. See also, ibid., pp. 515-516

[545] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 211

[546] See Brownlie, The Rule of Law in International Affairs, p. 14

[547] Richard Falk, 'The challenge of genocide and genocidal politics in an era of globalisation', in Dunne and Wheeler (eds.), Human Rights in Global Politics, p. 179

[548] Falk, 'The challenge of genocide', p. 179

then the potential fulfilment of a united world with peaceful cooperation and ethical harmony would surely represent a worthwhile aim.[549] Yet, for Weil this prospect is regrettably an illusory dream, and he concludes that we must acknowledge that the present international situation remains characterized by sovereign equality and political difference. In view of these characteristics, the best prospects for ensuring lasting peace and cooperation are ensured by an accommodation and acknowledgement of the functional role of voluntarism, and a departure from this established and proven function in the pursuit of lofty idealism could undermine the international system as a whole and lead to lawlessness and strife.[550] It is in view of the continuing importance of a voluntarist international law for the preservation of international pluralism and relative order that Weil cautions us to safeguard those essential features which international law has acquired in its historical functional development.[551] An international law grounded in the justice of human rights values collides with the firmly entrenched requirements of ideological neutrality and voluntarism in international law. These two visions of international law represent two prevalent and fundamentally opposed positions which Schachter terms the 'purposive' and 'non-purposive' approaches. The purposive approach believes that international legal rules must ultimately be grounded in and serve values and purposes which are common to civilized humanity.[552] Proponents of this purposive approach argue that Westphalian rules of mutual accommodation might be superseded by particular interests of greater intrinsic value to humanity, such as the protection of the fundamental rights of the individual. From this perspective, the protection of human rights represents a higher purpose than the protection of the domaine réservé of the sovereign state, and the latter goal might accordingly become suspended in the interest of the former.[553] In contrast, the non-purposive approach defends rules of mutual accommodation as the primary purpose of the international legal system. According to this view, history has demonstrated that the proper locus of authority for international law lies in its preservation of rules of co-existence and the prohibition of the use of non-defensive force. As Schachter comments, one can detect in the 'non-

[549] See Weil, 'Towards Relative Normativity in International Law?', pp. 441-442
[550] See Weil, 'Towards Relative Normativity in International Law?', p. 423
[551] See Weil, 'Towards Relative Normativity in International Law?', p. 420
[552] Schachter, International Law in Theory and Practice, p. 30
[553] Schachter, International Law in Theory and Practice, p. 31

purposive' approach "the ideas of civil society proposed by some individualist and anti-statist thinkers. On their view, law lays down the basic rules to enable individuals to pursue their self-chosen ends."[554] The non-purposive rules of international law are akin to constitutional prohibitions on the level of humanity as a whole which cannot be overridden by some particular parochial goal or policy. Just as constitutional rules serve to protect minorities in the domestic society from the tyranny of the majority, so international law serves to protect the international minority from the imposition of parochial values or substantive goals, even if these are asserted by a majority of states.[555] There is thus a latent tension between the idea that international law ought to accommodate the legal protection of the individual and the idea that doing so would violate fundamental rights of states and possibly jeopardize the state system as a whole. In essence, both approaches fulfil a purpose, but the former approach's purpose is to give ontological priority to the individual, whereas the latter's purpose is to give this priority to the state. We are thus dealing with "two liberalisms" in international law, of which one tends to view the preservation of the freedoms of the individual as the proper aim of pluralism, whereas the other aims to preserve the freedom and survival of states.[556] It is needless to say that the latter approach has predominated international law. As Schachter says: "In short, co-existence is itself an end and one may regard it as a paramount value of international law, even if not of morality."[557]

However, international law is only contingently tied to voluntarist positivism, but not intrinsically. Voluntarist positivism and sovereignty have historically served important functional needs, but in an ever more interconnected and modernized world these needs have become superseded by a need to protect human rights. International law is a legal system which was made by governments for governments, and as such, as Ago explains, its functional development was primarily of a "discretional nature and inspired by a practical criterion of social utility rather than the protection of a higher moral

[554] Schachter, International Law in Theory and Practice, p. 30. Schachter argues that this position is akin to the liberalism of Hayek being applied to the state system. See ibid., p. 33, n. 22. However, in my opinion, it is doubtful whether Hayek's methodological individualism can be applied coherently to states.
[555] Schachter, International Law in Theory and Practice, p. 31
[556] See Gerry Simpson, 'Two Liberalisms', European Journal of International Law, Vol. 12, No. 3, 2001, p. 537
[557] Schachter, International Law in Theory and Practice, p. 31. Schachter's parentheses

requirement".[558] The conceptual and functional origins of this system are arguably outmoded in that these have been developed in the wake of the Treaty of Westphalia, at a stage of human historical development when the notion of the human being as an individual, as an autonomous agent, had barely emerged. Although the voluntarist and positive features of international law were instrumental in the creation and preservation of a pluralist and heterogeneous international society, their weakness, as De Visscher says, "was their moral indifference to the human ends of power and their passive acceptance of the individualism of sovereignties. Cutting norms off from their deepest roots for the sole purpose of integrating them in a scientific but purely formal system, they constantly desiccated and impoverished them."[559] The functional development of international law as a horizontal legal system did indeed preserve pluralism and heterogeneity, but only for sovereign states. International law in its current form is an anachronistic legal system which gives ontological priority to the state, and the repercussions of this circumstance are all too often suffered by individuals. The preservation of the freedom of states through voluntarist positivism was ultimately achieved, as DeVisscher says, "only by sacrificing the idea of an objective order to a purely formal conception of international law. It excluded from law the higher considerations of reason, justice and common utility which are its necessary foundation."[560] Proponents of human rights culture must insists that the deepest root of law is ultimately the individual, and the common utility of law, whether international or internal, ought to be assessed in relation to its merit for human individuals and not fictitious legal 'individuals' such as states. International law must be proactively shaped so as to reflect this "intimate and indissoluble connection between the moderating view of internal power and the effectiveness of international law."[561]

The historically entrenched functions of international law are in the end only contingent and as a consequence they are malleable and can be made to accommodate the utility of fostering human agency for civilization and to heed the urgent pleas for empathy for

[558] Ago, 'Positive Law and International Law', p. 693.
[559] De Visscher, Theory and Reality in Public International Law, p. 55
[560] De Visscher, Theory and Reality in Public International Law, p. 21
[561] De Visscher, Theory and Reality in Public International Law, pp. 180-181

victims of human rights violations. International law must be modified so as to overcome the exclusion from its realm of all matters which cannot be reconciled with the express will of all states. As De Visscher says: "voluntarist positivism singularly accentuated the propensity of international law to immobility".[562] There are indeed many governments which have arguably a vested interest in denying the pursuit of the human rights project and we should not postpone the integration of a human rights jus cogens as a peremptory standard of civilization in international law until each and every governments has conceded. International law is not necessarily divorced from considerations of individual justice but has only contingently evolved to be so. We must thus strive to overcome the obvious lacuna in the international legal system when it comes to rules delineating the domestic protection of individuals, for in view of current international human rights legislation, the individual's *locus standi* in international law, in spite of a great deal of lip service, remains, in Brownlie's words, "on the whole prospective in nature".[563] In view of the individual's lack of locus standi, Franck points out that, the notion of justice in the international legal system must be seen as metaphorical, because justice, in this context, is primarily concerned with rule compliance by states as the primary agents of the international legal system, but states, unlike individual agents, are strictly speaking not sentient. Yet, as Franck asserts: "real injustice ... can only be accounted in units of suffering by individuals, not by some imaginary suffering of that inanimate aggregation known as 'the state'."[564] The same argument holds for pluralism in that, ultimately, states as such cannot be free but only the individuals of which they are composed. For Brierly the assertion that states have an absolute right to sovereignty "is a product of the pure gospel of individualism applied in the international field."[565] Freedom for states is a mere metaphor, but for the individual it is tangible. Ultimately, it is individualist pluralists who strive to promote 'real' freedom by insisting on the universal recognition and implementation of civil and political rights. Internationalist pluralists promote

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[562] De Visscher, Theory and Reality in Public International Law, p. 54
[563] Brownlie, 'The Place of the Individual in International Law', p. 435
[564] Franck, 'Is Justice Relevant to the International Legal System?', p. 946
[565] Brierly, The Basis of Obligation in International Law, p. 7

primarily a metaphorical freedom. As Simpson points out: "perhaps the new liberals are right to be proprietorial concerning the label 'pluralist'."[566]

In view of assertions of international law's intrinsic voluntarist and decentralized character we should remember that during the nineteenth century international law demonstrated it capacity to adapt to moral requirements. The Concert's legalized hegemony, in departing from traditional Westphalian tenets of absolute sovereign equality and independence, arguably furthered the development of humanitarian international law. Under the Concert's influence, as De Visscher says, the idea of the balance of power was given "new life by importing into it rational and moral elements", and during this period "the first outlines were being drawn of an international law foreign to the strictly political interest of States, inspired by the principles of civilization and by the needs of commercial relations between the people."[567] Advancements in practical international cooperation and organization aside, the Concert's legalized hegemony introduced and fostered the international humanitarian protection of the individual in departing from voluntarism and decentralization. An important development pertaining to the protection of individuals was the abolition of the slave trade. In 1814 the United Kingdom signed a treaty with France in this regard, and this tenet was also accepted by the Vienna Congress of 1815.[568] This practice was followed by numerous multilateral treaties and paved the way for the General Act of the Brussels Conference on the African Slave Trade of 1890.[569] Throughout this process of abolition, "the British Royal Navy, ruling the seas, played a central role as a maritime enforcement agency."[570] The civil and political rights of religious dissenters were reaffirmed by the Final Act of the Congress of Vienna in 1815, and by the time the Congress of Berlin met in 1878, the principle of the protection of an individual right to religious tolerance was so firmly established that the

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[566] Simpson, Great Powers and Outlaw States, p. 81, n. 71

[567] De Visscher, Theory and Reality in Public International Law, p. 27. See also Simpson, Great Powers and Outlaw States, pp. 104-105

[568] This commitment was renewed by the Congresses of Aix-la-Chapelle in 1818 and Verona in 1822. See De Visscher, Theory and Reality in Public International Law, p. 181

[569] See Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 21. Also of importance were agreements reached at the Conference of Berlin in 1885 for the protection of native peoples. See De Visscher, Theory and Reality in Public International Law, p. 181

[570] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 21

French delegate declared it to be a "basis of social organization in all states of Europe".[571] A further instance of the increased legal codification of humanitarian ideals, inspired by the formation of the International Committee of the Red Cross in 1863, was the humanization of warfare under the Geneva Convention of 1864.[572] The nineteenth century also witnessed the emergence of humanitarian intervention under the auspices of the Concert. As Akehurst says: "a new independent reason for intervention based on 'humanity' emerged in theory which was related to the ideas of political liberalism and the concept of fundamental human rights. State practice in the nineteenth century increasingly invoked humanitarian reasons to justify intervention."[573] As Brownlie says, one example of the Concert's "genuine humanitarian action is provided by the French occupation of parts of Syria and the policing of the coast by warships from August 1860 to June 1861 to prevent the recurrence of massacres of Maronite Christians".[574] A further example is the 1878 Treaty of Berlin, which also protected Christian minorities from the Turks.[575] However, Akehurst's cautions that humanitarian reasons merely "revealed a new tendency in the official grounds advanced by states to justify intervention in that period, but not a new rule of customary international law. In reality, states were mostly pursuing their own ends when intervening in another state for alleged humanitarian purposes."[576] Schachter also reminds us that "sympathy for victims of atrocities should not obscure the lessons of past invasions claimed to be humanitarian". When faced with this ambiguity of intention, which has often resulted in the imposition of political and material conditions not welcomed by many citizens and the exacerbation of tensions, he

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[571] Leo Gross, 'The Peace of Westphalia, 1648-1948', American Journal of International Law, Vol. 42, No. 1, 1948, p. 22, French delegate Waddington quoted on p. 23. On the influence of the Enlightenment on the Concert of Europe, see Howard, The Invention of Peace, pp. 40-51

[572] See Arthur Nussbaum, A Concise History of the Law of Nations (New York: Macmillan, 1954), pp. 224-225

[573] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 19. According to Akehurst's: "The doctrine played a role in the intervention by European powers in 1827 in support of the Greek uprising against the Turks, the intervention by Britain and France in 1856 in Sicily, allegedly in view of political arrests and supposed cruel treatment of the prisoners, and the famous intervention of Britain, France, Austria, Prussia and Russia in Syria in 1860-1 following the murder of thousands of Christian Maronites by the Druse Muslims. These acts were the prelude to repeated interventions by European powers into the Ottoman Empire in response to uprisings and killings on Crete in 1866, in Bosnia in 1875, Bulgaria in 1877 and Macedonia in 1887."; ibid., pp. 19-20

[574] Brownlie, 'The Place of the Individual in International Law', p. 451

[575] See Scott Burchill, 'Liberalism', in Burchill et. al. (eds.), Theories of International Relations (Basingstoke: Palgrave, 2001), p. 44

[576] Malanczuk (ed.), Akehurst's Modern Introduction to International Law, p. 20

argues that it "is hardly surprising that governments have refrained from adopting a general rule for humanitarian intervention."[577] Yet, as De Visscher asserts: "notwithstanding their sometimes political aims", the humanitarian interventions of the Great Powers, whether unilaterally or in concert, "helped to implant the idea of limitations upon sovereignty imposed by respect for man" and were "manifestations of a current of ideas that linked international law observance with respect for human personality in the internal order."[578] Thus, in its departure from voluntarism and decentralization the period of the Concert was "favourable to the protection of human rights" and illustrative of "the historical concordance between the development of positive international law and the respect shown the individual within the State."[579] Indeed, one can argue that the U.N. has made matters worse, for, as Luban remarks: "even when the right of domestic jurisdiction over human rights has been 'signed away' by a state, military intervention against it is proscribed. This doctrine, a product of the United Nations era, has replaced the nineteenth-century doctrine which permitted humanitarian intervention on behalf of oppressed people."[580]

The evocation of nineteenth century standards of civilization may appear unpalatable also in that it has become primarily associated with European notions superiority and racism under the guise of a benevolent mission civilisatrice. Yet, this is merely a contingent objection which only applies to the particular propagation of standards of civilization which was practiced by the Great Powers of the nineteenth century, and there is no reason to assume that every mention of a standard of civilization must be grounded in either an equally derogatory bias or an equally imperious bias. As Slaughter says: "Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States."[581] In the end, is it not reasonable to introduce a standard which distinguishes between states which mistreat individuals and those which protect their

[577] Schachter, International Law in Theory and Practice, p. 125
[578] De Visscher, Theory and Reality in Public International Law, p. 181
[579] De Visscher, Theory and Reality in Public International Law, p. 181. See also, ibid., pp. 126-127
[580] David Luban, 'Just War and Human Rights', p. 200, n. 14
[581] Slaughter, 'International law in a World of Liberal States', p. 506

agency and safety, at least in respect to fundamental human rights? Aaron Fellmeth questions poignantly why under the pluralist guise of current international law "the integrity of a fascist dictatorship is entitled to as much respect as the government of a social democracy".[582] Furthermore, human rights are already explicitly acknowledged in the Universal Declaration as a standard of civilization, and the International Court of Justice has ruled that the effective observation of fundamental human rights constitutes a general principle of law for civilized nations. Even if the Declaration as a whole is dismissed as a parochial defence of individual agency, a structurally revised focus on fundamental human rights can surely be upheld to constitute a coherent peremptory norm, a jus cogens for all societies and governments, for all individuals. If we have sound reasons to uphold such a standard in principle, then the real question becomes one of pragmatic enforcement, and it is here that the U.N. Charter system exposes its weakness and the lethargy of its members. This forces the question upon us whether the Charter should be explicitly revised so as to accommodate the legitimacy of humanitarian intervention. In particular, should a group of states become entitled to enforce such a standard in the event of the Security Council's all too frequent inertia and paralysis.

Human rights intervention can arguably be construed to be in compliance with paragraph 4 of Article 2 of the Charter which prohibits 'the use of force against the political independence and territorial integrity of a state or in any manner inconsistent with the purposes of the United Nations'. Arguably, human rights intervention is not in violation of this stipulation in that it enforces human rights as a Purpose of the United Nations. It could also be argued that a state loses the right to unfettered sovereign independence and territorial integrity when a government violates its citizens' human rights. This line of argument can however not be coherently maintained under current international law de lege lata. As the law stands, invasion, even in order to enforce human rights, is in violation of a state's territorial integrity and political independence. To declare human rights intervention as consistent with the prohibition against the use of force of paragraph 4 of Article 2 of the Charter would be to misconstrue legal terms as these are generally understood. Furthermore, human rights do indeed represent a Purpose of the U.N.

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[582] Quoted in Simpson, Great Powers and Outlaw States, p. 81

Charter, yet one which was explicitly deemed to be of lesser status than the Charter's primary function as a collective security covenant. As Schachter explains: "the use of force by a State in another country without that country's consent must be considered as inconsistent with a major Charter purpose. It is strange, if not absurd, to argue that the added reason for the illegality of force (namely, inconsistency with a Charter purpose) results in an exception to the general prohibition of force against political independence and territorial integrity."[583] Thus, even when faced with an urgent demand to prohibit widespread brutality, atrocities, massacres and destruction, Schachter concludes that any humanitarian use of force not explicitly sanctioned by the Security Council will in all likelihood fail "to win the support of the international community of States or of any significant segment of that community. No United Nations resolution has supported the right of a State to intervene on humanitarian grounds with armed troops in a State that has not consented to such intervention. Nor is there evidence of State practice and related *opinio juris* on a scale sufficient to support a humanitarian exception to the general prohibition against non-defensive use of force."[584] Even Sohn, who fervently endorses the Universal Declaration's status as jus cogens, acknowledges that: "Few representatives on the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States explicitly claimed that intervention to remedy gross violations of human rights was lawful as an implicit exception to charter principles prohibiting the use of force and intervention."[585] Barring a major revision of international law, according to Article 51 of the Charter, self-defence, whether unilaterally or collectively with the help of other states, against a foreign military invasion remains the only legitimate use of force which can be exercised without being expressly sanctioned by the Security Council.[586] In principle, the Security Council has the authority to mandate nations possessing the necessary capacity to intervene on behalf of human rights. Yet, this authority arises primarily if gross violations are generally deemed to be a clear and present threat to international peace and security, but, strictly speaking, no such authority

[583] Schachter, International Law in Theory and Practice, p. 118, Schachter's italics
[584] Schachter, International Law in Theory and Practice, p. 124, Schachter's italics
[585] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', p. 9, n. 28
[586] Schachter, International Law in Theory and Practice, p. 123

exists in the event of gross domestic violations.[587] Proponents of human rights culture can only rely on raising complaints in international fora, diplomatic enquiry and involvement. If these steps are taken as prophylactic measures during early sign of gross violations of human rights, then some atrocities may be avoided and, as a last resort, there is always condemnation.

Condemnation is however a rather futile remedy for the actual victims of human rights violations. Thus, human rights proponents should insist on a distinction of legitimacy based on fundamental human rights observation, and they should not stand idly by and must be willing to defend those fundamental human rights norms which have gained jus cogens status. As Reisman asserts, "Because rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights. It is no longer politically feasible or morally acceptable to suspend the operation of human rights norms until every constitutive problem is solved."[588] Furthermore, in an ever more interconnected world "domestic human rights pathologies" create repercussions which are increasingly felt globally as the ever growing number of displaced persons and refugees demonstrates. With the absorptive capacity of many places of refuge having reached their limits, the passive remedy of condemnation can no longer be relied upon. As Reisman points out: "An active strategy that addresses the pathology itself is required, both pragmatically and by the very conception of modern sovereignty."[589] Thus, those norms which have gained jus cogens status must be enforced, whereas violations of norms of lesser importance can be confronted with the passive strategy of diplomatic and economic sanction and condemnation. In the search for an active strategy we should revive that spirit of the League of Nations which allowed members to act without the approval of a Security Council. In the end, the real question is not one of action or inaction, but rather whether the need for occasional action is sufficient to demand a revision of the principles of voluntarism and decentralization which have proven their value in the course of history. As Schachter explains, in the absence of approval by the Security Council, states which

[587] Schachter, International Law in Theory and Practice, p. 125
[588] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 875
[589] Reisman, 'Sovereignty and Human Rights in Contemporary International Law', p. 876

can muster widespread support from the egalitarian General Assembly for a humanitarian intervention would face only minor international opposition and, in view of such support, they could certainly assert a "moral justification". Yet, even without such prior support by the General Assembly, an urgent intervention which clearly demonstrates compliance with, and the effectiveness of, its humanitarian mandate is likely to receive little international condemnation.[590] Schachter however questions whether "we get far in meeting the problem by formulating legal principles or guidelines on a general level."[591] Schachter fears that a general legal principle which allows for humanitarian intervention could lead to unilateral interventions which use humanitarian ideals as a mere pretext. Instead, humanitarian intervention must remain a rare and circumstantial breach of the rule prohibiting the unilateral use of force, although one which can be pardoned and tolerated if it was properly motivated by genuine humanitarian necessity.[592] Simma adopts a similar cautioned approach in that he accepts that grave humanitarian circumstances may occasionally force upon us the necessity to act in violation of established international law. However, Simma too concludes that if states were to adopt operation outside the established remit of the Charter as a regular modus operandi which undermines the Charter's central tenets of collective security, then the potentially negative consequences of such a development, would outweigh the potential humanitarian benefits.[593] For Simma, "resort to illegality as an explicit ultima ratio" in particular and isolated cases of severe human rights violation may be morally imperative, but to turn the exception into a rule would lead to an erosion of the authority of international law.[594] Thus, for Simma and Schachter, any enforcement action not licensed by the Security Council is strictly speaking illegal, but on rare occasions this illegality may be the lesser of two evils.

A somewhat different approach on the legality of human rights enforcement is proposed by Cassese who holds greater hopes for the progressive nature of international law. He agrees that the Security Council's authority is an essential and central aspect of global

[590] Schachter, International Law in Theory and Practice, p. 126
[591] Schachter, International Law in Theory and Practice, p. 125
[592] See Schachter, International Law in Theory and Practice, p. 126
[593] Simma, 'NATO, the UN and the Use of Force: Legal Aspects', p. 22
[594] Simma, 'NATO, the UN and the Use of Force: Legal Aspects', p. 22

stability, but he nevertheless believes that we are on the verge of the emergence of a customary rule which legitimizes humanitarian intervention. The new customary rule would allow states to take action, with significant support from the international community, in the face of gross human rights violations and crimes against humanity if the Security Council upon having deliberated the matter fails to take action. The new rule of customary law would thus not legitimize the use of unilateral force in general, but only, under stringently defined circumstances, in the event of atrocious human rights violations.[595] As Cassese explains, humanitarian intervention: "(i) would be justified by very special circumstance, (ii) must always constitute an extrema ratio, (iii) must be strictly limited to the purpose of stopping the aggression or the atrocities, (iv) must be strictly proportionate to the need to attain this goal, and (v) must yield to collective enforcement under United Nations authority as soon as possible."[596] For Cassese it is important to foster such emerging rules of customary law as otherwise an international community confronted with gross violations of human rights would be left in a legal vacuum. Cassese stresses that the rules of the international legal system, just as those of domestic legal systems, are subject to evolving circumstances which must be accommodated in a prudent manner, but a denial of this state of affairs and a desire to uphold lex lata regardless of changing circumstances would constitute an unrealistic approach, Under changing circumstances, a properly motivated and morally justifiable breach of lex lata may bring about to the formation of a new rule of law. For Cassese, the emergence of a new rule of customary law which prudently legitimizes humanitarian intervention expresses not only a realistic acknowledgement of moral necessity in extreme circumstance, but also a practical means for the restraint of violence and conflict in the world community.[597]

Proponents of humanitarian intervention must acknowledge that pleas for international pluralism are sound and coherent, and consistent individualist pluralists appear to be

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[595] See Cassese, 'A Follow-Up ...', p. 791 and p. 798

[596] Antonio Cassese, 'Ex iniuria ius oritur: *Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*', European Journal of International Law, Vol. 10, 1999, p. 29, italics of the title. In this piece Cassese explicitly addressed Simma's assessment that humanitarian intervention is necessarily illegal.

[597] See Cassese, 'Ex iniuria ius oritur ...', p. 30, Cassese's italics

confronted with a painful choice: either legal human rights culture, with its inevitable consequence of humanitarian intervention, or cultural pluralism and political self-determination, with its principled adherence to Westphalian sovereignty. Indeed, as Ignatieff says: "Human rights is nothing other than a politics, one that must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves."[598] Faced with such a painful choice, we should perhaps remind ourselves of that liberal spirit of the Enlightenment which proved the font of inspiration for all the great declarations of the freedoms of individual agency, be it the Atlantic Charter of 1941, or the U.N. Charter, or the Universal Declaration. However, as P. M. Brown reminds us, in the painstakingly slow progress of civilized humanity toward an ideal international law, real and tangible progress will only be achieved if the defenders of moral progress abandon lofty ideas and aspire to an idealism which is grounded in reality.[599] A realistic assessment of the problematic choice between international and individualist pluralism may lead us to the conclusion that we cannot fulfil the whole gamut of liberal principles and aspirations which we would ideally like to see fulfilled. We must set our scope narrower and choose in a consistent manner to endorse and defend only those principles which we find most defensible on coherent rational and moral grounds, a human rights jus cogens. In the end though, an absolute advocacy of the moral ends of political self-determination and cultural pluralism as well as of the moral ends of legal human rights culture cannot be maintained at the same time without causing a conflicting mandate. Since Westphalia states have fought for their freedom and independence from superior authority, for their equality before the law and for the inviolability of matters of domestic jurisdiction, and to safeguard this freedom they have created the "bastion of voluntarism". [600] Legal custom and the general principles inherent in international law have evolved so as to preserve pluralism and heterogeneity in the society of states and a potential departure from this modus vivendi could potentially jeopardize that fragile equilibrium which has been achieved in the last 350 years. Whether the international legal system will ever

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[598] Ignatieff, Human Rights as Politics and Idolatry, p. 22. See also Schachter, International Law in Theory and Practice, p. 330, who concurs that human rights are inherently political

[599] See P. M. Brown, 'The Theory of the Independence and Equality of States', p. 335

[600] Weil, 'Towards Relative Normativity in International Law?', p. 433

demonstrate sufficient progress so as to sufficiently accommodate the concerns of the human individual and give expression to a customary law of humanitarian intervention, as asserted by Cassese, remains to be seen, but a positive outcome can only be achieved if proponents of effective human rights implementation strive towards and press for a realization of such progress.

For now though, as Schachter points out, we must acknowledge that the prohibitions against the unilateral use of force serve an important purpose and remain the lynchpin of international stability. Even in view of the limitations and failures of the U.N. and its Security Council, an abandoning of the fundamental tenets of the Charter's system of collective security for the sake of moral idealism could turn out to be not only unrealistic, but indeed "foolish and dangerous".[601] It is in defence of the time honoured social function of an international legal system grounded in sovereign equality that Weil urges us to refrain from abandoning voluntarism in an attempt to institute an ill conceived international democracy which could impose law and lead to an international tyranny.[602] Weil reminds us forcefully of the potentially disastrous consequences of this project: "under the banner of law, chaos and violence would come to reign among states, and the international law would turn on and render itself with the loftiest of intentions."[603] The cautionary objections of pluralist internationalists grounded in the tenets of traditional international law are well intended, though they should not create a feeling of resignation for proponents of human rights culture. In the end, these objections merely remind us that international law is still a developing legal system, but as a social construct it is also amenable to further progressive development. Although hopes for the effective implementation of the Universal Declaration as a whole remain ephemeral to say the least, a customary law of fundamental human rights is already in the process of crystallizing and fundamental human rights norms have already been upheld by international jurisprudence as general principles of civilization and we should strive to defend them as such. The liberal and secular values of the Universal Declaration may not

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[601] Schachter, International Law in Theory and Practice, p. 131. The book actually reads: "The basic reality is that a stable society of independent *notions* ..." (my italics), but I assume this to be a misprint.
[602] See Weil, 'Towards Relative Normativity in International Law?', p. 420
[603] Weil, 'Towards Relative Normativity in International Law?', p. 433

yet have become universal moral currency, but a fundamental human rights jus cogens has become almost tangible and is within the reach of our grasp if only we stretch it far enough. Whether these inroads will lead towards the formation of Téson's proposed International Court of Human Rights, and whether they will one day lead to an effective and principled legal enforcement machinery remains to be seen. It may well take international law another 350 years to adequately acknowledge that states are not real individuals. For now though, it may be safer to treat them as such. As Jennings says: "Certainly it is still the position that international law, or rather civilised humanity, has still to solve the problems of war and violence and inhumanity, which international law has sought to cure from the very beginning. But hope lies not so much, or only, in new laws directly concerned with the endeavour to control war and violence, as in the gradual but undoubted penetration of international law into new parts of routine, peaceful life, thus building up the habit and expectation of legal ordering of international society."[604] Bearing in mind the historical track record of the international legal system, to depart from the Charter in the creation of a general legal basis for humanitarian enforcement is a tremendously risky venture and, as Weil warns us, we may well be running "the risk of cutting a key that will not fit the lock it will have to open. By projecting on today's international society the concepts appropriate to a different society, the present trends are indulging in the pleasures of anticipation in ways that, at best, are naively altruistic; at worst, amount to the hijacking of man's better feelings for the ends of power or ideology."[605] Yet, an acknowledgement of this unfinished development of the international legal system should not lead to complete resignation and deter human rights proponents from an insistence, as Cassese asserts, that occasional humanitarian intervention, in spite of a U.N. Charter condemning us to inaction, provides us with "a fallback solution for cases where inaction would be utterly contrary to any principle of humanity."[606]

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[604] Jennings, 'An International Lawyer Takes Stock', p. 528
[605] Weil, 'Towards Relative Normativity in International Law?', p. 442
[606] Cassese, 'A Follow-Up ...', p. 799

## Conclusion

The primary cause of the continuing lack of human rights proliferation and their effective implementation is that human rights lack concretization as legal instruments. If human rights are law, then their effective implementation and observation should be seen and upheld as a standard of legitimacy, and breaches of this standard should be dealt with. As Lorimer said: "Positive law is a dead letter which force alone will bring to life. Even municipal law, though defined by the joint action of legislation and jurisdiction, is not self-vindicating. It requires the further guarantee of an *irresistible* executive to secure its peaceful acceptance. ... The only condition on which tribunals of arbitration could perform the offices which many are willing to assign to them, would be the previous existence of an international organization, strong enough to support them from without, as they are supported in municipal jurisprudence."[607] The United Nations was from the onset impaired in regards to human rights enforcement, indeed it was designed as such, and some would argue that this is a good thing as it promotes pluralism on an inter-state level. Furthermore, pluralism and respect of otherness are surely worthwhile political aims. Yet, human rights promote pluralism too, indeed, in the long run they may be able to promote pluralism to a far greater extent in that liberal and secular rights raise and foster an awareness of otherness and toleration from the bottom up. After all, those entities which we call states and communities are only abstractions and invariably composed of individuals which are real. That human rights should be viewed as such was indeed an intention of the drafters of the Universal Declaration and they were also correct to stress that functional relation which exists between the domestic observation of human rights and the promotion of peace and security internationally. History has demonstrated all too frequently that international strife partly has its root causes in a lack of protection of civil and political rights on a domestic level. This instrumental role for the preservation of international stability aside, human rights preserve also the openness of that great experiment which the human species represents and thus with social progress for human civilization as a whole. A coherent epistemological grounding for human

[607] Quoted in P. M. Brown, 'The Theory of the Independence and Equality of States', p. 330, Lorimer's italics

rights emphasizes the instrumental role which the civil and political rights of the individual play in the contingent evolution of the human being. Human rights protect our capacity for freedom of thought and tolerant and open minded critical rational discussion, and thus with human rights function to foster our capacity to progress as a species as a whole. This progressive cultural mandate transcends the narrowly construed boundaries of the traditional territorially grounded notion of community in that it applies to the agency of every rational individual. This intrinsic correlation between liberal and secular human rights and human progress provides a coherent universal epistemological and ontological grounding for human rights. In an ever more interconnected world, all human beings stand to gain in the pursuit and achievement of economic, scientific and social progress which human rights observation entails. To stifle the liberal and secular values of human rights means to stifle human progress. Rorty is correct to emphasize the protean flexibility of our species and I think that the ability of human rights to foster and protect this trait suffices as an epistemological defence. As Rorty himself puts it: "If the experiment fails, our descendants may learn something important. But they will not learn a philosophical truth, any more than they will learn a religious one. They will simply get some hints about what to watch out for when setting up their next experiment. Even if nothing else survives from the age of the democratic revolutions, perhaps our descendants will remember that social institutions can be viewed as experiments in cooperation rather than as attempts to embody a universal and ahistorical order. It is hard to believe that this memory would not be worth having."[608] Cultural relativists will argue that the failure of human rights is related to the unwillingness of many cultures to accept these parochial standards, but this assertion can only be coherently maintained if one reifies the traditional territorial community as the sole source of ethics and rationality and ignores other sources of ethics which transcend the bounds of territoriality. It is surely questionable whether victims of human rights abuses actually desire their wretched state, or whether individuals the world over actually enjoy the lack of economic, scientific and social progress which is entailed by a lack of human rights observation. The ontological

[608] Richard Rorty, Objectivity, Relativism and Truth (Cambridge: Cambridge University Press, 1991), p. 196

dimension of human rights can be coherently grounded by pointing to the universal community of victims.

It may well be the case that there is little international homogeneity of conviction in the beneficial functional nature of liberal and secular human rights as instruments for human progress and bottom up pluralism. It may indeed need more sentimental education to foster such homogeneity of conviction, but the project will also need some more immediate remedies, at least in relation to victims suffering from gross and systematic abuses of fundamental human rights. It may be illegitimate to intervene on behalf of human rights, but it would be immoral not to do so. International law is not intrinsically divorced from moral concerns. A further root cause of human rights inertia is thus the lack of political will dedicated to press forward in realizing this vision. This political will must build on that already existing conviction of human rights and aim to extend it. This political will must also be applied to pressing for further progress in international legal innovation. The foundation for human rights as an essential aspect of international law already exists and it is our duty to seek to extend it. International law is after all merely a contingent social construct and not permanently delineated. It is here that the majority of civilized nations must take the lead and insist on and work towards further progress by instituting a fundamental human rights jus cogens which must be upheld as a peremptory standard of legitimacy in international law. To postpone this project until all nations will have conceded is virtually to deny the possibility of progress and merely panders to all those governments which have vested interest in their denial of human rights. As Booth argues: "If we had to wait until everyone was persuaded before taking any step in life, we would still be in the dark ages."[609] Human rights set limits to what can be tolerated, and human rights proponents must be willing to assert these limits in the event of serious transgressions. Building on that growing conviction in international relations which accommodates a need for humanitarian intervention in spite of Westphalian sovereignty we must insist that we cannot stand idly by when faced with serious domestic violations. When the Charter was conceived the domestic observation of human rights was seen as instrumental in strengthening a lasting collective security covenant. Arguably they have

[609] Booth, 'Three Tyrannies', p. 59

fulfilled this function in that the possibility of a World War has become increasingly remote and we live in a more peaceful and interconnected world than that which existed prior to the covenant. The liberal zone of peace not only exists but it also grows steadily. It is time that collective security lives up to its end of the bargain and strengthens human rights. As De Visscher reminds us: "In the international as in the internal order, human values are the reason behind the legal rule. Based upon moral conceptions which are the very essence of civilization, they impose themselves upon the State, whose mission is to ensure their protection and their free development. There is no context in which power has a more definitely functional character."[610]

[610] De Visscher, Theory and Reality in Public International Law, p. 180

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