INTERNATIONAL HUMAN RIGHTS

THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS

Text and Materials

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6. How do you assess the significance and consequences of Nuremberg? Even if you agree with some or several of the criticisms above, do you nonetheless conclude that the trial and judgment were justified in their actual historical forms? If so, why?

ADDITIONAL READING

On Nuremberg see three books by Telford Taylor: *Nuremberg Trials: War Crimes and International Law* (1949); *Nuremberg and Vietnam: An American Tragedy* (1978) and *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). See also Memorandum Submitted by the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, UN Doc. A/CN.4/5 (1949); E. Schwelb, 'Crimes against Humanity', 23 Brit. Ybk. Int'l. L. 178 (1946); Symposium: 'The Nuremberg Trials: A Reappraisal and Their Legacy', 27 Cardozo L. Rev. 1549–738 (2006); Kevin John Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011). More generally, see T. Meron, *War Crimes Law Comes of Age: Essays* (1998).

NOTE

This chapter has offered an illustrative survey of different forms or sources of international law (custom, general principles, treaties) and of several traditional international law topics (laws of war, state responsibility, minority-protection treaties, and international criminal law) as background to the study of the post-Second World War human rights regime. The following excerpts from lectures by Louis Henkin fill in a number of gaps in the history of ways in which pre-1945 international law had been concerned with protection of individuals. Like the earlier materials in this chapter, they too bring contemporary human rights to mind.

LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS

216 Collected Courses of The Hague Academy of International Law (Vol. IV, 1989) 13, at 208

Chapter X:
State Values and Other Values: Human Rights

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That until recently international law took no note of individual human beings may be surprising. Both international law and domestic legal norms in the Christian

world had roots in an accepted morality and in natural law, and had common intellectual progenitors (including Grotius, Locke, Vattel). But for hundreds of years international law and the law governing individual life did not come together. International law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its 'domestic jurisdiction'.

Antecedents of the International Law of Human Rights

In fact, neither the international political system nor international law ever closed out totally what went on inside a State and what happened to individuals within a State. Early, international law began to attend to internal matters that held special interest for other States, and those sometimes included concern for individual human beings, or at least redounded to the benefit of individual human beings. But what was in fact of interest to other States, and what was accepted as being of legitimate interest to other States (and therefore to the system and to law), were limited *a priori* by the character of the State system and its values. Of course, every State was legitimately concerned with what happened to its diplomats, to its diplomatic mission and to its property in the territory of another State. States were concerned, and the system developed norms to assure, that their nationals (and the property of their nationals) in the territory of another State be treated reasonably, 'fairly', and the system and the law early identified an international standard of justice by which a State must abide in its treatment of foreign nationals. States also entered into agreements, usually on a reciprocal basis, promising protection or privilege — freedom to reside, to conduct business, to worship — to persons with whom the other State party to the treaty identified because of common religion or ethnicity.

Concern for individual human welfare seeped into the international system in the eighteenth and nineteenth centuries in other discrete, specific respects. In the nineteenth century, European (and American) States abolished slavery and slave trade. Later, States began to pursue agreements to make war less inhumane, to outlaw some cruel weapons to safeguard prisoners of war, the wounded, civilian populations. It is noteworthy that, in these instances, even less-than-democratic States began to attend to human values, though humanitarian limitations on the conduct of war may have brought significant cost to the State's military interests.

Following the First World War, concern for individual human beings was reflected in several League of Nations programmes. Building on earlier precedents in the nineteenth century, the dominant States pressed selected other States to adhere to 'minorities treaties' guaranteed by the League, in which States Parties assumed obligations to respect rights of identified ethnic, national or religious minorities among their inhabitants.... The years following the First World War also saw a major development in international concern for individual welfare, a development that is often overlooked and commonly underestimated: the

International Labour Office (now the International Labour Organisation (ILO)) was established and it launched a variety of programmes including a series of conventions setting minimum standards for working conditions and related matters.

In general, the principles of customary international law that developed, and the special agreements that were concluded, addressed only what happened to *some* people inside a State, only in respects with which other States were in fact concerned, and only where such concern was considered their proper business in a system of autonomous States. One can only speculate as to why States accepted these norms and agreements, but it may be reasonable to doubt whether those developments authentically reflected sensitivity to human rights generally. States attended to what occurred inside another State when such happenings impinged on their political-economic interests. States were concerned, and were deemed legitimately concerned, for the freedoms, privileges, and immunities of their diplomats because an affront to the diplomat affronted his prince (or his State), and because interference with a diplomat interfered with his functions and disturbed orderly, friendly relations. Injury to a foreign national or to his or her property was also an affront to the State of his or her nationality, and powerful States exporting people, goods, and capital to other countries in the age of growing mercantilism insisted on law that would protect the State interests that these represented.

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Humanitarian developments in the law of war reflected some concern by States to reduce the horrors of war for their own people and a willingness in exchange to reduce them for others. Powerful States promoted minorities treaties because mistreatment of minorities with which other States identified threatened international peace. Those treaties were imposed selectively, principally on nations defeated in war and on newly created or enlarged States; they did not establish general norms requiring respect for minorities by the big and the powerful as well; they did not require respect for individuals who were not members of identified minorities, or for members of the majority....

Even the ILO conventions, perhaps, served some less-than-altruistic purposes. Improvement in the conditions of labour was capitalism's defence against the spectre of spreading socialism which had just established itself in the largest country in Europe. States, moreover, had a direct interest in the conditions of labour in countries with which they competed in a common international market: a State impelled to improve labour and social conditions at home could not readily do so unless other States did so, lest the increase in its costs of production render its products non-competitive.

I have stressed the possibly political-economic (rather than humanitarian) motivations for early norms and agreements, identifying a State's concern for the welfare of some of its nationals as an extension of its Statehood and perhaps reflecting principally concern for State interests and values. If some norms and agreements in fact were motivated by concern for a State's own people generally, they did not reflect interest in the welfare of those in other countries, or of human beings generally. State interests rather than individual human interests, or at best the interests of

a State's own people rather than general human concerns, also inspired voluntary inter-State co-operation to promote reciprocal economic interests....

I would not underestimate the influence of ideas of rights and constitutionalism in the seventeenth and eighteenth centuries, and of a growing and spreading enlightenment generally: Locke, Montesquieu, other Encyclopedists, Rousseau; the example of the Glorious Revolution in England and the establishment of constitutionalism in the United States; the influence of the French Declaration of the Rights of Man and of the Citizen. Such ideas and examples have influenced developments inside countries, but they did not easily enter the international political and legal system. Concern by one country for the welfare of individual human beings inside another country met many obstacles, not least the conception and implications of Statehood in a State system. The human condition in other countries and the treatment of individuals by other Governments were not commonly known abroad since they were not included in the information sources of the time. Information (and concern) were filtered through the State system and through diplomatic sources, and human values as such were not the business of diplomacy. For those reasons, and for other reasons flowing from the State system, other States took little note and expressed little concern for what a Government did to its own citizens. In general, the veil of Statehood was impermeable. If occasionally something particularly horrendous happened — a massacre, pogrom — and was communicated and made known by the available media of communication, it evoked from other States more-or-less polite diplomatic expressions of regret, not on grounds of law but of *noblesse oblige* or of common princely morality wrapped in Christian charity (whose violation gave princes and Christianity a bad name).

Even if the implications of Statehood had not been an obstacle, as regards any but the grossest violations of what we now call human rights, few if any States had moral sensitivity and moral standing to intercede. When a State invoked an international standard of justice on behalf of one of its nationals abroad, it may have been invoking a standard unknown and unheeded at home. Few States had constitutional protections and not many had effective legislative or common-law protections for individual rights. Torture and police brutality, denials of due process, arbitrary detention, perversions of law, were not wildly abnormal. Surely, few States recognized political freedom — freedom of speech, association and assembly, universal suffrage. Many States denied religious freedom to some, and few States granted complete religious toleration; full equality to members of other than the dominant religion was slow in coming anywhere. Women were subject to rampant and deep-rooted inequalities and domination, often to abuse and oppression. Even today such violations are not the stuff of dramatic television programmes and do not arouse international revulsion and reaction; in earlier times, surely, violations of what are today recognized as civil and political rights caused little stir outside the country. A State's failure to provide for the economic and social welfare of its inhabitants was wholly beyond the ken of other States. There were no alert media of information and few civil rights or other non-governmental organizations to sensitize and activate people and Governments.

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QUESTION

Henkin sharply separates the prior era from the modern human rights regime. In particular, he emphasizes 'political–economic (rather than humanitarian) motivations' for early norms and antecedents of modern human rights law. Is his assessment correct or does he excessively depreciate the degree to which humanitarian values might have influenced the observed state practices? To what degree do 'political–economic (rather than humanitarian) motivations' characterize state promotion of international human rights law in the modern era?

E. BIRTH OF THE REGIME: THE UN CHARTER AND THE UDHR

The Nuremberg trial and several provisions of the United Nations Charter of 1945 held centre stage in the incipient human rights regime until 1948, when the UN General Assembly approved the Universal Declaration of Human Rights. For 28 years, the UDHR occupied centre stage. The two fundamental human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both became effective in 1976. (Note: only these two human rights treaties bear the solemn title of 'Covenant'.)

Together with the Declaration, the Covenants form the International Bill of Human Rights, which now stands at the core of the *universal* human rights system — universal in the sense that membership is open to states from all parts of the world. Chapter 11 examines three regional human rights systems, each open to members only from the designated part of the world: the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the 'European Convention on Human Rights'), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Each of these treaties is supported and developed (in different ways) by an intergovernmental body that in most cases is created by the treaty itself. The central institutional participants in the human rights regime also include other intergovernmental bodies such as the International Labour Organization, national governments and human rights agencies, nongovernmental human rights organizations, and a range of nongovernmental (and often international) organizations such as labour unions and churches.

This section focuses on the Charter and Declaration, while the next two chapters examine respectively civil and political rights, and economic and social rights. The Declaration itself includes both categories. These categories are far from airtight. Many treaties declare rights that straddle the two, or that fall clearly within the domains of both of them. Many rights are hard to categorize. Nonetheless, at their core, the conventional distinctions are clear, whatever the relationships and interdependency between the two. Freedom from torture, equal protection, due process

and the right to form political associations fall within the first category; the right to health or food or education come within the second.

COMMENT ON THE CHARTER, UDHR AND ORIGINS OF THE HUMAN RIGHTS REGIME

The human rights regime is not simply a systematic ordering, basically through treaties and customary law, of fundamental postulates, ideologies and norms (that is, 'oughts' in the form of rules, standards, principles). To the contrary, these basic elements are imbedded in institutions, some of them state and some international, some governmental or intergovernmental and some nongovernmental and in related international processes. It is impossible to grasp this regime adequately without an appreciation of its close relation to and reliance on international organizations. For example, the basic instruments of the universal system were drafted within the different organs of the United Nations and adopted by its General Assembly, before (in the case of the treaties) being submitted to states for ratification. UN organs play a major role in monitoring, officially commenting on, and applying sanctions to state behaviour.

The United Nations Charter itself first gave formal and authoritative expression to the human rights regime that began at the end of the Second World War. Since its birth in 1945, the UN has served as a vital institutional spur to the development of the regime, as well as serving as a major forum for many-sided debates about it. The purpose of the present comments is to call attention to aspects of the UN and its Charter that bear particularly on the human rights regime.

Readers should now become familiar with the provisions (in the Documents Supplement) of the Charter that are referred to below, and of the UDHR.

Charter Provisions

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

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

The Charter's references to human rights are scattered, terse, even cryptic. The term 'human rights' appears infrequently. Note its occurrence in the following

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

Several striking characteristics of these provisions emerge. Many have a promotional or programmatic character, for they refer principally to the purposes or goals of the UN or to the competences of different UN organs: 'encouraging respect for human rights', 'assisting in the realization of human rights', 'promote ... universal respect for, and observance of, human rights'. Not even a provision such as Article 56, which refers to action of the member states rather than of the UN, contains the language of obligation. It notes only that states 'pledge themselves' to action 'for the achievement' of purposes including the promotion of observance of human rights. Note that only one substantive human right, the right to equal protection, receives specific mention in the Charter (Arts. 1(3), 13(1)(b) and 55).

The Universal Declaration

Despite proposals to the contrary, the Charter stopped shy of incorporating a bill of rights. Instead, there were proposals for developing one through the work of a special commission that would give separate attention to the issue. That commission was contemplated by Charter Article 68, which provides that one of the UN organs, the Economic and Social Council (ECOSOC), 'shall set up commissions in economic and social fields and for the promotion of human rights'. In 1946, ECOSOC established the Commission on Human Rights (referred to in this book as the UN Commission), which evolved over the decades to become the world's single most important (and perhaps most disputed) human rights organ. At its inception, the new Commission was charged primarily with submitting reports and proposals on an international bill of rights. (The UN Commission was displaced by a newly created Human Rights Council in 2006. Chapter 9 examines the work of both the Commission and Council.)

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

The first path was followed. In 1948, the UN Commission adopted a draft Declaration, which in turn was adopted by the General Assembly that year as the Universal Declaration of Human Rights, with 48 states voting in favour and eight abstaining — Saudi Arabia, South Africa and the Soviet Union together with four East European states and a Soviet republic whose votes it controlled. (It is something of a jolt to realize today, in a decolonized and fragmented world of over 190 states, that UN membership in 1948 stood at 56 states.)

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

The plan to use the Universal Declaration as a springboard to treaties triumphed, but not as quickly as anticipated. The two principal treaties — the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) — made their ways through the drafting and amendment processes in the Commission, the Third Committee and the General Assembly, where they were approved only in 1966. Another decade passed before the two Covenants achieved in 1976 the number of ratifications necessary to enter into force.

During the 28 years between 1948 and 1976, a number of specialized human rights treaties such as the Genocide Convention entered into force. But not until the two principal Covenants became effective did a treaty achieve as broad coverage of human rights topics as the Universal Declaration. It was partly for this reason that the UDHR became so broadly known and frequently invoked. During these intervening years, it was the only broad-based human rights instrument available. To this day, it:

> has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole.... [T]he Declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps recognized. It proceeded to work its subversive path though many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace.[7]

As a declaration voted in the General Assembly, the UDHR lacked the formal authority of a treaty that binds its parties under international law. Nonetheless, it remains in some sense the constitution of the entire regime, as well as the single most cited human rights instrument.

[7] H. Steiner, 'Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond', Harvard Magazine, Sept.–Oct. 1998, p. 45.

Other UN Organs Related to Human Rights

Together with the UN Commission, other UN organs have played major roles in developing universal human rights. Their full significance with respect to drafting and approving treaties or declarations, monitoring, censuring, and authorizing or ordering state action becomes apparent in later chapters. A brief description follows.

Chapter IV of the Charter sets forth the composition and powers of the General Assembly. Those powers are described in Articles 10–14 in terms such as 'initiate studies', 'recommend', 'promote', 'encourage' and 'discuss'. Particularly relevant are Articles 10 and 13. Article 10 authorizes the General Assembly to 'discuss any questions or any matters within the scope of the present Charter [and] ... make recommendations to the Members of the United Nations ... on any such questions or matters'. Article 13 authorizes the GA to 'make recommendations' for the purpose of, *inter alia*, 'assisting in the realization of human rights'. Throughout its history, the GA has been active in voting resolutions related to human rights issues.

Contrast the stronger and more closely defined powers of the Security Council under Chapter VII. Those powers range from making recommendations to states parties about ending a dispute, to the power to authorize and take military action 'to maintain or restore international peace and security' (Art. 42) after the Council 'determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression' (Art. 39). Under Article 25, member states 'agree to accept and carry out' the Security Council's 'decisions' on these and other matters. No such formal obligation of states attaches to recommendations or resolutions of the General Assembly. As Chapter 9 indicates, the Security Council has in recent years used its powers to address situations involving major human rights violations.

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

Historical Sequence and Typology of Instruments

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

(1) The UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject. But what it does say has been accorded great significance. Through interpretation and extrapolation, as well as frequent invocation, the sparse text has constituted a point of departure for inventive development of the entire regime.

(2) The UDHR, viewed by some as a further elaboration of the brief references to human rights in the Charter, occupies in important ways the primary position of constitution of the entire regime. Today many understand the UDHR — or more specifically, numbers of its provisions — to have gained formal legal force by becoming a part of customary international law.

(3) The two principal covenants, which alone among the universal treaties have broad coverage of human rights topics, develop in more detail the basic categories of rights that figure in the Universal Declaration, and include additional rights as well

(4) A host of multilateral human rights treaties (usually termed 'conventions', for there are only the two basic 'covenants'), as well as resolutions or declarations with a more limited or focused subject than the comprehensive International Bill of Rights, have grown out of the United Nations (drafting by UN organs, approval by the General Assembly) and (in the case of treaties) have been ratified by large numbers of states. They develop further the content of rights that are more tersely described in the two covenants or, in some cases, that escape mention in them. This fourth tier consists of a network of treaties, most but not all of which became effective after the two Covenants, including: the Convention on the Prevention and Punishment of the Crime of Genocide (142 states parties as of May 2012), the International Convention on the Elimination of all Forms of Racial Discrimination (175 parties), the Convention on the Elimination of all Forms of Discrimination against Women (187 parties), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (147 parties), and the Convention on the Rights of the Child (193 parties). This book discusses to one or another degree most of these instruments.

QUESTION

Compare the premises to and character and provisions of the UDHR with the prior illustrations in Chapter 2 of certain premises and doctrines in international law that constitute 'background' to the postwar human rights regime. In what respects (putting aside its legal character as a declaration rather than a treaty) does the UDHR stand out as strikingly different, as resting on premises that were not simply alien to but close to heresies within the preceding international law?

NOTE

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

> The United Nations Charter, a vehicle of radical political-legal change in several respects, did not claim authority for the new human rights commitment it

projected other than in the present consent of States. Unlike the international standard of justice for foreign nationals, which derived from the age of natural law and clearly reflected common acceptance of some natural rights, the Charter is a 'positivist' instrument. It does not invoke natural rights or any other philosophical basis for human rights. (The principal Powers could not have agreed on any such basis.) The Charter Preamble links human rights with human dignity but treats that value as self-evident, without need for justification. Nor does the Charter define either term or give other guidance as to the human rights that human dignity requires. In fact, to help justify the radical penetration of the State monolith, the Charter in effect justifies human rights as a State value by linking it to peace and security.

Perhaps because we now wish to, we tend to exaggerate what the Charter did for human rights. The Charter made the promotion of human rights a purpose of the United Nations; perhaps without full appreciation of the extent of the penetration of Statehood that was involved, it thereby recognized and established that relations between a State and its own inhabitants were a matter of international concern. But the Charter did not erode State autonomy and the requirement of State consent to new human rights law....

...

In 1945, the principal Powers were not prepared to derogate from the established character of the international system by establishing law and legal obligation that would penetrate Statehood in that radical way; clearly, they themselves were not ready to submit to such law....

NOTE

From the start, the human rights regime had universal aspirations. It was not to address only the developed countries of the West/North but rather all regions and all states, whatever their form of government, socio-economic situation or religious–cultural traditions. After all, the key document at the very start of the regime was entitled the *Universal* Declaration of Human Rights. Its language, like that of many later human rights treaties, speaks abstractly of 'everyone', or 'no person'. It communicates no sense of differentiation among its subjects based on religion, gender, colour, ethnicity, national origin, wealth, region, education. To the contrary, the human rights texts fasten on equal protection as a cardinal concept.

Over the decades, the question of how 'universal' the postwar human rights are or should seek to become has assumed greater prominence. The 'universal' is often contrasted with the 'particular' or 'culturally specific', or 'cultural relativism'. The different meanings of these concepts and illustrations of their significance for a number of human rights topics figure as a central theme in Chapters 6 and 7. As a preface to those chapters, and as companion to this section's introduction to the UDHR, the excerpts below from Mary Ann Glendon's book on the making of the Declaration comment on the question of its universality and on the political and ethical traditions that inform it.

MARY ANN GLENDON, A WORLD MADE NEW

(2001), at 221

Chapter 12: Universality under Siege

The problem of what universality might mean in a multicultural world haunted the United Nations human rights project from the beginning....Earlier [in 1947] some of the world's best-known philosophers had been asked to ponder the question, "How is an agreement conceivable among men who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought?"

No one has yet improved on the answer of the UNESCO philosophers: Where basic human values are concerned, cultural diversity has been exaggerated. The group found, after consulting with Confucian, Hindu, Muslim and European thinkers, that a core of fundamental principles was widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language of rights. Their survey persuaded them that basic human rights rest on "common convictions," even though those convictions "are stated in terms of different philosophic principles and on the background of divergent political and economic systems?"....

...

The hopeful view of the UNESCO philosophers was challenged when a host of new nations appeared on the international stage in the 1950s. With sixteen new members joining the United Nations in 1955 alone and with many Latin American countries retreating from their pro-US positions, the balance of power in the General Assembly had shifted....

Over the years that mood was expressed in characterizations of the Declaration as an instrument of neocolonialism and in attacks on its universality in the name of cultural integrity, self-determination of peoples, or national sovereignty. In some cases the motivations are transparently self-serving. When leaders of authoritarian governments claim that the Declaration is aimed at imposing "foreign" values, their real concern is often domestic: the pressure for freedom building among their own citizens. That might have been the case, for example, when the Iranian representative at a ceremony commemorating the Declaration's fiftieth anniversary in 1998 charged that the document embodies a "Judeo-Christian" understanding of rights, unacceptable to Muslims. Or on the occasions when Singapore's Lee Kuan Yew attempted to justify the suppression of human rights in the name of economic development or national security.

... [M]any challenges to the Declaration's universality are made by individuals who are genuinely concerned about ideological imperialism....University of Buffalo law professor Makau Mutua described the Declaration as an arrogant attempt to universalize a particular set of ideas and to impose them upon three-quarters of the world's population, most of whom were not represented at its creation. Kenya-born Mutua said, "Muslims, Hindus, Africans, non-Judeo-Christians, feminists, critical theorists, and other scholars of an inquiring bent of mind have exposed the Declaration's bias and exclusivity."

These accusations of cultural relativism and cultural imperialism need to be taken seriously. *Is* the Declaration a "Western" document in some meaningful sense, despite its aspiration to be universal? *Are* all rights relative to time and place? *Is* universality a cover for cultural imperialism? Let us examine the charges on their merits.

Those who label the Declaration "Western" base their claim mainly on two facts: 1) many peoples living in non-Western nations or under colonial rule, especially those in sub-Saharan Africa, were not represented in the United Nations in 1948; and 2) most of the Declaration's rights first appeared in the European and North or South American documents on which John Humphrey based the original draft. Those statements are accurate, but do they destroy the universality of the Declaration?

... It is true that much of the world's population was not represented in the UN in 1948: large parts of Africa and some Asian countries remained under colonial rule; and the defeated Axis powers — Japan, Germany, Italy, and their allies — were excluded as well. But Chang, Malik, Romulo, Mehta, and Santa Cruz were among the most influential, active, and independent members of the Human Rights Commission. And the members of the third committee, who discussed every line of the draft over two months in the fall of 1948, represented a wide variety of cultures.

... Before the whole two-year process from drafting and deliberation to adoption reached its end, literally hundreds of individuals from diverse backgrounds had participated. Thus Malik could fairly say, "The genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles."

Proponents of the cultural-imperialism critique sometimes say that the educational backgrounds or professional experiences of men like Chang and Malik "westernized" them, but their performance in the Human Rights Commission suggests something rather different....

...

... On December 10, 1948, Brazil's Belarmino de Athayde summed up sentiments that had been expressed by many other third committee members when he told the General Assembly that the Declaration did not reflect the particular point of view of any one people or group of peoples or any particular political or philosophical system. The fact that it was the product of cooperation among so many nations, he said, gave it great moral authority.

...

The Declaration ... was far more influenced by the modern dignitarian rights tradition of continental Europe and Latin America than by the more individualistic documents of Anglo-American lineage. The fact is that the rights dialect that prevails in the Anglo-American orbit would have found little resonance in Asia or Africa. It implicitly confers its highest priority on individual freedom and typically formulates rights without explicit mention of their limits or their relation to other rights or to responsibilities. The predominant image of the rights bearer, heavily influenced by Hobbes, Locke, and John Stuart Mill, is that of a self-determining, self-sufficient individual.

Dignitarian rights instruments, with their emphasis on the family and their greater attention to duties, are more compatible with Asian and African traditions. In these documents, rights bearers tend to be envisioned within families and communities; rights are formulated so as to make clear their limits and their relation to one another as well as to the responsibilities that belong to citizens and the state

...

In the spirit of the latter vision, the Declaration's "Everyone" is an individual who is constituted, in important ways, by and through relationships with others. "Everyone" is envisioned as uniquely valuable in himself (there are three separate references to the free development of one's personality), but "Everyone" is expected to act toward others "in a spirit of brotherhood." "Everyone" is depicted as situated in a variety of specifically named, real-life relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order. Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in "a spirit of brotherhood" and ends with community, order, and society.

Whatever else may be said of him or her, the Declaration's "Everyone" is not a lone bearer of rights.... [The] departure from classical individualism while rejecting collectivism is the hallmark of dignitarian rights instruments such as the Declaration.

In the years since its adoption, the Declaration's aspiration to universality has been reinforced by endorsements from most of the nations that were not present at its creation. Specific references to the Declaration were made in the immediate post-independence constitutions of [the author names 19 African and Asian states]....

... All in all, it has been estimated that the Declaration has inspired or served as a model for the rights provisions of some ninety constitutions.... And in 1993,... representatives of 171 countries at the Vienna Conference on Human Rights affirmed by consensus their "commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights."

...

It would be unwise, however, to minimize the danger of human rights imperialism. Today governments and interest groups increasingly deploy the language of human rights in the service of their own political, economic, or military ends. One of the twentieth century's most distinguished diplomats, George F. Kennan, expressed his misgivings about the United States' statements and demands concerning human rights in a 1993 memoir. He sensed in them, he said, "an implied assumption of superior understanding and superior virtue."

...

... Much confusion has been created in current debates by two assumptions that would have been foreign to the framers of the Declaration. Today both critics and supporters of universal rights tend to take for granted that the Declaration mandates a single approved model of human rights for the entire world. Both also tend to assume that the only alternative would be to accept that all rights are relative to the circumstances of time and place.

Nothing could be further from the views of the principal framers. They never envisioned that the document's "common standard of achievement" would or should produce completely uniform practices....

The Declaration's architects expected that its fertile principles could be brought to life in a legitimate variety of ways. Their idea was that each local tradition would be enriched as it put the Declaration's principles into practice and that all countries would benefit from the resulting accumulation of experiences....

There is little doubt about how the principal framers of the Universal Declaration would have responded to the charge of "Western-ness." What was crucial for them — indeed, what made universal human rights possible — was the *similarity* among all human beings. Their starting point was the simple fact of the common humanity shared by every man, woman, and child on earth, a fact that, for them, put linguistic, racial, religious. and other differences into their proper perspective.

NOTE

Makau Mutua, to whose ideas Glendon refers in the preceding excerpts, takes a fundamentally different position about the origin and character of the UDHR — a position examined in the materials on cultural relativism in Chapters 6 and 7. He states:[8]

> ... Non-Western philosophies and traditions particularly on the nature of man and the purposes of political society were either unrepresented or marginalized during the early formulation of human rights.... There is no doubt that the current human rights corpus is well meaning. But that is beside the point.... International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise.... Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

QUESTIONS

1. As a principle of interpretation, in what direction (if any) would Glendon's understanding of the UDHR'S 'dignitarian' tradition point with respect to, say, (a) a question of freedom of speech as applied to hate speech, (b) a question of individual liberty in relation to the right of others to an adequate standard of living, (c) a question of equal protection in relation to a claim for gay marriage?

[8] M. Mutua, 'The Complexity of Universalism in Human Rights', in András Sajó (ed.), *Human Rights with Modesty* (2004), at 51.

2. From a textual examination of the UDHR (that is, independent of locating the UDHR in a larger historical and philosophical context) are you persuaded by Glendon's more community-oriented account of its rights-based prescriptions or by a more individualistic account?

3. Based on Glendon's argument in these excerpts, how do you react to her position that the UDHR was at its origin and is now properly understood as having universal validity?

NOTE

Understandings of the Universal Declaration have inevitably changed over time. Appreciation of earlier ideas at the start of the human rights regime illuminates its general evolution as well as suggests how perceptions of it and, more broadly, international law have developed over the 60 years. There follow some excerpts from an influential book by a preeminent scholar of international law of his generation, Hersch Lauterpacht. At the time of the book's publication, the Declaration was two years old and untested as to its character and significance.

H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS

(1950), at 61

Chapter 4: The Subjects of the Law of Nations, the Function of International Law, and the Rights of Man

...

What have been the reasons which have prompted the changes in the matter of subjects of international law, with regard both to international rights and to international duties? These causes have been numerous and manifold. They have included, with reference to the recognition of the individual as a subject of international rights, the acknowledgment of the worth of human personality as the ultimate unit of all law; the realisation of the dangers besetting international peace as the result of the denial of fundamental human rights; and the increased attention paid to those already substantial developments in international law in which, notwithstanding the traditional dogma, the individual is in fact treated as a subject of international rights. Similarly, in the sphere of international duties there has been an enhanced realisation of the fact that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law and of its effectiveness in a period of history in

which the destructive potentialities of science and the power of the machinery of the State threaten the very existence of civilised life.

Above all, with regard to both international rights and international duties the decisive factor has been the change in the character and the function of modern international law. The international law of the past was to a large extent of a formal character. It was concerned mainly with the delimitation of the jurisdiction of States.... In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case....

...

... [I]t is in relation to State sovereignty that the question of subjects of international law has assumed a special significance. Critics of the traditional theory have treated it as an emanation of the doctrine of sovereignty. In their view it is State sovereignty — absolute, petty, and overbearing — which rejects, as incompatible with the dignity of States, the idea of individuals as units of that international order which they have monopolised and thwarted in its growth. It is the sovereign State, with its claim to exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity....

...

... [T]he recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms, as the ultimate subject of international law, is a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the State as a being distinct from the individuals who compose it, with all that such personification implies. That recognition brings to mind the fact that, in the international as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts....

... International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State.... [T]he recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organized international community itself. That fundamental law, as expressed in the acknowledgment of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the a international legal order....

Chapter 5: The Idea of Natural Rights in Legal and Political Thought

...

... The law of nature and natural rights can never be a true substitute for the positive enactments of the law of the society of States. When so treated they are

inefficacious, deceptive and, in the long run, a brake upon progress.... The law of nature, even when conceived as an expression of mere ethical postulates, is an inarticulate but powerful element in the interpretation of existing law. Even after human rights and freedoms have become part of the positive fundamental law of mankind, the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international....

[Lauterpacht then turns to historical antecedents of 'the notion and the doctrine of natural, inalienable rights of man pre-existent to and higher than the positive law of the State'. He observes that 'ideas of the law of nature date back to antiquity', and briefly describes such ideas and notions of natural right in Greek philosophy and the Greek state, in Roman thought, in the Middle Ages and in the Reformation and the period of Social Contract. Lauterpacht then addresses 'fundamental rights in modern constitutions'.]

In the nineteenth and twentieth centuries the recognition of the fundamental rights of man in the constitutions of States became, in a paraphrase of Article 38 of the Statute of the Permanent Court of International Justice, a general principle of the constitutional law of civilised States. It became part of the law of nearly all European States....

... [T]here is one objection to the notion of natural rights which, far from invalidating the essential idea of natural rights, is nevertheless in a sense unanswerable. It is a criticism which reveals a close and, indeed, inescapable connexion between the idea of fundamental rights on the one hand and the law of nature and the law of nations on the other. That criticism is to the effect that, in the last resort, such rights are subject to the will of the State: that they may — and must — be regulated, modified, and if need be taken away by legislation and, possibly, by judicial interpretation; that, therefore, these rights are in essence a revocable part of the positive law of a sanctity and permanence no higher than the constitution of the State either as enacted or as interpreted by courts and by subsequent legislation....

...

Chapter 17: The Universal Declaration of Human Rights

The Universal Declaration of Human Rights ... has been hailed as an historic event of profound significance and as one of the greatest achievements of the United Nations.... Mrs. Roosevelt, Chairman of the Commission on Human Rights and the principal representative of the United States on the Third Committee, said: 'It [the Declaration] might well become the international Magna Carta of all mankind.... Its proclamation by the General Assembly would be of importance comparable to the 1789 proclamation of the Declaration of the Rights of Man, the proclamation of the rights of man in the Declaration of Independence of the United States of America, and similar declarations made in other countries'....

...

The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the

human rights and fundamental freedoms which it proclaimed. The debates in the General Assembly and in the Third Committee did not reveal any sense of uneasiness on account of the incongruity between the proclamation of the universal character of the human rights forming the subject matter of the Declaration and the rejection of the legal duty to give effect to them. The delegates gloried in the profound significance of the achievement whereby the nations of the world agree as to what are the obvious and inalienable rights of man ... but they declined to acknowledge them as part of the law binding upon their States and Governments....

... [T]he representative of the United States, in the same statement before the General Assembly in which she extolled the virtues of the Declaration, said: 'In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation....'

...

... It is now necessary to consider the view, expressed in various forms, that, somehow, the Declaration may have an indirect legal effect.

In the first instance, it may be said — and has been said — that although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however imperfect, binding upon the Members of the United Nations. It is unlikely that any tribunal or other authority administering international law would accept a suggestion of that kind. To maintain that a document contains an authoritative interpretation of a legally binding instrument is to assert that that former document itself is as legally binding and as important as the instrument which it is supposed to interpret....

... [T]here would seem to be no substance in the view that the provisions of the Declaration may somehow be of importance for the interpretation of the Charter as a formulation, in this field, of the 'general principles of law recognized by civilised nations'. The Declaration does not purport to embody what civilized nations generally recognize as law.... The Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by States Members of the United Nations....

...

Undoubtedly the Declaration will occasionally be invoked by private and official bodies, including the organs of the United Nations. But it will not — and cannot — properly be invoked as a source of legal obligation....

Not being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot form the subject matter of legal interpretation. There is little meaning in attempting to elucidate, by reference to accepted canons of construction and to preparatory work, the extent of an obligation which is binding only in the sphere of conscience....

The fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance. It is possible that, if divested of any pretence to legal authority, it may yet

prove, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law....

...

The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of the sacrifice of the sovereignty of States which it involves. Thus conceived, the fundamental issue in relation to the moral authority of the Declaration can be simply stated: That authority is a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own....

Its moral force cannot rest on the fact of its universality — or practical universality — as soon as it is realised that it has proved acceptable to all for the reason that it imposes obligations upon none....

... [C]ompare the Declaration of 1948 with that of [the French Declaration of] 1789 and similar constitutional pronouncements. These may not have been endowed, from the very inception, with all the remedies of judicial review and the formal apparatus of enforcement. But they became, from the outset, part of national law and an instrument of national action. They were not a mere philosophical pronouncement.... One of the governing principles of the Declaration — a principle which was repeatedly affirmed and which is a juridical heresy — is that it should proclaim rights of individuals while scrupulously refraining from laying down the duties of States. To do otherwise, it was asserted, would constitute the Declaration a legal instrument. But there are, in these matters, no rights of the individual except as a counterpart and a product of the duties of the State. There are no rights unless accompanied by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration.

...

QUESTION

Looked at from today's perspective, which of Lauterpacht's ideas or predictions about the UDHR and human rights would require substantial revision?

ADDITIONAL READING

J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999); G. Alfredsson & A. Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999); B. van der Heijden & B. Tahzib-Lie (eds.), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (1998); Y. Danieli, E. Stamatopoulou & C. J. Dias (eds.), *Universal Declaration of Human Rights: 50 Years and Beyond* (1999); and M. A. Glendon, *A World Made New* (2001).