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# THE EFFECT OF TREATIES AND OTHER FORMAL INTERNATIONAL ACTS ON THE CUSTOMARY LAW OF HUMAN RIGHTS

*Arthur M. Weisburd\**

## I. INTRODUCTION

The object of this discussion is to offer a way of evaluating the impact of treaties and other formal international acts upon the customary international law of human rights. Its basic premise is that this issue is not simple, and not to be answered categorically. That is, it seems questionable to accept any view of the problem which focuses, for example, simply upon the status of treaties as treaties, without considering the circumstances of each treaty under discussion.

The approach taken in this paper is to, first, offer a way about thinking of the concept of a legal rule. The paper then applies this generalization about legal rules to rules of customary international law in an effort to determine criteria for deciding when such rules may be said to exist. It applies these criteria to the question of the impact upon the customary international law of human rights of human rights treaties and certain other international acts. Finally, the discussion asks whether it truly matters whether human rights rules have any basis in international law other than as treaty requirements.

## II. DETERMINING THE EXISTENCE OF LAW

In thinking about the subject of customary international law, it can be helpful to think about the idea of law in general. The subject is endless, however, and the possible points of view one can take toward it are close to innumerable. Selection, therefore, is unavoidable.

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Given the necessity of selecting an avenue of approach, this paper starts by asking, if a social institution is to be characterized as a legal system, what does this mean? What does such an assertion convey about the system in question? In other words, what does a legal system look like?

In answering this question, this discussion will accept the view of H.L.A. Hart that a legal system is an institution intended to affect behavior by coercing obedience to the system's rules.<sup>1</sup> Professors McDougal<sup>2</sup> and Reisman<sup>3</sup> have also insisted that a putative legal rule's status as law depends in part upon the ability and intention of the rule-promulgating authority to control the behavior to which the rule is directed. It follows therefore that one can identify a rule of a legal system by observing the behavior of those persons within the system charged with coercing obedience to a rule. If violation of a putative rule is met with coercion from such persons, it is at least possible that the putative rule is in fact a rule of the system. Conversely, if the system's authorities do not react to violations of a putative rule, its status as a rule is doubtful.

The foregoing raises a number of problems. In the first place, it focuses on violations of a rule. It is certainly possible, however, to imagine a community so law-abiding that the question of reacting to rule violations never arises, since rules are never violated. It would be highly paradoxical to exclude from a legal system those rules taken so seriously that no coercion is necessary to induce obedience to them. We should, therefore, broaden our definition of legal rules to include not only those norms enforced by a system's authorities, but also those which are so widely observed that enforcement is not necessary. According to this view, then, for a norm to be considered a rule of a particular legal system, those subject to the system must either obey the rule or be sanctioned when they violate it.

A second problem is presented by references to "the system's rules." Determining the meaning of that term in different contexts can be difficult. For our purposes, however, it is unnecessary to spend much time on this point. If a legal system is a social institution intended to affect behavior by

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<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* 84 (1960).

<sup>2</sup> Myres S. McDougal, *Law and Minimum World Public Order: Armed Conflict in Larger Context*, 3 UCLA PAC. BASIN L.J. 21, 23-24 (1984).

<sup>3</sup> W. Michael Reisman, *International Lawmaking: A Process of Communication: the Harold D. Lasswell Memorial Lecture*, in AM. SOC'Y INT'L L., PROC. OF THE 75TH ANNIVERSARY CONVOCATION 101, 111 (1983).

coercing obedience to certain rules, the system's rules are simply those to which obedience is coerced. It follows further that such a system must have some means of generating rules and of determining whether a putative rule has been properly generated. But while it is obviously possible to spend considerable time on the implication of these two necessities, it is enough for us to posit that they exist in any legal system, by definition. That is, to assert that an institution is a legal system is to assert that this system has some means of creating rules and of determining the content of the body of rules it has created.

A more serious difficulty is raised by the idea that nonenforcement of a rule by a system's authorities raises doubts about the rule's legal status. It is easy to think of cases in which such an assertion would be doubtful. For example, suppose the legislature of some American state enacted statutes purporting to criminalize various forms of gambling, but that police officers in parts of the state neglected to enforce those statutes. It would certainly be accurate to characterize the statutes as unenforced in those parts of the state, but it seems wrong to say that the failures of the police mean that the statutes have ceased to be legal rules.

It would appear, upon reflection, that the problem is presented because an insistence upon enforcement as the sole test of a rule's legality does not take account of the nature of relatively highly developed legal systems. In such systems, the system's rules for determining whether legal rules have been created limit the authority to create and repeal legal rules to a particular group of people. The duty to enforce such rules, however, is in such systems often borne by other people. In systems where the people who have the authority to create legal rules are different from those who have the duty to enforce such rules, a focus upon enforcement alone distorts the system, ignoring what Hart would presumably call the system's rules of recognition.<sup>4</sup> Within the context of a given system, obvious difficulties are presented by simultaneously asserting, first, that law-making and -repealing authority is limited to certain persons in particular positions, and second, that the actions of different persons not occupying such positions have had the effect of repealing a legal rule through non-enforcement. In such a system, it would seem necessary to acknowledge that a rule's pedigree—that is, its establishment by persons vested by the system with law-creating authority<sup>5</sup>—will

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<sup>4</sup> HART, *supra* note 1, at 92-93.

<sup>5</sup> This use of the term "pedigree" derives from THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 94-110 (1990).

under normal circumstances be the only determinant of its legal status. Whether or not it is enforced in a particular circumstance would not be relevant to a rule's legal status.

A corollary of the foregoing, however, is that such problems are presented only in relatively differentiated systems. In a system in which no distinction is made either between legislators and enforcers or between actions with legislative effects and actions limited to enforcement, the contradiction identified in the preceding paragraph cannot arise. As to such undeveloped legal systems, then, it would appear reasonable to maintain the position that a rule's legal status depends on whether it is obeyed or, in cases of disobedience, whether coercion is exerted to compel obedience.

Aside from the foregoing, a further factor relevant to determining a rule's legal status is the time-perspective from which the inquiry is made. That is, if the issue is whether X was a legal rule 300 years ago in social unit Y, one can investigate what happened 300 years ago in Y in order to reach a conclusion. If, however, the question is whether X would be applied as a legal rule tomorrow in social unit Y, the approach must be different. Instead of seeking to determine what the system's coercers did in the past with respect to enforcing a rule, one would be seeking to determine what such persons would do in the future if faced with a situation which has not yet arisen. That is, one would be engaged in prediction. Of course, what has been done in the past may well be very helpful in making such a prediction, but one would be justified in considering the enforcing authorities' past behavior only if there was reason to believe that such consideration would in fact be an aid in predicting future enforcing behavior. Further, presumably any information which would facilitate an accurate prediction as to future enforcing behavior would be relevant to determining what legal rules would be applied at some future point.

What information one would seek in such a situation obviously depends on the legal system in question. If a given system were highly organized such that enforcement authorities more or less automatically enforced statutes enacted by the legislature, then simply knowing that a statute had been enacted would justify the assumption that its requirements would be enforced in the future. The situation would necessarily be much more complicated in a legal system that was not highly organized. If law-making was not an activity sharply differentiated from other activity and if authority to participate in making and enforcing law was widely dispersed, many types of information would be useful and indeed necessary in making one's prediction as to future enforcement. In any case, the touchstone is to keep

in mind that, in such a situation, one is seeking information which facilitates predictions.

### III. DETERMINING THE EXISTENCE OF RULES OF CUSTOMARY INTERNATIONAL LAW

#### A. *The "Obey or be Sanctioned" Standard*

It remains to apply the foregoing to customary international law. Assuming the correctness of what was argued in the preceding section, it seems that, in order to be able to properly characterize a norm as a rule of customary international law, it must be true either that states very seldom violate the norm—such that the question of enforcement does not arise—or that the international legal system is prepared to employ its characteristic means of coercion in response to violations of the norm. Given the nature of the international legal system, "characteristic means of coercion" necessarily must refer to actions by states, either individually or collectively, as states are the only entities involved in international law controlling means of coercion.<sup>6</sup> Of course, the form coercion might take would vary from case to case. What is crucial, however, to permit the characterization of a norm as a rule of customary law, is that states refuse to acquiesce in a breach of the norm, but on the contrary actively seek to reverse the effects of the breach.

The preceding paragraph employs the simpler version of the "obey or be sanctioned" test discussed above; that is, it rejects the possibility that the circumstances of the promulgation of a norm as a rule of customary international law may be so authoritative as to render irrelevant any subsequent lack of enforcement. Since this point is important to this discussion, it seems necessary to make it explicit and to explain why this conclusion is justified.

To understand this conclusion, it is necessary to reflect upon the structure of the international legal system. That system is radically decentralized. Although it exists primarily to regulate the behavior of states, there are no

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<sup>6</sup> Of course, some international organizations have the authority to coerce their members in particular circumstances, for example, the authority conferred on the Security Council of the United Nations by Chapter VII of the United Nations Charter. Not only are such organizations composed of states, but neither do they possess tools of coercion beyond those provided by the member states.

states who are formally excluded from being one of the system's "authorities". On the contrary, all states are eligible at all times to take part in the creation of customary international law. Further, the same states who possess law-creating authority are also and simultaneously the only enforcers of rules of customary law, as there are no international institutions possessing any instruments of coercion not provided by states. Finally, any act of a state, including a violation of an existing rule of law,<sup>7</sup> may contribute to the development of a new rule of law.

Adding all these factors together, it is very difficult to imagine how one could establish a pedigree for a rule of customary law which was proof against non-enforcement. Such a pedigree would require some way of distinguishing acts which can create or "repeal" an international legal rule from other types of acts by states. But what form could such a distinction take? It is not possible to rely on the identity of the state actors since, as noted above, all states are capable of taking part in the law-creating process. Nor could one insist that some formal criteria justify attributing less weight to some acts than others, since there is no "constitution" for the international community establishing such criteria. Of course, it might be possible to determine inductively that states in fact are especially likely to adhere to the "obey or be sanctioned" standard as to rules generated in particular ways. Obviously, however, to validate a method of rule generation by reference to this standard hardly establishes that rules can exist which do not satisfy the standard. Finally, it is not possible to build a pedigree by distinguishing between acts done by states in their capacities as legislators of international law and acts by states as enforcers of international law, both because states fill both capacities simultaneously and because so many acts of states address both the creation and the enforcement of legal rules. In sum, it is very hard to explain how a rule of customary law can be insulated from testing against the "obey or be sanctioned" standard.

It must be noted that numerous authorities disagree with the foregoing argument. They would insist that particular rules of international law have become so firmly established that contrary practice or an absence of enforcement are irrelevant to determining the rules' legal status. To demonstrate these rules' established character, these writers rely on the rules' widespread acceptance, on their importance, or on the frequency with which

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<sup>7</sup> ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 97-98 (1971).

states refer to the rules' character as legal rules.<sup>8</sup> These positions, it would appear, share a common characteristic: despite their different phrasing, they all argue that, through some means, there has been demonstrated such a broad appreciation of the fundamental character of some rules that ignoring their importance would amount to almost willful blindness.

If this is a fair characterization of these approaches, then it would appear that they suffer from an internal contradiction. In essence they say, "Certain rules have been accepted to the point that they have become fundamental; therefore, failures to obey the rules or to sanction violators simply are beside the point." But if there are so many cases in which transgressions of the rule have evoked no sanctions that the legal status of the rule is questioned, what is the basis for asserting that the rule has been accepted as important? Presumably, the least ambiguous way states can demonstrate their acceptance of particular rules of law is by following those rules and by insisting that other states do so as well. If a given state does not adhere to a rule or react to other states' violations of that rule, surely that state's attitude toward the rule cannot be called one of whole-hearted acceptance, even if its officials have in some contexts and in various ways expressed positive sentiments concerning the rule. In other words, it would appear that the best way to decide *whether* a state "accepts" a rule or *whether* it regards the rule as "fundamental" is by examining the state's behavior to determine whether and to what extent the state has followed the rule and how it has reacted to violations of the rule by other states.<sup>9</sup>

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<sup>8</sup> It is not possible to list all the writers who have taken this position. A partial listing would include: RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, nn.1,2 (1986); Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 1982-IV R.C.A.D.I. 9, 333-37; authorities cited in Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 91-92, 93-94 (1992).

<sup>9</sup> Indeed, it would seem that any other approach could give rise to strange paradoxes. Consider the case of a state whose representatives frequently assert, in various fora, the importance and fundamental character of a particular human rights rule, for example, the rule forbidding the employment of torture by states. Assume that, despite its representatives' pronouncements, the state regularly tortures certain categories of persons—political prisoners, perhaps. Suppose it is asserted, as of year X, that the state's practice has contributed to the emergence of a rule of customary international law forbidding torture by states, the assertion being grounded on the statements by the states' representatives. Suppose that, in year X plus 3, it is asserted that the state's practice of torturing political prisoners is violative of the customary law rule forbidding torture. Suppose finally that the state's practice regarding torture did not change at all over the period X minus three through X plus three. What are



If the state ignores the rule in practice, it would seem inaccurate to characterize it as "accepting" the rule in any meaningful sense; nor is it clear how a rule could be considered "fundamental" to a state if that state does not in practice apply the rule.<sup>10</sup> Indeed, it might be asked whether it does not distort the concept of law to the point of meaninglessness to define it to include rules which are likely in many cases to be neither obeyed nor enforced when disobeyed.

One further point must be addressed before leaving this subject. This paper has referred to the importance of enforcement in determining the existence of a rule of customary law. It has also noted that such enforcement must necessarily be carried out by states. However, it has not addressed the problem of determining which states enforce which rules. Indeed, the discussion to this point could be read as defining as part of customary law only those rules which all states seek to enforce every time they are breached. If that definition were employed, then there would be very little customary law indeed, since few breaches of even uncontroversial rules of customary law evoke such widespread reactions. Further, given the decentralized character of the international legal system, it would be both difficult in practice and paradoxical in principle to insist on such an approach

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we to make of the allegation against the state?

If it is asserted that its behavior in X plus 3 is inconsistent with a rule against torture, how could the identical behavior in year X contribute to the formation of that rule? Conversely, if it is assumed that, when a state's behavior is deemed to contribute to the emergence of a customary rule, the rule embodies whatever that behavior included, then the state's behavior does not violate the rule. But that would force the reformulation of the rule: instead of construing the rule as forbidding states to engage in torture, it would be necessary to read the rule as permitting states to engage in torture while requiring them to denounce the practice.

<sup>10</sup> The same argument could be made in response to the position taken by Professors Simma and Alston, *supra* note 8, at 102-06, that human rights principles could more easily be understood as forming part of international law as "general principles of law recognized by civilized nations" than as rules of customary international law. They argue that reiterations of principles by states—in treaties, in international fora, in international dealings generally—ought to be enough to constitute the "recognition" of the principles within the meaning of Article 38 of the Statute of the International Court of Justice, June 26, 1945, art. 3; 59 Stat. 1055, 1060 (1945). Assuming for the sake of argument that such recognition at the international level would be adequate to satisfy Article 38, the question remains as to how recognition of a norm as a general principle of law is to be demonstrated. That is, in what sense has a state recognized a principle as legally binding upon itself when its behavior ignores the principle and its acceptance is only expressed in circumstances that lead to no acknowledgment of any authority in any other state or in any international body to demand compliance with the principle?

to enforcement. Rather, in the common case in which the breach of a customary rule by one state violates the legal rights of one or several other identifiable states, surely it is enough if the affected states act to enforce the rule in question. Indeed, in such circumstances, one could question the basis for any action taken by a state whose rights were not affected; such action might be seen as a claim by the unaffected state to some sort of general supervisory authority over other states, which would hardly be consistent with the decentralized character of the international legal system.

One consequence of the foregoing, however, is that states' failure to enforce violations of rules which especially affect them raise doubts about the legal status of those rules. As this paper has argued, acquiescence by a system's authorities in violations of a legal rule amounts to a "repeal" of that rule. If in a given situation the relevant "authority" is a particularly affected state, the relevant non-enforcement is likewise that of the particularly affected state.

Imagine, however, an international legal duty whose breach by a state would not in principle particularly affect any other state or states. Rules requiring states to respect the human rights of their own nationals are an obvious example of such duties, since their breach would not especially affect any other identifiable state. To speak of enforcement of such duties by states particularly harmed by their breach, then, would make no sense, since there would be no such states. But to say that a breach does not harm interests peculiar to any one state is not to say that it harms no state interests, since states may share interests in common, such that a breach of duty—though not affecting one state more than another—affects all states. In such a case, since the duty by definition is one owed to all states, presumably any state ought to be able to respond to a breach of the duty. Indeed, there is support for the proposition that international law recognizes such *erga omnes* obligations and permits enforcement of them by any state.<sup>11</sup>

This concept of *erga omnes* obligations requires special comment in light of the employment in this discussion of the "obey or be sanctioned" standard for identifying rules of customary law. More specifically, two points seem important. First, it would appear that there are some duties in international law which, if they exist at all, must be *erga omnes*. This follows simply because there are some duties whose breach could not plausibly be said to

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<sup>11</sup> Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Sp.), 1970 I.C.J. 3, 32 (Second Phase) (Judgment of Feb. 5).

affect some states more than others, such that there would be no logical basis for describing a breach of the duty as peculiarly harmful to any one state or group of states. In such a case, whatever harm the duty exists to prevent must therefore be shared by all states if it exists at all.

The second point follows from the first. If a rule is characterized as *erga omnes*, by definition any state may assert a claim based on its breach. Conversely, rejection by particular states or groups of states of any interest in a putative *erga omnes* obligation necessarily amounts to a denial that the obligation exists. This must follow, since the obligation—if it exists—runs to all states. Just as acquiescence by a state in an action arguably violative of rights peculiar to it raises doubts as to the existence of the right in question, so a state's denial of interest in enforcing an *erga omnes* rule undercuts the argument that rule in fact is *erga omnes*. And if the rule is one that, by its nature, must be *erga omnes* if it exists at all, to deny its *erga omnes* character is to deny the rule's existence.

This observation has consequences for the application of the "obey or be sanctioned" standard to the customary law of human rights. It would appear that rules of customary law protecting human rights must be *erga omnes* if they exist, since their breach cannot be said to affect one state more than another. Thus the attitudes of all states toward the enforcement of such rules are relevant for determining whether the "obey or be sanctioned" standard is satisfied. In other words, since there are no states not affected by a breach of the rule, there are no states whose reactions to the breach are irrelevant. Application of the standard in this context, then, requires a broad survey of state attitudes; even incidents in which some states react to a violation of human rights by imposing sanctions on the violator could actually lead to a weakening of the applicable human rights rule if others react in a manner demonstrating their belief that no enforceable obligation has been breached.

In sum, given the character of the international legal system, a rule must satisfy the "obey or be sanctioned" standard if it is to be considered a rule of that system; the system is simply too decentralized to permit reliance on a rule's pedigree to establish its status. Further, if the rule in question must be an *erga omnes* rule if it exists, then the reactions of all states to particular cases of violations of the rule are relevant to a determination whether a given rule satisfies the standard.

### *B. Customary International Law and Treaties*

The foregoing addresses customary international law generally. The focus of this paper, however, is the relationship between human rights treaties and the customary international law of human rights. How can treaties and customary law relate?<sup>12</sup>

The first point to make follows from the discussion above. If a rule of customary law is one that satisfies the obey or be sanctioned standard, then treaties are relevant to custom to the extent that they aid in determining whether that standard is satisfied in a given case. More specifically, treaties can give some indication of the likelihood that states will, subsequent to the date of the treaty's adoption, adhere to a given standard of behavior. They can also permit predictions as to the probability of enforcement action if particular putative norms are violated.

This information can be conveyed in a variety of ways. In the first place, a treaty can provide information about the parties' view of the state of customary international law at the time of the treaty's conclusion. For example, imagine a fishing treaty between two states. Suppose that treaty included a provision to the effect that fishing vessels of each state would be permitted to fish in the other's territorial sea "as defined by customary international law", but further provided "except that for reasons of State Y's economic security, vessels of State X shall not be permitted to fish in that portion of Y's territorial sea defined by [designated latitude/longitude points]." Surely this language would imply that, in the view of States X and Y, the area from which the X vessels were excluded fell within Y's territorial sea as defined by customary international law. Such a treaty thus provides information as to the views of two states on the rules of customary law regarding the extent of a coastal state's territorial sea. It should be stressed that such indications of states' views as to the content of customary law at a particular period are relevant because they facilitate the prediction as to future behavior which, as noted above, is an essential aspect of determining the content of customary law. This follows because it seems reasonable to assume that, if a given state sees a particular rule as legally binding at one point in time, it will continue to hold that view at some later point, absent some basis for believing that the state's view has changed. And it likewise seems reasonable to assume that, if the state at the later point

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<sup>12</sup> This subject is addressed at greater length in Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 12 VAND. J. TRANSNAT'L L. 1 (1988).

views the rule in question as legally binding, it will conform its conduct to that rule.

Aside from providing a snapshot of custom at the time of the treaty's drafting, a treaty may also bear on customary law by giving rise to a rule which passes into custom.<sup>13</sup> That is, parties to the treaty may come to treat the treaty's rules as binding quite apart from their treaty context, and non-party states may begin adhering to a rule drawn from a treaty despite their non-party status. The treaty's language may be useful in predicting whether such developments are likely. Of course, it is always possible that a particular treaty will come to be applied in a manner different from that implied by its language; for that reason, it would be a mistake to insist that one can simply assume that future behavior by treaty parties will conform to that required by the apparent meaning of the treaty text. Correspondingly, it would be a mistake to insist that the prediction of future behavior, which is essential to determining the content of customary law, may be based solely on the treaty's language, without regard to practice under the treaty. Nonetheless, it is hardly unreasonable to assume that the behavior of treaty parties will conform to their treaty obligations until there is some reason to think otherwise. Analysis of a treaty's text, then, may be relevant to an investigation of customary law by facilitating the prediction of future state behavior.

Of course, whether a rule of customary law exists depends on the general practice of states,<sup>14</sup> and the mere conclusion of a treaty does not establish that the treaty's rules either represent customary law at the time of the treaty's conclusion or that they will become customary law. Obviously, for example, if all one knew about a particular norm was that it was embodied in a particular bilateral treaty, one would hesitate to conclude that the norm represented customary law. In this connection, the pattern of adherence to the treaty is relevant to the treaty's status.<sup>15</sup> The more states that become parties to the treaty, the easier it is to argue that its rules have passed into customary law.

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<sup>13</sup> See *North Sea Continental Shelf Case* (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20), ¶ 71 [hereinafter *North Sea Case*].

<sup>14</sup> Statute of the International Court of Justice, June 26, 1945, art. 38, para. b, 59 Stat. 1055, 1060 (1945); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

<sup>15</sup> See *North Sea Case*, 1969 I.C.J. 3, ¶ 73.

Finally, the practice of parties to a treaty may be relevant toward an understanding of their view of custom. For example, suppose a treaty requires the parties to accord one another certain rights. Suppose one of the states parties scrupulously observes its treaty obligations in this regard, but regularly denies the same rights to states not parties to the treaty on the basis of their non-party status. Obviously, such behavior would indicate that the state in question viewed its obligation to accord the rights as purely a matter of treaty law, with customary law not requiring behavior toward non-parties similar to that required by the treaty toward parties.

Admittedly, the foregoing is somewhat abstract. This paper will therefore turn to applying these principles to the treaties which are the focus of the discussion, those dealing with human rights.

#### IV. TREATIES AND THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

##### *A. Introduction*

The following discussion will examine a number of aspects of the relationship between certain human rights treaties and the customary law of human rights. It will focus on three elements of the regimes of the treaties examined: their texts; the pattern of adherence to them, including the nature of reservations interposed by the states parties; and finally some aspects of practice under the treaties. In each case, the purpose of the inquiry is to determine what prediction regarding future state behavior may be based on the treaty under discussion. More specifically, the question is, does the instrument in question support a prediction that states generally will either adhere to a particular rule, or else will encounter sanctions if the rule is violated?

Unfortunately, this discussion cannot address all relevant human rights treaties if it is to be of reasonable length. It therefore focuses on three: the International Covenant on Civil and Political Rights<sup>16</sup> (the Covenant), the Convention on the Elimination of All Forms of Discrimination Against

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<sup>16</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 58 Fed. Reg. 45, 934 (1993), 999 U.N.T.S. 171 [hereinafter Covenant].

Women<sup>17</sup> (the CEDAW), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>18</sup> (the CAT).

## B. Treaty Texts

### 1. *The International Covenant on Civil and Political Rights*

As is well known, the Covenant—as well as the companion International Covenant on Economic, Social and Cultural Rights<sup>19</sup>—was adopted by the United Nations with a view toward putting into a concrete, legal form the duty of states to respect the rights recognized in the Universal Declaration of Human Rights.<sup>20</sup> Each party to the Covenant “undertakes to ensure to all individuals present within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .”<sup>21</sup> The Covenant then goes on to require each party to respect a broad spectrum of rights—the rights to life, to equal protection of the law, and to marry; the right to freedom of religion, association, and expression, and the rights to be free from torture, slavery, servitude, arbitrary arrest and unfair criminal proceedings, to name but a few.<sup>22</sup> Clearly, this language, together with that of the individual articles of the substantive portion of the instrument, is best interpreted as intended to impose on the states parties an obligation to afford to the individuals specified the rights addressed in the Covenant.

The issue for this discussion, it should be stressed, is not that of determining the exact character of the treaty obligation assumed by the parties to this Covenant. Rather, the question is one of determining what impact this treaty has had on the customary international law of human rights. Treaty interpretation questions are important, therefore, only as they bear on this question of the content of customary international law.

<sup>17</sup> Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>18</sup> Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/Res/39/46 (1984) [hereinafter CAT].

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 3, 1966, 993 U.N.T.S. 3.

<sup>20</sup> G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948).

<sup>21</sup> Covenant, *supra* note 16, art. 2(1).

<sup>22</sup> *Id.* arts. 6-27.

What then can we learn from the text of the Covenant? First, we can gather some information regarding the state of customary international law at the time the Covenant was signed, as perceived by the states who drafted the covenant. Second, we can reach conclusions about the character state practice would have taken if the Covenant was applied in practice as its language would apparently require. This latter point is relevant to the capacity of the instrument itself to generate rules of law, which is to be distinguished from its capacity to inspire practice which becomes law but which differs in some important particulars from the Covenant's own regime.

Considering the state of customary law at the time of the Covenant's drafting, then, it would appear that its text supports two propositions: first, that a state's treatment of its own nationals could not be considered a matter purely of the state's internal affairs, such that any form of outside interest in the subject amounted to an unlawful interference in those internal affairs; and second, that states had no *international legal obligation*, outside the treaty context, to respect the human rights of its nationals. Obviously, both of these observations require comment.

The first point follows necessarily from the fact of the Covenant's existence. It would seem to be a contradiction in terms to characterize a subject which states deem to be an appropriate object for a multilateral treaty to be something exclusively a matter of the domestic jurisdiction of states. While labelling a subject an appropriate matter for interstate concern does not specify the form that concern may take, at least the fact of the Covenant's creation would indicate that customary international law would permit some forms of expressions by states of interest in and dismay over human rights violations by other states.

At the same time, however, the Covenant is inconsistent with the proposition that, as of 1966, states saw themselves as having an obligation under customary international law to refrain from violating the human rights of individuals. This follows from the Covenant's weak enforcement provisions. Nothing in the Covenant affirmatively authorizes any entity—either another state, or a group of states, or the Human Rights Committee established by Article 28<sup>23</sup>—to enforce the obligations created by the Covenant against any state party. The only requirement which is mandatory for all parties is that of making reports to the Human Rights Committee.<sup>24</sup> To be sure, the Covenant establishes a procedure whereby a state party may

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<sup>23</sup> *Id.* art. 28.

<sup>24</sup> *Id.* art. 40.



communicate to the Human Rights Committee its belief that another state party is violating the Covenant. This method of enforcement is available, however, only if both states have explicitly recognized the competence of the Human Rights Committee to receive such communications. Further, the Covenant permits the Human Rights Committee only to make good offices available to the states concerned in the matter, and, if such efforts fail, to appoint a Conciliation Commission, with the consent of the states in question.<sup>25</sup> The Human Rights Committee is not empowered to make any binding determinations under the Covenant.

The implications of this limitation on enforcement would seem clear. Under the Covenant, the Human Rights Committee may act on an interstate communication only against a state which has specially consented to its authority, only if the communicating state has similarly consented, and only to the extent of, in essence, mediating between the states involved. These limitations make sense only if it is assumed that the Covenant affords no interstate means of enforcement beyond those methods spelled out in its text. If states parties could make claims against one another for breaches of the Covenant in the manner usually available to parties to treaties, the provisions of Articles 41 and 42 limiting both the possibility and the consequences of interstate complaints would be useless. Applying the rule that a treaty is to be interpreted as a whole,<sup>26</sup> the only way to interpret the Covenant which takes account of Article 41's limitations is to read it as excluding remedies for violations other than those mentioned in its text.<sup>27</sup>

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<sup>25</sup> *Id.* arts. 41, 42.

<sup>26</sup> See Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 54 I.L.R. 303, 328-29 (Arbitral Trib. established by *compromis* of July 11, 1978, 1978), and authorities cited therein.

<sup>27</sup> It should be noted that some authors reject this conclusion. Professors Henkin and Simma, for example, both argue that the usual remedies available to parties to multilateral treaties in the event of breaches of those treaties should be understood to be available to parties to the Covenant, despite the language of Article 41. Louis Henkin, *Human Rights and 'Domestic Jurisdiction'*, in T. BUERGENTHAL & J. HALL, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 29-33 (1977); Bruno Simma, *Consent: Strains in the Treaty System*, in R. ST. J. MACDONALD & DOUGLAS M. JOHNSTON, THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 485, 502 (1983). Professor Simma thus asserts:

. . . [I]t must be emphasized that multilateral treaties for the protection of human rights, like all others, embody correlative rights and duties between the contracting parties *ut singuli*, resulting in a duty for each party to fulfill its obligations *vis-a-vis* all the others, and conversely, in

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a right for each party to demand compliance from every other party. conventional [sic] mechanisms, if they are available in concrete cases, naturally have precedence over bilateral enforcement, but they do not preclude it. He who asserts a departure from this general rule must prove it. He would have to show that all parties have had the intention of depriving human rights treaties of one of their most important driving forces. Such proof cannot be supplied.

*Id.* (footnotes omitted). It would appear, however, that Professor Simma is mistaken as to the nature of the proof required to displace the general rule he cites. It would seem that the question turns, not on the parties' intentions in general, but on their understanding of the effect of the text of the treaty to which they agreed. That is, the issue is whether the parties to the drafting of the Covenant understood that the effect of its language was to eliminate the availability of the usual remedies for breach. If they did, and nonetheless adopted this language, then the treaty presumably should be read in line with this understanding of its consequences. Further, if the drafters understood the treaty to have this effect, it would appear irrelevant that some of them clearly would have preferred a different system. The question is not, did all parties *want* a treaty with limited remedies, but rather, did they draft a treaty which they all *agreed* provided only limited remedies, however reluctant some of them may have been to do so.

We are thus faced with interpreting the Covenant. Obviously, some commentators would not agree that the text of that treaty clearly compels the interpretation offered in the text of this article. In such a situation, where a treaty's text arguably supports differing interpretations, it is permissible to consult its negotiating history to aid in interpretation. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331. And the history of the Covenant makes clear that the states involved in its drafting understood that remedies for breaches of the Covenant other than those specified in its text were not to be available.

This conclusion is compelled by an examination of the debates of the Third Committee of the United Nations General Assembly regarding the article of the Covenant which became Article 41. In the form presented to the Third Committee by the Commission on Human Rights, the relevant article of the draft Covenant (Article 40 in the draft) would have given the Human Rights Committee authority to initiate a fact-finding and conciliation procedure against any party to the Covenant upon the complaint of any other party; submission to the Committee's authority in this regard was mandatory for all parties. *Report of the Third Committee*, U.N. GAOR, 21st Sess., ¶¶ 398, 410, U.N. Doc. A/6546 (1966). A number of states objected to the mandatory character of the Human Rights Committee's authority; nine states offered an amendment which limited the Committee's authority in this regard to those states who had accepted that authority, and then only in cases of "complaints"—later revised to "communications"—from states which had themselves accepted that authority. *Id.* ¶¶ 402, 403, 410. France in turn offered an amendment which, while altering the Commission's draft, would have retained the mandatory character of the Human Rights Committee's authority. *Id.* ¶ 405. The Third Committee rejected the French amendment, and instead adopted the nine-state substitute for the language originally proposed by the Human Rights Commission. *Id.* ¶¶ 419-20. The debates make clear that this step was taken for several reasons. Some

Furthermore, a reading of the Covenant as precluding claims by states against other states for human rights violations as breaches of treaty implies a view as to the customary law status, as of 1966, of the rights listed in the Covenant. Specifically, that reading implies that the states who participated in the Covenant's drafting assumed that customary international law provided no basis for claims by states against other states for human rights violations. This follows, again, from Article 41. Just as that article makes no sense if parties to the Covenant could circumvent its strictures by making treaty--based claims against other parties, so it would make no sense if customary

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states saw mandatory authority in the Committee as inconsistent with their sovereignty. Others—though not objecting to a mandatory regime for themselves—feared that other states' objections to such a regime would make such states hesitate to become parties to the Covenant, and argued that it was better to have a widely-ratified Covenant with weak enforcement provisions than a Covenant with stronger enforcement provisions and fewer parties. *Id.* ¶ 408-13.

What is striking about these debates, from the point of view of the present discussion, is the clear assumption by *all* participants that the only remedies for breaches of the Covenant would be those spelled out in its text. After all, if parties to the Covenant were to have the right to make claims against one another for breaches of its provisions outside the Covenant's own implementation provisions, whether Article 40 (as it was numbered in the Human Rights Commission draft) was mandatory or not was largely beside the point. In debate, however, all participants took for granted that, if Article 40 had no mandatory character, then there were *no* mandatory remedies for breaches of the Convention. See U.N. GAOR, 3d Comm., 21st Sess., 1415th mtg., U.N. Doc. A/C.3/SR.1415 (1966); U.N. GAOR, 3d Comm., 21st Sess., 1416th mtg. ¶ 19 (Costa Rica), 37 (Madagascar), 45 (Belgium), U.N. Doc. A/C.3/SR.1416 (1966); U.N. GAOR, 3d Comm., 21st Sess., 1417th mtg. ¶¶ 41-43 (Jamaica), U.N. Doc. A/C.3/SR.1417 (1966); U.N. GAOR, 3d Comm., 21st Sess., 1418th mtg. ¶ 11 (Upper Volta), U.N. Doc. A/C.3/SR.1418 (1966). Supporters of the Human Rights Commission's draft sought to allay the concerns of other states by stressing the relatively limited powers of the Human Rights Committee, *e.g.*, U.N. GAOR, 3d Comm., 21st Sess., 1417th mtg. ¶ 34 (Finland), U.N. Doc. A/C.3/SR.1417 (1966), an argument that would have been beside the point if, in addition to the Committee's authority, parties to the Covenant retained the capacity to make claims directly against one another based on the violation of the Covenant's provisions. Particularly interesting were the comments of the representative of India, one of the states sponsoring the nine-power amendment which was substituted for the Human Rights Commission's language. He stated that India's position was motivated in part "by the feeling that the time had not yet come to set up an international legal system by the enforcement of human rights throughout the world." U.N. GAOR, 3d Comm., 21st Sess., 1416th mtg. ¶ 2, U.N. Doc. A/C.3/SR.1416 (1966). Not only does this comment bear on India's understanding of the effect of the amendment of which it was a co-sponsor, but it also indicates that state's view of the status of customary international law at the time this debate took place.

law provided a basis for such claims outside the treaty context. Article 41 could have been seen as effective to accomplish its obvious purpose of shielding states from scrutiny by other states only if the drafters assumed that customary law provided no basis for ignoring Article 41.

The text of the Covenant, then, indicates that states as of 1966 saw human rights questions as appropriate matters of international concern, but not as implicating obligations under customary international law. As pointed out above, however, the text is important with respect to customary law not only for the information it provides as to the content of that law in 1966, but also for its potential to affect that law in the future. But this distinction—though important in principle—would appear to make no difference in this case. That is, state behavior which adhered to the scheme of the Covenant could not be expected to generate a customary international law of human rights, since that scheme—as explained above—precluded any international legal enforcement of the Covenant's substantive provisions. Of course, it would have been possible, after 1966, for state behavior under the Covenant to depart from the original scheme—for example, there could have evolved some method of making interstate claims based on the Covenant. The point to be made here is not that such developments were impossible as of 1966, but that such a course of events would *not* have been what one could have predicted based on the Covenant itself. In short, one could not, in 1966, have predicted on the basis of the text of the Covenant that states would come to see human rights rules as enforceable legal norms even outside the treaty context.

## 2. *The Convention for the Elimination of All Forms of Discrimination Against Women*

The CEDAW, which dates from 1979, requires parties to it to eliminate discrimination against women in broad areas of political, social, economic and cultural life.<sup>28</sup> As is true of the Covenant, the language of its substantive provisions is the language of legal obligation. It would also appear to have the same two effects on the customary international law of human rights as did the Covenant. That is, the existence of the CEDAW reinforces the proposition that human rights questions are matters of international concern, such that inquiry into and comment about a state's human rights record by other states or international organizations could not be seen as

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<sup>28</sup> CEDAW, *supra* note 16, arts. 2-16.

unlawful interference in internal affairs. However, the CEDAW's implementation provisions, as well as those of the Covenant, indicate that its drafters did not see the obligations it imposed either as enforceable under the treaty through interstate complaints or, by extension, as enforceable under customary law without reference to the treaty.

The implementation provisions of the CEDAW are less extensive than those of the Covenant. It provides for the creation of a Committee on the Elimination of Discrimination Against Women<sup>29</sup> (the Committee) and further requires states parties to report on their efforts to give effect to the CEDAW, such reports to be submitted within one year after the CEDAW enters into force for the reporting states, and thereafter every four years and when requested by the Committee.<sup>30</sup> Unlike the Covenant, the CEDAW makes no provision for complaints that states parties have violated their obligations under the CEDAW, either from other states parties or from individuals.

On its face, this last point creates an ambiguity. It might be argued that the CEDAW's silence on the subject demonstrates that normal interstate remedies are to be available in cases of breach; unlike the situation under the Covenant created by that instrument's Article 41, there is no article of the CEDAW which would be rendered useless if such remedies were deemed to be available under the latter treaty. On the other hand, the precedent of the Covenant suggests that the omission from the CEDAW of even optional complaint procedures indicates that no form of enforcement was to be available for the CEDAW apart from that inherent in the reporting system.

Resolving this ambiguity justifies consideration of the negotiating history of the CEDAW. And the negotiating history makes plain the drafters' assumption that the only remedies for the violation of the CEDAW would be those specified in its text.<sup>31</sup> That assumption, it will be recalled, is

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<sup>29</sup> *Id.* art. 17.

<sup>30</sup> *Id.* art. 18.

<sup>31</sup> The relevant negotiating history comes from two meetings of the United Nations Economic and Social Council's Commission on the Status of Women, which was responsible for drafting the CEDAW. Following the adoption of the CEDAW article which became Article 18, the Belgian delegate proposed an additional article which would have obligated the parties to the CEDAW to examine, in the Commission on the Status of Women, the possibility of adding implementation procedures to the CEDAW which would permit parties to the convention and their nationals to address the body which, in the final version of the convention, became the Committee, U.N. ESCOR, Comm. Status of Women, Resumed 26th Sess., 673d mtg. ¶ 93-96, U.N. Doc. E/CN.6/SR.673 (1976). The Belgian proposal was

inconsistent not only with the argument that normal treaty remedies are available for the violation of the CEDAW, but also with any belief on the delegates' part that the provisions of the CEDAW restated customary law as it existed at the time of the CEDAW's finalization. This follows because it would have made no sense to exclude interstate remedies for acts that breached the CEDAW if the same acts were also violations of customary law and thus susceptible to interstate remedies without regard to the treaty.

In sum, as was argued above with respect to the Covenant, the proper interpretation of the text of the CEDAW undercuts any argument that sex discrimination was a violation of customary law as of 1976, or for that matter as of 1979. Further, such an interpretation shows that, unless implementation of that Convention departed from the method originally envisaged for it, the CEDAW could not give rise to a rule of customary law imposing state responsibility for discrimination against women.

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considered in the Commission's next meeting, and rejected by a vote of 11-8-3, U.N. ESCOR, Comm. Status of Women, Resumed 26th Sess., 674th mtg. ¶ 31, U.N. Doc. E/CN.6/SR.674 (1976). The debate on the measure made clear that a number of states objected to the idea that the CEDAW might permit complaints against states for failures to observe the convention, *See id.* ¶ 7 (Egypt); *id.* ¶ 12 (Pakistan); *id.* ¶ 24 (Togo); *id.* ¶ 25 (India); *id.* ¶ 29 (Thailand). The latter two states argued that the provision was unnecessary, as either the group which became the Committee on the Elimination of Discrimination Against Women or the Commission on the Status of Women would be able to adequately supervise the implementation of the CEDAW. This position implicitly assumed that such supervision was the only remedy made available by the CEDAW unless the Belgian proposal was adopted. Equally important, none of the states supporting the Belgian proposal countered that the capacity to raise such complaints existed in any case, either as a general remedy under the CEDAW or as a matter of customary law, *id.* ¶¶ 1-31. As was true with respect to the debate over making Article 41 of the Covenant mandatory, so here: the debate makes sense only if it was based on the assumption that neither the CEDAW itself nor customary law, as of 1976, provided a basis for states to assert that other states had incurred international responsibility for discriminating against women. Further, since the issue was apparently never raised again in the course of the consideration of the CEDAW (*see Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination Against Women*, U.N. GAOR, 3d Comm., 34th Sess., at 5-16, U.N. Doc. A/C.3/34/14 (1979)), there is no evidence that any view of the matter different from that taken by the states represented on the Commission on the Status of Women had come to the fore by the time the text of the CEDAW was approved by the General Assembly in 1979.

### 3. *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The CAT of 1984, as its name implies, addresses only a limited number of human rights violations, those involving infliction of torture and other cruel, inhuman, or degrading treatment.<sup>32</sup> It differs from the Covenant, not only in the narrowness of its focus, but also in the detail it devotes to the human rights issue it addresses. Parties to it do not assume a mere general obligation to refrain from torture; rather, they undertake specific obligations to criminalize acts of torture, to train and oversee persons likely either to encounter or to be tempted to engage in torture with a view toward preventing the practice, to investigate complaints of torture, and to provide redress for such acts perpetrated by their public officials.<sup>33</sup> Each party is also required to enable itself under its own law either to extradite or to itself exercise jurisdiction over persons alleged to have perpetrated acts of torture, wherever such acts may have occurred and regardless of the nationality of either the victim or the accused torturer.<sup>34</sup>

As was true of the substantive portions of the Covenant and the CEDAW, the substantive provisions of the CAT leave no doubt that they are intended to create obligations for the states parties. However, the relationship between the CAT and customary international law is somewhat harder to gauge than the similar relationship between the Covenant and customary international law.

The very existence of the CAT, like that of the Covenant and the CEDAW, has an impact on customary law. Specifically, it reinforces the argument that torture is an appropriate subject of international concern. The CAT goes beyond the Covenant, however, in requiring parties to establish universal jurisdiction over torturers. The least one can say about this portion of its text is that its drafters were prepared to consider torturers as criminals in international law, in the same sense that pirates are. Even if this position did not represent the drafters' view of the content of customary law as of 1984, such an approach surely has the potential, other things being equal, to give rise to a new rule of customary international law, according to which normal limitations to states' assertion of jurisdiction over non-nationals would not apply in the case of torturers.

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<sup>32</sup> CAT, *supra* note 18, arts. 1-27.

<sup>33</sup> *Id.* arts. 4, 10-15.

<sup>34</sup> *Id.* arts. 5-9.

As was also true of the Covenant and the CEDAW, however, the CAT, properly interpreted, seems inconsistent with an argument that, as of the date of its finalization, a state violating the terms of the treaty also violated customary international law. Again, this conclusion is compelled by the CAT's enforcement provisions. The CAT provides for the establishment of a Committee Against Torture<sup>35</sup> (Torture Committee), and gives the Torture Committee four responsibilities. It is to review reports from state parties, itself carry out investigations upon receiving "reliable information containing well-founded indications that torture is being systematically practised" within a party's territory, and investigate communications from state parties and individuals that states parties are violating their obligations under the CAT.<sup>36</sup> While the requirement that parties submit reports is mandatory, all the other implementation mechanisms are optional.<sup>37</sup>

The same arguments made with respect to similar provisions of the Covenant apply to the CAT. Provisions making optional a state's subjection to treaty procedures intended to enforce an obligation to prevent torture make no sense if states would in any case have parallel rights under customary law to make claims against other states perpetrating acts of torture. The CAT's inclusion of such provisions, then, implies that the drafting states did not believe that such a right existed under customary law as of 1984.<sup>38</sup>

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<sup>35</sup> *Id.* arts. 17-18.

<sup>36</sup> *Id.* arts. 19-22.

<sup>37</sup> *Id.* arts. 19-22, 28. The CAT differs from the Covenant in one respect, in that, while states must opt in to the interstate and individual complaint procedures, as is true under Art. 41 of the Covenant and under the First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 302, states wishing to avoid the authority of the Committee Against Torture to conduct its own investigations must opt out.

<sup>38</sup> As was true of the Covenant, the negotiating history of the CAT reinforces this conclusion. The draft text was presented by the Human Rights Commission to the General Assembly in a form that made clear that the full Commission had not sought to resolve controversies existing regarding certain of the CAT's provisions (the controversial provisions were included in the draft but enclosed in square brackets). Specifically, controversy existed regarding Arts. 19 and 20. Under the draft Convention, the Committee Against Torture would, in reviewing the reports required by Art. 19, have had the authority to make "suggestions" to states. This was seen as objectionable as permitting the Committee to, in effect, evaluate state compliance with the CAT. Draft Art. 20 was seen as raising a problem in that it made submission to the Committee's investigatory authority mandatory. Both socialist states and members of the non-aligned movement complained that these provisions permitted the Committee to interfere in their internal affairs, and objected to them. Further, a number of states expressed the fear that inclusion in the Convention of the provisions in question could dissuade some states from becoming parties to it. Ultimately, the Third



Further, as was true under the Covenant and the CEDAW, the limited character of the undertakings under the CAT meant that practice in accord with the plan of that instrument would not give rise to a rule of customary international law in future. Again, this is not to say practice under the CAT in operation could not have diverged from that envisioned at the drafting stage, and thus have given rise to a rule.<sup>39</sup> It is only to say that adherence to a treaty scheme which excludes enforcement of the obligations the treaty creates cannot give rise to a customary legal rule as to those same obligations, since, as explained above, that concept of "legal" obligation assumes that the obligation in question is enforceable.

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Committee deleted the authority of the Committee Against Torture to make "suggestions" and adopted a Bulgarian amendment adding to the CAT Art. 28, which permits states to opt out of Art. 20's grant of investigative authority to the Torture Committee. U.N. GAOR, 3d Comm., 39th Sess., mtgs. 48-52, 60, U.N. Docs. A/C.3/39/SR.48 - A/C.3/39/SR.52, A/C.3/39/SR.60 (1984); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 96-107, 236-49 (1988). As was true with the debates over the Covenant, those over the CAT make sense only if the parties assumed that there were no mandatory international legal enforcement mechanisms relating to torture. Even under the mandatory version of Art. 20, for example, the Committee Against Torture was authorized at most to investigate, make findings, transmit those findings to the state concerned together with comments and suggestions, and at its discretion, to include a summary account of the proceeding in its Annual Report. It seems unlikely that states would trouble themselves to oppose such a provision if they saw themselves as vulnerable in any case to claims by other states based on a violation of a customary law rule against torture. Further, supporters of the mandatory system did not argue that it was a limited measure, in light of the availability of claims based either on the CAT itself or on customary rules against torture; on the contrary, they argued that without the Human Rights Commission's version of Arts. 19 and 20, the CAT would become a "voluntary commitment" (Belgium), U.N. GAOR, 3d Comm., 39th Sess., 49th mtg., U.N. Doc. A/C.3/39/SR.49, at 10 (1984), and that without those provisions, the text has "no more than face value" (Spain), U.N. GAOR, 3d Comm., 39th Sess., 52d mtg., U.N. Doc. A/C.3/39/SR.52 at 4 (1984).

<sup>39</sup> For example, even though the CAT makes no provision for enforcing its requirement that states exercise universal jurisdiction over torturers, the practice of claiming such jurisdiction could become so widespread and uncontroversial that it could be deemed permitted by customary international law.

### C. *Patterns of Adherence*

#### 1. *Introduction*

Patterns of adherence to human rights treaties are relevant to their status as customary international law for several reasons. First, ratification presumably represents at least some form of acceptance of the rules a treaty embodies; conversely, a refusal to ratify is consistent with the possibility that nonratifying states do not accept some aspect of the treaty. Relatively limited participation in a treaty thus raises a question regarding the customary law status of a treaty's rules,<sup>40</sup> since limited participation supports doubts as to the "general" character of the acceptance of the norms in question. This would be particularly true of human rights treaties, since their subject matter is not such as to leave some states with "no interest in becoming parties . . . ."<sup>41</sup>

Second, given the optional character of the implementation provisions of the Covenant and the CAT, adherence to those provisions in particular sheds light on states' willingness to be held accountable for their breaches of human rights treaties. As pointed out above, one of the hall-marks of a legal rule is its enforceable character; an indication that particular states are unwilling to have the provisions of human rights treaties enforced against them, then, casts doubt on those states' acceptance of the treaties' rules as matters of customary law.

Finally, analysis of reservations to human rights treaties is for two reasons useful in determining the content of customary international law. First, such analysis throws light on the limitations of the obligation which the reserving state is willing to accept. Even a reservation which is impermissible under a particular treaty<sup>42</sup> will be useful for determining the content of customary law, since at minimum such a reservation suggests that the reserving state's future behavior will not be what might be expected if expectations were based solely on the text of the treaty in question. And, as pointed out above, treaties are relevant to customary international law only insofar as they aid in predicting future behavior.

The second useful aspect of reservations is the light they may throw on the views of non-reserving states. It could be argued that parties to a treaty

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<sup>40</sup> North Sea Case, 1969 I.C.J. 3, ¶ 73.

<sup>41</sup> *Id.*

<sup>42</sup> Vienna Convention on the Law of Treaties, *supra* note 27, art. 19.

who do not object to a reservation presumably do not find the reservation objectionable; in other words, such non-objecting parties would presumably be prepared to acquiesce in behavior by the reserving state that was consistent with the reservation. Such an argument, however, surely goes too far. All parties will not pay especially close attention to the reservations made to a multilateral treaty. Further, some may accept Bowett's distinction between "permissibility" and "opposability" of reservations,<sup>43</sup> and see no need to object to reservations which, because of impermissibility, would be ineffective in any case.<sup>44</sup> Finally, when a reservation has evoked objections from some states, other states which find the reservation objectionable may see no point in adding to the list of objecting states, since additional objections would make no legal difference. For all these reasons, the implications of a state's failure to object to a treaty reservation are too ambiguous to support any firm conclusions. It would seem, however, reasonable to note that such a failure is ambiguous, and that one possible explanation is that non-objecting states in fact do not find the reservation objectionable. In other words, while a state's failure to object to a reservation to a treaty to which it is a party certainly does not demonstrate its acquiescence in that reservation, the failure leaves murky the non-objecting state's attitude toward the reservation, and by extension, toward behavior by the reserving state consistent with that reservation.

The discussion that follows, then, considers these aspects of patterns of adherence to the three human rights treaties addressed in this paper.

## 2. *The Covenant*

Although the Covenant has been open for adherence for about 26 years, as of July 29, 1994, the parties to it numbered only 127, one of which (Switzerland) is not a member of the United Nations.<sup>45</sup> As the United Nations currently includes 185 states,<sup>46</sup> this means that about one-third of the states of the world have not become parties to the Covenant. Further, the

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<sup>43</sup> D. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B.I.L. 67, 88-90 (1976-77).

<sup>44</sup> Vienna Convention on the Law of Treaties, *supra* note 27, art. 19.

<sup>45</sup> *Report of the Human Rights Comm., Vol. 1*, U.N. GAOR, 49th Sess., Supp. No. 40, at 89 (1994) [hereinafter *Human Rights Comm. Report*].

<sup>46</sup> *Membership of Principal United Nations Organizations in 1995*, 32 U.N. MONTH. CHRON. (Mar. 1995), at inside back cover.

non-adherents include a significant number of Muslim states,<sup>47</sup> as well as about half the states of East Asia.<sup>48</sup> These circumstances support doubts as to the generality of the acceptability of the Covenant's provisions, and thus of their status as customary law.

This impression is reinforced by a consideration of the pattern of acceptances of the Human Rights Committee's authority under Article 41 and of adherence to the First Optional Protocol to the Covenant.<sup>49</sup> Only 44 states, as of July 29, 1994, had made declarations under Article 41, 32 of those being either European or primarily inhabited by descendants of Europeans.<sup>50</sup> Seventy-seven states were parties to the First Optional Protocol as of that date, 38 of whom had also made declarations under Article 41.<sup>51</sup> Not quite half of the 77 are European or European-settled states, with the balance divided approximately evenly between Caribbean and Latin American states and African states; very few Asian states have become parties to the First Optional Protocol.<sup>52</sup> In other words, fewer than half the states of the world have been willing to agree to any measure of implementing the Covenant that could lead to their being called to account for specific violations of the Covenant. Asian parties in particular seem reluctant to accept one or the other of the "communication" procedures.<sup>53</sup> Given the large number of important Asian states who have refused to adhere to the Covenant at all, this circumstance necessarily raises questions about Asian perceptions as to the customary legal character of the Covenant's provisions.

Consideration of reservations adds little to our understanding of the parties' attitudes toward the Covenant. Twenty-four states have made

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<sup>47</sup> Of the states of the Arabian peninsula, only Yemen is a party to the Covenant. Other non-parties with significant Muslim populations include Bangladesh, Chad, Indonesia, Mauritania, Turkey and Pakistan. *1994 Human Rights Comm. Report, supra note 45, at 89-92.*

<sup>48</sup> East Asian non-parties include Brunei, China, Indonesia (also counted among the Muslim states), Laos, Malaysia, Myanmar, Singapore and Thailand. *Id.*

<sup>49</sup> *First Optional Protocol to the International Covenant on Civil and Political Rights, supra note 37, at 302.*

<sup>50</sup> *1994 Human Rights Comm. Report, supra note 45, at 94-95.*

<sup>51</sup> *Id.* at 92-94.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 92-95.

significant substantive reservations, but these are generally limited in scope.<sup>54</sup>

Overall, however, patterns of adherence provide only weak support for the proposition that the Covenant represents customary international law. One-third of the states of the world, including significant groupings of states, are not parties. And over one-third of the parties to the Covenant have refused to expose themselves to international accountability for breaches of it.

### 3. *The CEDAW*

One hundred thirty-two states had become parties to the CEDAW as of February 4, 1994.<sup>55</sup> This represents about 70% of the states of the world. A number of states with significant Muslim populations have not become parties, however.<sup>56</sup> Moreover, the significance for customary law of the number of adherents to the CEDAW is somewhat dissipated by the large number of significant reservations which states have made to the Convention.<sup>57</sup> Sixteen parties, including almost all of the predominantly Muslim parties, have made reservations that would appear to markedly limit their actual acceptance of the principles of the CEDAW.<sup>58</sup> Given the sweeping character of many of these reservations, it is somewhat surprising that they

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<sup>54</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at December 31, 1993*, at 125-33, U.N. Doc. ST/LEG/SER.E/12 (1994) [hereinafter *1993 Multilateral Treaties*]. The most common reservations reject any absolute obligation to segregate juvenile from adult prisoners, and qualify the undertaking in the Covenant to ban war propaganda. *Id.*

<sup>55</sup> *Report of the Comm. on the Elimination of Discrimination Against Women*, U.N. GAOR, 49th Sess., at 154-56, U.N. Doc. A/49/38 (1994) [hereinafter U.N. Doc. A/49/38].

<sup>56</sup> Afghanistan, Chad, Iran, Mauritania, Pakistan, Syria and Saudi Arabia are among the non-parties; indeed, no state of the Arabian peninsula except Yemen has become a party to the CEDAW. *Id.*

<sup>57</sup> For a detailed discussion of reservations to the CEDAW, see Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L. L. 643 (1990).

<sup>58</sup> For example, Bangladesh, Egypt, Libya, the Maldives and Morocco all qualify their acceptance of the Covenant by subordinating it to Islamic law. Iraq, Jordan, Tunisia, and Turkey, while not referring to Islamic law in their reservations, nonetheless refuse to accept significant substantive elements of the CEDAW, particularly provisions relating to gender equality in marriage. Brazil, Jamaica, India, Israel, the Republic of Korea, Mauritius, and Thailand have also made reservations that could seriously limit the effect of the Covenant in at least some particulars. *1993 Multilateral Treaties, supra* note 54, at 167-75.

have evoked relatively few objections from the parties to the treaty. In no case have as many as eight parties objected to a reservation; in most cases, the same four parties have interposed objections.<sup>59</sup> Furthermore, none of the objecting states have asserted, in its objection, that the Convention is not in force between the reserving and objecting state because of the reservation. On the contrary, several have explicitly stated that their objection does not preclude the entry into force of the treaty between the objecting and the reserving states.<sup>60</sup> Others, though using language in their objections strongly implying that they see the reservations to which they object as effectively nullifying the reserving states' adherence to the Convention, have not made this conclusion explicit.<sup>61</sup>

Taken together, these reservations appear to weaken any argument that the CEDAW represents customary international law. As noted above, their effect is, in many cases, to greatly limit the obligations state purport to assume under the convention. That is, one seeking to predict the future behavior of the reserving states with respect to the subjects addressed by the CEDAW would be forced to conclude that they would ignore rather than obey the treaty in some sets of circumstances. Thus, to the extent that one's expectations were based on the CEDAW, the number of states that one could plausibly expect to behave as though they regarded discrimination against women as a violation of international law would not be 132, but 116. This amounts to about 64% of the membership of the United Nations, which seems too small a proportion upon which to base claims of a general practice.

This conclusion is reinforced by the lack of reaction to the reservations by other parties to the CEDAW. State objections to reservations under that instrument are especially important, since they are the principal means of raising questions regarding the permissibility of reservations; the Committee lacks authority to compel states to abandon even impermissible reservations.<sup>62</sup> As noted above, failures to object to reservations are ambiguous indicators of states' attitudes toward those reservations. In this case,

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<sup>59</sup> Far and away the most frequent objectors are Germany, Mexico, the Netherlands, and Sweden. These four were joined by Denmark, Finland and Norway in objecting to Libya's reservation. *Id.* at 175-77.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Report of the Comm. on Elimination of Discrimination Against Women*, U.N. GAOR, 39th Sess., pt. 2, Annex 3, at 55, U.N. Doc. A/39/45 (1984).

however, given the large number of parties to the CEDAW and the questionable compatibility of many of the reservations with the treaty, it is surprising that so few states have raised objections. Further, the limited character of the objections which have been made suggests that even the objecting states are reluctant to squarely insist upon good faith adherence to the treaty. This conclusion seems compelled by the facts that most of the objectors expressly state that their objections do not preclude the entry into force of the treaty between themselves and the reserving states, and that none of the objectors declare the treaty not in force between themselves and the reserving states. At least it would appear that anyone contending that the CEDAW represented customary international law would need to explain such relatively tepid reactions to some very doubtful reservations.

#### 4. *The CAT*

The pattern of adherence to the CAT likewise lends only weak support to the proposition that it is customary international law. It has been available for adherence for ten years, but only 96 states have become parties.<sup>63</sup> Almost all have refrained from opting out of the jurisdiction of the Torture Committee to investigate allegations of torture on its own motion; however, only 36 have agreed to one or the other of the complaint procedures the CAT provides, and 29 of the 36 are either European or primarily inhabited by the descendants of Europeans.<sup>64</sup> There have been no significant reservations to the CAT.

This pattern of adherence would not appear to support the proposition that torture at a state's behest is a violation of customary international law. A convention to which barely half the members of the U.N. are willing to adhere seems a poor indication of the general practice of states. This conclusion is reinforced by the reluctance of the states which have become parties to be held accountable for breaches of the Convention. While, as noted above, almost all are subject to the investigative jurisdiction of the Torture Committee, those investigations may be triggered only as to allegations of the *systematic* practice of torture.<sup>65</sup> Most of the parties are unwilling to be compelled to address claims regarding torture that could not

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<sup>63</sup> *Report of the Committee Against Torture*, U.N. GAOR, 49th Sess., Supp. No. 44 at 30-32, U.N. Doc. A/49/44 (1994) [hereinafter *1994 Torture Comm. Report*].

<sup>64</sup> *Id.*

<sup>65</sup> CAT, *supra* note 18, art. 20.

be called systematic. In short, state reaction to the CAT tends if anything to reinforce the impression that states generally are unwilling to accept *legal* obligations to respect human rights.

#### *D. Practice Under Human Rights Treaties*

This portion of the discussion addresses the effect of practice under human rights treaties on the customary law status of the rules those treaties set forth. Preliminarily, it is important to make clear what "practice" is being addressed here. Obviously, from the point of view of the primary beneficiaries of human rights norms—the mass of people of the world—the most important issue with respect to practice is, do states respect human rights or do they not? Similarly, the actual practice of states with respect to protection of human rights is presumably the crucial determinant of the existence of a customary law of human rights.<sup>66</sup> And there seems to be little disagreement with the proposition that a large number of states systematically flout even the most basic norms of human rights. The reports of Amnesty International, for example, compel this conclusion.<sup>67</sup> Similarly, Professor Opsahl, writing in late 1991, estimated that the Covenant had had "only a marginal impact in perhaps one-third of the ninety-six States Parties."<sup>68</sup> On this basis, then, it is difficult to maintain the proposition that the actual practice of states supports the view that there is any very extensive customary international law of human rights.

It is not this aspect of practice under human rights treaties, however, that this discussion proposes to address. Rather, the object in this portion of this paper is to examine the behavior of the states parties to human rights treaties with respect to matters relevant to such treaties but not in the first instance involving the substantive rights the treaties purport to protect. The discussion then seeks to determine what inferences this behavior suggests concerning the extra-treaty legal status of the rules of such treaties. (Most of the remarks that follow will necessarily focus on the Covenant, given the length of time it has been in effect and the greater opportunity for practice to develop with respect to it).

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<sup>66</sup> For a discussion of this point, see Weisburd, *supra* note 12. For a discussion reaching a similar conclusion, see Simma & Alston, *supra* note 8, at 90-100.

<sup>67</sup> See AMNESTY INTERNATIONAL, REPORT 1993 (1993).

<sup>68</sup> Torkel Opsahl, *The Human Rights Committee*, in PHILIP ALSTON, THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 369, 436 (1992).



What then does practice, in the above-described sense, tell us about the customary legal status of the rules of human rights treaties? First, the background of the CEDAW and CAT raises questions as to the customary legal status of the rules of the Covenant as of 1979 and 1984. As noted above, the negotiating histories of those instruments cast doubt on the proposition that the prohibitions against discrimination against women and against torture had entered customary international law as of 1979 and 1984, respectively.<sup>69</sup> Yet both prohibitions are contained in the Covenant.<sup>70</sup> The debates on those instruments, that is, necessarily reflect states' views as to the customary law status of some of the Covenant's articles, and indicate that, at the time the treaties were opened for signature, states did not see those articles, at least, as having given rise to a right in states to invoke other states' international responsibility if the latter had engaged in conduct violating those articles.

Doubts as to the customary law character of the rights listed in the Covenant also receive some reinforcement from the lack of use of the inter-state complaint procedure of Article 41. That procedure is simply not used.<sup>71</sup> To be sure, as noted above, relatively few states have subjected themselves to the Human Rights Committee's authority with respect to this procedure. Further, most of those who have are parties to the European Convention on Human Rights, and rely on that treaty's enforcement mechanisms with respect to one another.<sup>72</sup> But not all the states who have brought themselves under Article 41 are European, and not all have unblemished human rights records. Further, any state against whom a complaint might be made would necessarily have agreed in advance to subject itself to this procedure, presumably reducing the political risk to the complaining state. It is therefore noteworthy that Article 41 remains, in Professor Opsahl's phrase, a "hypothetical function" of the Human Rights Committee.<sup>73</sup> This non-use suggests, once again, a reluctance on the part of states to hold one another responsible for violations of human rights, which in turn seems inconsistent with an argument that human rights norms are matters of *law*, that is, rules to be enforced against violators.

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<sup>69</sup> See *supra* notes 28-39, and accompanying text.

<sup>70</sup> Covenant, *supra* note 16, arts. 3, 7, 26.

<sup>71</sup> Opsahl, *supra* note 68, at 419-20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 420.

A third and related observation is that, as a matter of fact, states objecting to actions by other states which would be violations of customary law if the standards of human rights treaties have entered customary law apparently do not usually label such actions illegal, at least when the objecting state's own nationals are not involved; rather, objecting states characterize their intercessions as motivated by humanitarian considerations.<sup>74</sup> Indeed, this seems to be the case even when the allegedly offending state is bound by an arguably relevant human rights treaty.<sup>75</sup> This pattern reinforces the impression that parties to human rights treaties do not see those treaties as enforceable except through such implementation measures as the treaty may include; it amounts to "subsequent practice . . . which establishes the agreement of the parties regarding [the human rights treaties'] interpretation."<sup>76</sup> Moreover, it also supports doubts as to the customary legal status of the norms set out in those treaties. To be sure, as Kamminga has observed, such reticence may reflect only a tactical judgment by an objecting state that, in a particular case, it would be more likely to succeed in aiding the person or persons it sought to assist by characterizing its action as a matter of humanitarian interest, as opposed to the invocation of a legal duty.<sup>77</sup> It would therefore go too far to assert that such evidence of actual state practice *compels* the conclusion that states do not, in practice, consider violations of putative human rights norms to be violations of customary international law. What can be said, however, is that the failure of objecting states to invoke customary international law in such circumstances suggests some uneasiness about relying upon that body of law as a basis for an approach to another state regarding human rights violations. That is, it suggests some state ambiguity on the actual legal character of human rights norms. Moreover, it would seem uncontroversial that states would reinforce the customary legal character of human rights norms if they invoked that legal character in their objections to actions by other states. Their failure to do so thus not only casts some doubt on such norms' legal status, but suggests limited interest on the part of objecting states in reinforcing that legal status.

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<sup>74</sup> MENNO T. KAMMINGA, *INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS* 25-62 (1992).

<sup>75</sup> *Id.*

<sup>76</sup> Vienna Convention on the Law of Treaties, *supra* note 27, art. 31.3(b).

<sup>77</sup> KAMMINGA, *supra* note 74, at 33-34, 58.

A fourth relevant point concerns states' reactions to their own human rights violations. Under both the Covenant<sup>78</sup> and the CAT,<sup>79</sup> parties are obliged to provide redress to persons injured by violations of the rights guaranteed in those instruments. There is, however, considerable reason to doubt whether such redress is in fact provided. Thus Special Rapporteur van Boven, charged by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with carrying out a study "concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,"<sup>80</sup> concluded:

It is clear from the present study that only scarce or marginal attention is given to the issue of redress and reparation to the victims. The disregard of the rights of the victims is also pointed out by United Nations rapporteurs and working groups that deal with consistent patterns of gross violations of human rights. For example, the Special Rapporteur on extrajudicial, summary or arbitrary executions recently stated that with regard to compensation granted to the families of victims of extrajudicial, summary or arbitrary executions, only one Government had reported to him that indemnification was being provided to the families.<sup>81</sup> (footnoted omitted)

This issue has raised concern even with respect to compliance with the "views" expressed by the Human Rights Committee in response to individuals' complaints of violations of the Covenant under the procedure established by the First Optional Protocol. Since adherence to the First Optional Protocol is purely voluntary, it might be assumed that the 77 states which have in fact adhered to it would conform to the Human Rights Committee's views as a matter of course. In fact, that Committee became disturbed enough about the level of compliance with its "views" in such

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<sup>78</sup> Covenant, *supra* note 16, art. 2(3).

<sup>79</sup> CAT, *supra* note 18, art. 14.

<sup>80</sup> *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, U.N. GAOR, 45th Sess., ¶ 1, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993).

<sup>81</sup> *Id.* ¶ 132.

cases to appoint a special rapporteur to address the matter.<sup>82</sup> The Committee has expressed views in 193 cases, finding violations of the Covenant in 142.<sup>83</sup> The Special Rapporteur sought follow-up information regarding 120 of these cases, receiving it in only 65.<sup>84</sup> Furthermore, the Committee observed that "a little more than one-fourth of the replies" were "fully satisfactory," while "[a] little over one-third . . . cannot be considered satisfactory."<sup>85</sup> The Committee was sufficiently concerned by this situation to decide to give extensive publicity to whatever information it could obtain regarding implementation of its views.<sup>86</sup>

A final element of practice relevant to this study concerns state compliance with such implementation obligations as existing human rights treaties include. The one such obligation common to all three treaties here discussed and mandatory for all parties is that of reporting. Yet states commonly neglect their reporting obligations. A study carried out by Professor Alston at the request of the General Assembly demonstrates that at least half the parties to each of the three conventions discussed in this paper are behind in their reporting obligations; several defaulters owe more than one report.<sup>87</sup> As he points out, in a climate of toleration of non-reporting,

Government officials may justifiably come to assume that ratification or accession to a human rights treaty is an act that brings much sought after kudos but is otherwise of little consequence. The standards contained in the treaty are

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<sup>82</sup> *Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., Supp. No. 40 at 173-74, U.N. Doc. A/46/40 (1992).

<sup>83</sup> *1994 Human Rights Comm. Report*, *supra* note 45, at 84.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 85-86.

<sup>87</sup> *Status of Preparation of Publications, Studies and Documents for the World Conference: Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Conventions on Human Rights, World Conference on Human Rights Preparatory Committee*, 4th Sess., ¶ 104, Table 1, U.N. Doc. A/CONF. 157/PC/62/Add.11/Rev. 1 (1993) [hereinafter *Effective Implementation of Human Rights Instruments*].

The situation reported by Alston continues. As of July 29, 1994, a total of 96 reports from 75 parties to the Covenant were overdue. *1994 Human Rights Comm. Report*, *supra* note 45, at ¶ 53, p. 12. Seventy-two states owe 108 reports under CEDAW, U.N. Doc. A/49/38, *supra* note 55, at 161-74, and 39 states owe reports under CAT, *1994 Torture Comm. Report*, *supra* note 63, at 34-38.

unlikely to be taken seriously in the context of domestic law and policy-making if the obligation to report to the treaty body, which in many respects is one of the less onerous implications of becoming a party, is ignored. Finally, any fears on the part of nongovernmental organizations or of political and other interest groups that the treaty system is toothless and even irrelevant are reinforced.<sup>88</sup>

One may fairly ask whether the lax attitude toward the reporting obligation which Professor Alston details would not all ready support the conclusions which he suggests.

It should also be noted that the impression that states do not take human rights treaty regimes very seriously is reinforced by their collective failure to provide anything approaching adequate administrative and financial support to the bodies charging with overseeing implementation of those treaties. Professor Alston's report makes clear how strapped for resources those bodies are.<sup>89</sup> Indeed, he observes with respect to the meeting time allocated to the treaty bodies, ". . . that many of the treaty bodies are only able to function within their existing allocations of meeting time because of the enormous rate of overdue and unsubmitted reports, and because they are devoting a clearly inadequate amount of time to the consideration of each report."<sup>90</sup> Obviously, states' failures to meet their reporting obligations under human rights treaties and to provide to treaty implementation bodies resources adequate to their task amount to the undercutting of such enforcement of those treaties as may exist, and thus reinforce the conclusion that states generally do not see the obligations in those treaties as enforceable. That conclusion is equivalent to the determination that states do not see the rules of those treaties as matters of law.

#### *E. Human Rights Treaties and Customary Law: Conclusion*

The foregoing discussion examines three aspects of three human rights treaty regimes to determine whether any of them would support a prediction that the "obey or be sanctioned" standard would be applied to violations of the rights the treaty purports to protect. The only possible conclusion is that

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<sup>88</sup> *Effective Implementation of Human Rights Instruments*, *supra* note 87, ¶ 110.

<sup>89</sup> *Id.* ¶ 183-206.

<sup>90</sup> *Id.* ¶ 193.

none of them do. As to each, the text—while certainly supporting the proposition that human rights questions are not pure matters of states' domestic jurisdiction—cuts against any argument that violations of human rights give rise to international responsibility.

Patterns of adherence to such treaties likewise raise doubts as to their effect on customary law. In part, this conclusion flows from states' failures to subject themselves to enforcement procedures when they are available. In part, it depends on the relatively limited adherence to such treaties and, equally important, the particularly low levels of adherence by identifiable groups of states. And as to the CEDAW, it is reinforced by the apparent tolerance by most parties of reservations to the treaty which seem clearly contrary to its object and purpose.

Finally, practice under the treaties reinforces doubts as to their status as customary law. This practice includes, to be sure, the flouting of human rights norms by many parties to these treaties, but is not limited to such behavior. It includes as well the attitudes of states negotiating treaties which elaborated upon rights all ready supposedly protected by the Covenant, states' failures either to use such enforcement procedures as human rights treaties make available or to claim a *legal* basis for complaints as to human rights violations by other states, states' failures to redress their own violations of human rights, and the apparently widespread lack of interest either in complying with the reporting obligations created by human rights treaties or in supporting treaty-created monitoring bodies at a realistic level.

Arguably, no one of these factors in isolation is inconsistent with the existence of a general acceptance by states of the "obey or be sanctioned" character of international human rights norms. Taken together, however, they seem to demonstrate that human rights treaty regimes do not support the proposition that states accept the enforceable, which is to say the legal, character of human rights norms.

#### V. OTHER FORMAL INTERNATIONAL ACTS RELEVANT TO THIS DISCUSSION

Discussions of the customary international law of human rights very frequently place weight on more or less formal acts by groups of states which, though not taking the form of instruments creating legal obligations

to respect human rights, nonetheless address human rights questions.<sup>91</sup> In this spirit, this portion of this paper will consider the implications for this area of customary law of certain recent formal international acts which have implications for human rights.

First on the list, because it has a legal effect although it purports to create no obligations to respect human rights, is the General Assembly's creation of the post of High Commissioner for Human Rights.<sup>92</sup> The resolution creating that position is interesting in a number of respects. First, it nowhere declares human rights obligations to be matters of international law; it characterizes the "promotion and protection of all human rights" as "a legitimate concern of the international community"<sup>93</sup> in a context in which one might have expected a reference to international law, if human rights norms are in fact seen as extra-treaty legal norms. The closest the resolution comes to recognizing a legal obligation in this regard is its characterization of "promot[ion] and protect[ion] of all human rights and fundamental freedoms" as a "duty", type unspecified.<sup>94</sup>

A second interesting aspect of the resolution is that the right to which it seems to give most prominence is the right to development.<sup>95</sup> This is significant because at least some scholars would seem to see respect for that right as precluding actions that might otherwise be logical mechanisms for enforcing human rights obligations, such as economic pressures.<sup>96</sup> Recognizing a right to development thus may in practice weaken protections for other rights.

Finally, the new High Commissioner's authority is ambiguous and would not appear to extend to enforcement measures. Thus, the resolution provides that the High Commissioner shall "function within a framework" that couples the obligation "to promote the universal respect for and observance of all human rights" with the obligation "to respect the sovereignty, territorial

<sup>91</sup> For example, the number of discussions of this issue which refer to the Universal Declaration of Human Rights is too numerous to recount; but it is uncontroversial that that instrument was not intended to be legally binding at the time of its adoption. Antonio Cassese, *The General Assembly: Historical Perspective*, in ALSTON, *supra* note 68, at 25, 31.

<sup>92</sup> G.A. Res. 48/141, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/141 (1994) [hereinafter Res. 48/141].

<sup>93</sup> *Id.* ¶ 3(a).

<sup>94</sup> *Id.* ¶ 3(b).

<sup>95</sup> *Id.* paras. 4,6 and ¶¶ 3(c) and 4(c).

<sup>96</sup> Omer Y. Elagab, *Coercive Economic Measures Against Developing Countries*, 41 INT'L & COMP. L.Q. 682, 694 n.33 (1992).

integrity and domestic jurisdiction of States.”<sup>97</sup> Similarly, the only provision expressly addressing the High Commissioner’s dealings with states is that which gives him/her the responsibility “[t]o engage in a dialogue with all governments in the implementation of his/her mandate with a view to securing respect for all human rights.”<sup>98</sup> All in all, it would not appear that the High Commissioner for Human Rights is seen as an enforcer of law.

A second relevant recent formal act was taken by the World Conference on Human Rights, convened by the United Nations in Vienna in June, 1993<sup>99</sup> when it adopted its Vienna Declaration and Programme of Action<sup>100</sup> (Vienna Declaration). That instrument declares that “Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law.”<sup>101</sup> The impact of this unequivocal statement, however, is somewhat lessened by the absence from the Vienna Declaration of any express reference to enforcement of human rights obligations. Indeed, the statement quoted above is preceded by one to the effect that “States *should* eliminate all violations of human rights and their causes . . .”<sup>102</sup> (emphasis supplied) and followed two sentences later by the statement that “Governments *should* take effective measures to prevent and combat [all forms of racism and racial discrimination, xenophobia and related intolerance]”<sup>103</sup> (emphasis supplied). The use of “should” in these contexts creates a certain ambiguity. Further, the Vienna Declaration places considerable weight on the right to development,<sup>104</sup> which can pose a quandary for human rights enforcement, as noted above. Finally, the Vienna Declaration qualifies somewhat its affirmation of the universal character of human rights by observing that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”.<sup>105</sup> This language likewise creates ambiguities, since bearing such factors in mind

<sup>97</sup> Res. 48/141, *supra* note 92, ¶ 3(a).

<sup>98</sup> *Id.* ¶ 4(g).

<sup>99</sup> *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, June 25, 1993, 32 I.L.M. 1661 (1993).

<sup>100</sup> U.N. GAOR, World Conference on Human Rights, pt. 1 ¶¶ 20-46, U.N. Doc. A/CONF.157/24 (1993).

<sup>101</sup> *Id.* § I, ¶ 15.

<sup>102</sup> *Id.* § I, ¶ 13.

<sup>103</sup> *Id.* § I, ¶ 15.

<sup>104</sup> *Id.* § I, ¶¶ 10-12.

<sup>105</sup> *Id.* § I, ¶ 5.



could lead to the conclusion that there can be agreement on human rights norms only so at abstract a level as to preclude the creation of enforceable international legal rules.

The Vienna Declaration's ambiguity is reinforced when consideration is given to certain of the declarations adopted by states of particular regions in preparation for the World Conference. In the Tunis Declaration,<sup>106</sup> 42 African states took positions which seem to cast doubt on their agreement with the proposition that human rights obligations are enforceable against governments under customary international law. Aside from their assertion that "[t]he right to development is inalienable,"<sup>107</sup> which raises problems for the reasons all ready discussed, they assert: "Respect for human rights is undeniably a matter of international concern. No preconceived model, however, can be prescribed on a universal scale. The promotion of human rights in the world is a *goal* to the attainment of which all States, without exception, are called upon to contribute"<sup>108</sup> (emphasis supplied). Obviously, to label promotion of human rights as a "goal" is to use language which is hard to reconcile with a concept of legal obligation.

Even more at odds with a view of human rights as imposing international legal obligations is the Bangkok Declaration,<sup>109</sup> adopted by 34 Asian states. The parties to it "*discourage[d]*" making development aid conditional on human rights questions,<sup>110</sup> "*[e]mphasize[d]* the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure"<sup>111</sup> and "*[r]eiterate[d]* that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development."<sup>112</sup> They further asserted that, "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical,

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<sup>106</sup> *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, U.N. GAOR, 47th Sess. at 1-3, U.N. Doc. A/CONF.157.AFRM/14 (1992).

<sup>107</sup> *Id.* ¶ 8.

<sup>108</sup> *Id.* ¶ 5.

<sup>109</sup> *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. GAOR, 48th Sess. at 3-7, U.N. Doc. A/CONF.157/ASRM/8 (1993).

<sup>110</sup> *Id.* ¶ 4.

<sup>111</sup> *Id.* ¶ 5.

<sup>112</sup> *Id.* ¶ 6.

cultural and religious backgrounds.”<sup>113</sup> Finally, they too give great weight to the right to development.<sup>114</sup>

It is true, of course, that these regional declarations predate the Vienna Declaration. It could be argued therefore, that—to the extent that they suggest either qualifications on the belief in universal human rights standards or opposition to the concept of the enforceability of human rights norms—they have been rendered irrelevant by that instrument. This argument seems doubtful, however, since there is reason to question whether states were led to alter their position on these questions by the World Conference. For example, the Interparliamentary Organization of the Association of South East Asian Nations (ASEAN), adopted the Kuala Lumpur Declaration<sup>115</sup> in September, 1993,<sup>116</sup> well after the conclusion of the World Conference. That instrument includes provisions which are very hard to reconcile with a view of human rights norms as creating internationally enforceable legal obligations. For example, it provides, “[e]ach member state has the right to development based on its own objectives, to set its own priorities, and to decide the ways and means of realizing its development without external interference.”<sup>117</sup> Further, it asserts that “[u]niversal promotion and protection of human rights should take place in the context of international cooperation based on respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states, and human rights should not be used as a conditionality for economic cooperation and development assistance.”<sup>118</sup> It lays exceptionally heavy stress on the right to development.<sup>119</sup> It also omits from its list of rights some which are generally recognized in other international and regional human rights instruments,<sup>120</sup> and qualifies other commonly recognized rights.<sup>121</sup> All in all, the Kuala Lumpur Declaration would

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<sup>113</sup> *Id.* ¶ 8.

<sup>114</sup> *Id.* para. 11, ¶¶ 17-19.

<sup>115</sup> See Appendix [hereinafter Kuala Lumpur Declaration].

<sup>116</sup> *ASEAN Lawmakers Want Mechanism to Check Rights Abuses*, KYODO NEWS SERVICE, Sept. 24, 1993, available in LEXIS, Nexis Library, Allworld File.

<sup>117</sup> Kuala Lumpur Declaration, *supra* note 115, art. 4.

<sup>118</sup> *Id.* art. 5.

<sup>119</sup> *Id.* arts. 16-19.

<sup>120</sup> It does not expressly address the right to be free from torture, for example. *Id.*

<sup>121</sup> In Article 1 it insists on a balance between the rights of the individual and those of the community, while in Articles 7, 9, 12 and 13 it in effect permits interference with certain rights if done in accordance with law. *Id.*

appear to be strikingly forthright both in its rejection of any international enforcement of human rights norms and in its adoption of a scale of priorities of human rights which is inconsistent with such enforcement.

Taken together, these recent formal acts tend to support the view derived from a consideration of human rights treaties. That is, there is little opposition to the concept that human rights are a matter of international concern. However, when confronted with the question of enforcement of human rights, states often respond either by evading the question or by taking positions squarely inconsistent with such enforcement. And, as observed repeatedly, in this paper, norms that are not properly enforceable in a legal system are not rules of that system.

## VI. FINAL THOUGHTS

Adding all of this together, it would appear that evidence does not support the proposition that states generally are prepared to acknowledge that human rights norms are internationally enforceable. If that is true, then labelling such norms rules of customary law would appear to be a contradiction in terms. That is, in any event, the position this paper takes.

But a more basic issue presents itself. What difference does it make whether human rights norms can be characterized as rules of law? That question turns out to be surprisingly hard to answer.

Of course, it would make a very great difference indeed if human rights questions were seen as purely matters of domestic jurisdiction. If that were true, then it would be impossible even for states to expostulate with one another regarding human rights issues. But this is clearly not the case. Aside from the effect created by the treaties discussed in this paper, state practice clearly demonstrates that states in practice acknowledge in one another a right to comment on one another's behavior with respect to human rights.<sup>122</sup>

It would also make a difference if states sought to impose sanctions on human rights violators which took the form of reprisals, that is, otherwise unlawful actions justified only as a response to a preceding unlawful action by the target of the reprisal.<sup>123</sup> This is rarely the case, however; most states who react to human rights violations appear to rely upon steps which

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<sup>122</sup> KAMMINGA, *supra* note 74, at 17-126; Simma & Alston, *supra* note 8, at 98-99.

<sup>123</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1986).

are lawful but unfriendly, such as economic boycotts.<sup>124</sup>

This is not to say that the non-legal character of human rights norms makes no difference at all. If the argument of this paper were accepted, then international tribunals would be disabled from applying any customary law of human rights. Given the treaty based character of existing regional courts of human rights and the lack of importance of action by the International Court of Justice in this area, however, that qualification would seem to be of limited significance. Also, as Professors Simma and Alston have observed,<sup>125</sup> the question has implications for domestic law. Even here, however, the impact would seem to be limited. Admittedly this observation is speculative, but it seems unlikely that domestic courts play a very important role in enforcing human rights norms in states other than their own. To be sure, the question might arise in the context of a court's deciding whether there existed customary international legal norms that could be applied in a purely domestic case. One may doubt, however, whether customary law would ever be a very important source of such norms for states whose courts and legislatures were receptive to human rights concepts. Such a state is likely to have significant protection for human rights in its domestic law.

The argument of this paper, then, comes down to two propositions. First, an examination of international human rights treaty regimes and of non-treaty formal international acts suggests that, while states have a right under customary international law to take an interest in other states' compliance with human rights norms, they have no obligation under that law to obey such norms. Second, because of states' right to take an interest in other states' human rights performance, and because any negative reaction in such a case would almost certainly take the form of an act that though unfriendly, was lawful, the non-legal status of human rights norms is irrelevant for most purposes of international relations.

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<sup>124</sup> Ironically, this issue is complicated by the fallout of the World Conference on Human Rights. If in fact a right to development becomes established in customary law, it would obviously have the potential to render unlawful acts currently categorized as lawful but unfriendly. That would in turn force more attention than is currently necessary to the question of the precise legal character of human rights norms.

<sup>125</sup> Simma & Alston, *supra* note 8, at 85-87.

## APPENDIX

*KUALA LUMPUR DECLARATION ON HUMAN RIGHTS BY AIPO*

## Preamble

Whereas, the peoples of ASEAN recognize that all human beings are created by the Almighty, and possess fundamental rights which are universal, indivisible and inalienable;

Whereas, the peoples of ASEAN are born free and equal with full dignity and rights and are endowed with reasoning and conscience enabling them to act responsibly and humanely towards one another in a spirit of brotherhood.

Whereas, the peoples of ASEAN realize that human beings cannot live alone but in harmony with one another with nature and their environment to achieve complete fulfilment of their aspirations in a just society based on harmonious and balanced economic, social, political and cultural developments;

Whereas, the peoples of ASEAN recognize that human rights have two mutually balancing aspects; those with respect to rights and freedom of the individual and those which stipulate obligations of the individuals to society and state;

Whereas, the peoples of ASEAN accept that human rights exist in a dynamic and evolving context and that each country has inherent historical experiences, and changing economic, social, political and cultural realities and value system [sic] which should be taken into account.

Whereas, the peoples of ASEAN are convinced that human beings had a right to development and freedom from poverty, hunger, illiteracy, ignorance, injustice, diseases and other human miseries;

Whereas, the peoples of ASEAN reaffirm the observance of the United Nations Universal Declaration of Human Rights Charter, and the Vienna Declaration and Program of Action of 25 June 1993;

Whereas, the continuing progress of ASEAN in freeing its people from fear and want has enabled them to live in dignity;

Whereas, ASEAN seeks to further enhance its role in promoting a world order based on freedom, peace and social justice through international, regional and bilateral cooperation.

## HUMAN RIGHTS DECLARATION PRINCIPLES

### *Part I*

#### *Article 1*

All human beings, individually and collectively, have a responsibility to participate in their total development, taking in account the need for full respect of their human rights as well as their duties to the community. Freedom, progress and national stability are promoted by balance between the rights of the individual and those of the community.

#### *Article 2*

All human beings, without distinction as to race, colour, sex, language, religion, nationality, ethnic origin, family or social status, or personal convictions have the right to live in dignity and to enjoy the fruits of development and should, on their part, contribute to and participate in it.

#### *Article 3*

All human beings have the right to self-determination. By virtue of this right, they freely determine their political status and may pursue their economic, social, political and cultural development.

#### *Article 4*

Each member state has the right to development based on its own objectives, to set its own priorities, and to decide the ways and means of realizing its development without external interference.

#### *Article 5*

Universal promotion and protection of human rights should take place in the context of international cooperation based on respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states, and human rights should not be used as a conditionality for economic cooperation and development assistance.

*Article 6*

National development shall be founded on the basis of respect for the dignity and value of human beings, which required the elimination of all forms of inequality, exploitation, colonialism, racism, and the implementation of civil, political, economic, social and cultural rights without discrimination.

*Part II**FUNDAMENTAL HUMAN RIGHTS**Article 7*

Everyone has the right to life. No one shall be deprived of such right except in accordance with the law.

*Article 8*

Everyone has the right to freedom of thought, opinion, conscience and religion, these rights include freedom of teaching, practice, worship and observance, both in private and public, individually or in community with others.

*Article 9*

Everyone has the right to property, liberty and security of person. No one shall be deprived of these rights except in accordance with law.

*Article 10*

Any violation of these fundamental human rights should be redressed in accordance with law.

*Part III**BASIC RIGHTS AND DUTIES OF CITIZENS AND STATES**Article 11*

Everyone is equal before the law and is entitled to protection of the law without any discrimination.

*Article 12*

Everyone has the right to freedom of expression which carries inherent duties and responsibilities.

*Article 13*

Everyone has the right to freedom of association. No restrictions may be imposed on the exercise of this right other than those prescribed by law.

*Article 14*

Everyone charged with a criminal offence has the right to be presumed innocent until proven otherwise according to law.

*Article 15*

Everyone citizens [sic] has the right and should have the opportunity, without unreasonable restrictions, to participate in the conduct of public affairs directly or indirectly through freely chosen representatives, to vote and to be elected to public office.

*Article 16*

It is the right and duty of each member state to formulate appropriate and sustainable national development policies that aim at the constant improvement of the well-being for all its citizens on the basis of active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

*Article 17*

Each member state should undertake all necessary measure [sic] for the realization of the rights [sic] to development and shall ensure equality of opportunity for all its citizens in their access to basic resources, education, health services, food, housing, employment, public services and the fair distribution of income.

*Article 18*

Each member state should undertake appropriate economic, social, political, technical and cultural measures in order to promote social justice.

*Article 19*

Each member state has the duty to encourage and facilitate the participation of all citizens in all spheres of development to ensure full realization of human rights.



*Article 20*

It is the task and responsibility of each member state and every citizen to ensure the promotion, implementation and protection of human rights.

*Article 21*

It is likewise the task and responsibility of member states to establish an appropriate regional mechanism on human rights.

*Article 22*

Each member state and its citizens shall endeavor to exercise the aforementioned rights and duties subject only to such limitations as are determined by law in respect of these rights and duties to meet the just requirement [sic] of morality, public order and the general wellbeing of society.