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International Human Rights: Problems of Law, Policy, and Practice

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Chapter 1

The Concept of Human Rights

From Morality to Law: The Abolition of Slavery

I. The Concept of Human Rights

What do we mean by "human rights"? There is no simple answer despite the widespread usage of the term or its equivalent in diverse languages. At its core, however, the concept of human rights embraces a certain universe of values having to do with human dignity. These values, and the claims to which they give rise, are understood to apply across national boundaries and cultural divides. Although deemed universal in some sense, human rights draw their content from diverse sources—for some, fundamental moral or ethical precepts discerned through rational thought; for others, religious ideals handed down over time; and for still others, an understanding of social consensus at some level. Whatever the source or content of human rights, the widespread perception is that they necessarily belong to everyone *inherently*; human rights are not granted by temporal authority, rather they are to be recognized and upheld by it to maintain legitimacy.

The concept of human rights can be seen at work in the Declaration of Independence of the 13 colonies that became the original United States, through which its drafters defied the British sovereignty asserted over them on the grounds of "truths" held "self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Western liberal tradition of the eighteenth century that inspired these words, and similar words that heralded the French Revolution, is often regarded as the intellectual wellspring of what we know today as human rights. Yet non-Western philosophical and intellectual traditions also lay claim to precepts of universal and inherent human rights, giving the concept of human rights a multicultural foundation for its common postulates of human dignity.

In his concurring opinion in the Namibia case before the International Court of Justice, Judge Ammoun linked the idea of human equality with "[t]wo streams of thought established on the two opposite shores of the Mediterranean, a Graeco-Roman stream represented by Epictetus, Lucan, Cicero and Marcus Aurelius; and an Asian and African stream, comprising the monks of Sinai and Saint John Climac, Alexandria with Plotinus and Philo the Jew, Carthage to which Saint Augustine gave new lustre." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 77-78. Equality and other human rights precepts can also be found in expressions of thinking developed among peoples indigenous to the Americas and Asia.

For the Navajo of North America, for example, "the idea of being superior to a fellow Navajo or nature is discouraged. There is an innate knowledge in each one of us that we are to treat with respect all persons and nature with whom we share this world." Judicial Branch of the Navajo Nation, Annual Report, The Navajo Concept of Justice, at 1 (1988). Based on this tradition, Navajo customary law continues to be invoked in Navajo courts to protect human rights such as freedom of expression and political participation. See *Navajo Nation v. Crockett*, 24 Indian L. Rep. 6027 (Navajo 1996); *Bennett v. Navajo Board of Election Supervisors*, 17 Indian L. Rep. 6099 (1990).

Asian authors expressed the idea of human rights from at least the fifth century B.C. Chinese philosopher Hsün-tzu wrote that: "In order to relieve anxiety and eradicate strife, nothing is as effective as the institution of corporate life based on a

clear recognition of individual rights." UNESCO, *Birthright of Man* 39 (1969). The Code of Hammurabi (1795-1750 B.C.), the oldest written legal code known today, represented a codification and development of the customary law of the region and was probably based upon earlier codes that are now lost. In the Preamble to the Code, Hammurabi expressed the fundamental purposes of government: "to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers, so that the strong should not harm the weak... and enlighten the land, to further the well-being of mankind."

However much broad convergence there may be around basic conceptions of human rights, abuses of human rights have abounded over time and space. In part, this is because of shifting ideas about what is right and wrong; in many cases, what is today considered an affront to human rights was once considered acceptable behavior, at least by a sizable or powerful group. In part, human rights abuses occur simply because of the persistent and often widespread tendency of persons in positions of power to fall short of expectations or worse. Throughout the world there have been powerful opponents of human rights who have sought to retain privilege, hierarchy, hereditary rule, and property. In eighteenth-century Europe, human rights proponents challenged and in turn were challenged by vested interests: Thomas Paine was hung in effigy in English cities; Voltaire's writings were banned. Reactionary authors referred to the "monstrous fiction" of human equality. Jeremy Bentham rejected the idea of natural or inherent rights, labeling it "nonsense on stilts." In his strongly held view, people should know "their proper place."

Individuals and groups have joined to assert basic rights against perceived wrongs through action that transcends national boundaries and that has eventually influenced official law, policy, and behavior. Today, there is a substantial body of human rights norms recognized in various international instruments of law, accompanied by procedures to promote their implementation. Human rights have become part of international law and transnational relations out of efforts to shape perceptions about the essence of human dignity and to bring behavior in line with those perceptions and the values they represent.

II. The Movement to Abolish Slavery and the Slave Trade

A. *Introduction*

The process by which the concept of human rights is harnessed to generate legal obligation and change is illustrated by the attack against and eventual official demise of slavery. Notwithstanding the American Declaration of Independence and its proclamation of equality for all (at least men), slavery was legal in much of the United States for nearly a century after the country's birth, just as it was in much of the world. Slavery had existed throughout history and across the globe, but it changed fundamentally in the sixteenth century with the onset of the trans-Atlantic slave trade from Africa. The numbers alone exceeded any past practice. Between 1519 and 1866, some 9.5 million Africans were imported as slaves into North America, while a further million died on the voyage. The trade reached its peak in the 1780s, when an average of 100,000 people were imported to the

Americas annually to be sold as slaves. See James A. Rawley, *The Transatlantic Slave Trade: A History* (rev. ed., 2005). Of course, countless other slaves were carried to Europe, the Caribbean, and Central and South America. Slavery led to the emergence of ideologies of racism, apartheid, and segregation. From the sixteenth to the nineteenth centuries, the international slave trade flourished, and slavery was legal in most countries of the world.

Yet, almost from the beginning, a small but vocal minority in the slave-trading countries expressed its determined opposition to slavery, joining the mostly unheard voices of slaves themselves. These individuals began to organize the world's first human rights nongovernmental organizations in the modern genre. They published articles and pamphlets; they preached against slavery; and they organized active campaigns of protest. Slaves themselves engaged in uprisings in Saint-Dominique, Haiti, and elsewhere. Many of those most outspoken against the abuse were themselves former and reformed slave traders or slave owners. Unlike many, they saw a gap between the proclamations of rights—especially in England, the United States, and France—and the practice of slavery; and they invoked the high ideals of religion and philosophy to mount opposition. They were thus able to draw intellectual and moral strength from the general proclamations of human rights. As economic factors evolved to allow for the rapid accumulation of wealth without dependence on slavery, the abolitionist movement gained strength.

Public pressure grew throughout the first part of the nineteenth century on both sides of the Atlantic. In Britain, public agitation forced members of Parliament to confront the issue. Following a slave revolt, Haiti became independent in 1804. As early as 1807, public opinion forced votes in the U.S. Congress and British Parliament to end the participation of both countries in international slave trading. The U.S. Act to Prohibit the Importation of Slaves was matched by the British Act for the Abolition of the Slave Trade. Both made it illegal to trade in, purchase, sell, barter, or transport any human cargo for the purpose of slavery, although ownership of slaves was not proscribed.

Neither law could be effective without international cooperation and the agreement of other nations. The focus turned to the Congress of Vienna in 1814-1815, where antislavery activists pressed for action, including the outright eradication of slavery. About this time, Thomas Clarkson's highly influential tract, "Evidence on the Subject of the Slave Trade," was translated from English into French, German, Spanish, and Italian. The British delegate at the Congress of Vienna complained about the public pressure being mounted, but its force could not be denied. The Congress of Vienna established a special committee on the international slave trade and finally agreed to sign the Eight Power Declaration, which acknowledged that the international slave trade was "repugnant to the principles of humanity and universal morality" and that "the public voice in all civilized countries calls aloud for its prompt suppression." Yet the declaration did not make slave trading a crime, sanction the arrest of slavers, or provide machinery for enforcement.

A legally binding treaty soon followed, however. During the Congress itself, a treaty signed on November 20, 1815, among Britain, Russia, Austria, Prussia, and France included a pledge to consider measures "for the entire and definitive abolition of a Commerce so odious and so strongly condemned by the laws of religion and nature." The Treaty of Ghent, signed by the United States and Britain that same year, declared that traffic in slaves was "irreconcilable with the principles of humanity and justice." Treaty of Peace and Amity, Feb. 18, 1815, 12 T.I.A.S. 47.

Antislavery societies continued their pressure, led by Lord Wilberforce in the United Kingdom. In addition, the pope instructed all Catholics to abstain from the slave trade. In 1840, the first World Anti-Slavery Conference was organized. Eventually governments responded. By 1882, a network of more than 50 bilateral agreements permitted the search of suspected slave ships on the high seas, without regard to flag. Domestically, states slowly emancipated their slaves in response to public pressure. Britain did so in 1833, France in 1848, and most Latin American countries did so as they became independent. The issue of slavery was a major factor in the U.S. Civil War, and President Lincoln issued the Emancipation Proclamation in 1863. In the late 1880s, Cuba and Brazil became the last countries in the Western Hemisphere to abolish slavery.

By 1890, governments were prepared to take effective international action. They negotiated the 1890 General Act for the Repression of the African Slave Trade, which referred to the "crimes and devastations engendered" by trafficking in humans. The convention required that actions be taken to suppress the slave trade at sea and along inland caravan routes, to prosecute and punish slave traders, and to liberate captured slaves. (Ironically and tragically, this humanitarian impulse also served to provide a pretext for colonial occupation throughout Africa.) The agreement reflected the principle of shared international responsibility to respond to gross human rights violations, and marked the first general agreement on a common standard of behavior for all states. Further agreements on abolition of slavery and repression of the slave trade were concluded in 1919, 1926, and 1956.

The extracts below show the evolution in moral understanding about slavery, the coincidence of political and economic factors that made opposing it easier, and the rhetorical assault on maintaining slavery as a legal institution. These materials are followed by the celebrated Sommersett case of 1772, in which a British court gave legal expression to the mounting opposition to slavery wherever it existed, and by a description of subsequent international legal developments against slavery.

B. The Moral and Philosophical Evolution

David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823*

41-44 (1975) (footnotes omitted)

The emergence of an international antislavery opinion represented a momentous turning point in the evolution of man's moral perception, and thus in man's image of himself. The continuing "evolution" did not spring from transcendent sources: as a historical artifact, it reflected the ideological needs of various groups and classes. The explanation must begin, however, with the heritage of religious, legal, and philosophical tensions associated with slavery—or in other words, with the ways in which Western culture had organized man's experience with lordship and bondage.

From antiquity slavery has embodied symbolic meanings connected with the condition and destiny of man. For the Greeks (as for Saint Augustine and other early Christian theologians) physical bondage was part of the cosmic hierarchy, of the divine scheme for ordering and governing the forces of evil and rebellion.

For the ancient Hebrews, slavery could be a divine punishment; a time of trial and self-purification prior to deliverance; and the starting point for a historical mission. The literature of Hellenistic and early Christian times is saturated with the paradoxes of human bondage: man was a slave to sin or to his own passions; his incapacity for virtuous self-government justified his external bondage; yet he might escape his internal slavery by becoming the servant of universal reason—or of the Lord. Emancipation from one form of slavery depended on the acceptance of a higher and more righteous bondage....

...The early Christian view of slavery was of central importance in reconciling the masses to the existing social order. It constituted the core of an ideology that encouraged hope, patience, endurance, and submission, while reminding the powerful of their own fallibility....Thus Saint Thomas Aquinas could affirm that slavery was contrary to the first and highest intent of nature, and yet insist that it conformed to the second intent of nature, which was adjusted to man's limited capacities. He could therefore suggest that slavery was a necessary part of the governing pattern of the universe, speak of the slave as the physical instrument of his owner, and find scholastic justifications for the Roman rule that the child of a free man and a bondwoman should be a slave. Neither Luther nor Calvin, one may note, had any notion that Christian liberty could alter the fact that some men are born free and others slaves. Indeed, as a result of the verdict of many centuries, one could not begin to assert the universal sinfulness of slavery without questioning the doctrine of original sin and challenging the entire network of rationalization for every form of subordination.

Roger Anstey, *The Atlantic Slave Trade and British Abolition, 1760-1810*

94-97, 126-127, 212-217 (1975) (footnotes omitted)

The world of the late eighteenth century was quite different. The French Revolution manifested the most radical change in values and institutions that Christendom had yet known. Traditional authority was dethroned; Christianity was dismissed with a scorn which demonstrated the Jacobins' belief that the dismissal was final, whilst the whole life of the revolutionary state attested the belief that society could be given a different direction. In England, after an initial heady exaltation, there were few who wanted change to go so far and so fast: but the very force of Burke's condemnation of the 'presumption' of men in supposing they have made discoveries in the realm of morality, government and in ideas of liberty, and his scorn of their 'pert loquacity' in giving voice to their claim, testifies to the existence of a different attitude to change than that professed by Newton and Pope.

Included in the change of values was a clear shift in attitudes towards subject peoples. Even people generally opposed to radical change in the state—Burke is a striking example—believed British policy towards the Americans to be immoral and thus called into question the whole nature of imperial power....

Nowhere is the change of view more marked than in attitudes towards slavery and the slave trade....Nearly every school of thought which dealt with ethical problems had, from about the middle of the century, come up with specific condemnations of slavery sometimes persuasively encapsulated in a corpus of moral or legal philosophy. And very varied were these schools. Gisborne wrote

his widely read *Principles of Moral Philosophy* (1789) not least to counter the doctrine of expediency propounded by Paley in *The Principles of Moral and Political Philosophy* (1785); but both condemned slavery and the slave trade. A major segment of French Enlightenment opinion and especially the Abbé Raynal, whose work was very influential in England, was hostile to slavery: so, opposed in almost everything else, was John Wesley. Dr. Johnson strongly opposed slavery; so did Rousseau whom Johnson detested.

This change must be explored a little further, and it may be as well to spell out the mode of exploration, and its limits. It is *not* our purpose [here] to argue that a change in moral and intellectual attitudes to slavery is a sufficient explanation of abolition—that first great triumph of the anti-slavery cause. The aim is the much more limited one of arguing that the content of received wisdom had so altered by the 1780s that educated men and the political nation, provided they had no direct interest in the slave system, would be likely to regard slavery and the slave trade as morally condemned, as no longer philosophically defensible. They might, it can reasonably be inferred, even be prepared to support abolition, provided that they had no direct interest in the slave system, provided that they could be assured that the national interest would not thereby be significantly harmed, and to the extent that anything so novel as a positive measure of institutional reform could command support. The role which is to be credited to a change in ideas is therefore noteworthy but limited....A more dramatic role was the achievement of the two religious groups in the abolition movement, Quakers and Evangelicals. Though influenced by the currents of thought of their age, their inspiration was essentially religious....

In summarizing the development of eighteenth-century thought, as it relates to reform and to anti-slavery, three concepts—liberty, benevolence and happiness—particularly repay attention. This is, of course, not to suggest that the intellectual history of the century is to be seen exclusively in these terms: its preoccupations were far wider than this. But the development of the three concepts, during roughly the first three-quarters of the century, manifests a cast of thought which is increasingly incompatible with slavery and which leans tentatively towards the possibility and desirability of appropriate reforms. In tracing the rise of anti-slavery thought, therefore, the development of ideas of liberty, benevolence and happiness has an unequalled importance. Not all the philosophers of the age are significantly concerned with all of these ideas and they vary in the attention which they devote to the one or to the other. But if in some cases a concern with these ideas is of restricted importance in the context of the philosophers' thought as a whole, this is of little significance in the context of the clear overall tendency....[The] generalized eighteenth-century change in ideas is usually accompanied by a specific condemnation of Negro slavery.

Ideological development in the eighteenth century was, though less obviously, theological as well as philosophical; and so certain theological changes will also claim our attention. Examination of both philosophical and theological change is also called for by the need to explain the inheritance from their age which was a part of the Evangelical and Quaker world-view, and which, because it was a common heritage, enabled these core groups in the abolitionist camp, the Evangelicals and the Quakers, to speak meaningfully to their age, because in a language which it understood. Finally, the prevalence of relevant concepts in literature will be cited as evidence that changes in ideas were not confined to the leaders of thought....

C. *Economic and Political Factors*

Howard Temperley, The Ideology of Antislavery

In *The Abolition of the Atlantic Slave Trade: Origins and Effects in Europe, Africa and the Americas* 26-29 (David Eltis and James Walvin eds., 1981) (footnotes omitted)

Britain and the northern United States both had experienced remarkable rates of economic growth in the course of the eighteenth century. Probably nowhere else in the world was the relative increase in wealth and population more striking than in the thirteen colonies. This, as we all know, was one of the factors which persuaded the British government to attempt to tighten its hold on the colonists, and so helped to precipitate the break with the mother country. Yet Britain's own rate of growth during these years, although less marked in relative terms, was also impressive, whether we compare it with what had happened in previous centuries or with the experiences of her political rivals. This was, as economic historians continually remind us, a period of crucial importance for the previous millennium, the gains of the eighteenth century represented the departure point from which began the sustained growth that has characterized the modern world. Britain and her ex-colonies were in the forefront of this development. Materially speaking, they had reason to feel proud of their achievement.

A second characteristic that Britain and the northern states (as opposed to the South) shared was the fact that they had achieved this prosperity without direct recourse to slave labor, at least on any significant scale. To be sure, there was slavery in Britain right up to the end of the eighteenth century (the Sommersett decision [*infra*, at 14] notwithstanding), and it lingered on in the northern states even longer. As late as 1820 there were still eighteen thousand slaves in the northeastern United States, and at the time of the first census in 1790 the figure was more than double that; but compared with the situation south of the Mason-Dixon line this represented a relatively modest stake in the institution. It must also be remembered that both Britain and the northern states had profited, and were continuing to profit on an ever-increasing scale, from the employment of slaves elsewhere. Nevertheless, the fact remains that, so far as their domestic arrangements were concerned, both were committed to an essentially free-labor system.

These points are too obvious to dwell on. Yet they are worth emphasizing if only because they help to explain why men in these two societies were so ready to accept ideas of progress, and in particular ideas of progress which linked individual freedom to material prosperity. The two, needless to say, are not necessarily connected. More often that not, they have been seen as opposing principles, the assumption being that the pursuit of the one must necessarily entail the sacrifice of the other. Implicit in the whole idea of government is the belief that individual freedom must be given up to secure the benefits of an ordered society, among which must be included a measure of material satisfactions. How much freedom needs to be sacrificed is a matter of opinion, but history is not wanting in examples of societies welcoming tyrants because the alternatives of anarchy and lawlessness were regarded as even less acceptable. So the commonly expressed eighteenth century view that freedom and prosperity were not only reconcilable but mutually supportive, and that the more you had of the one the more you could expect of the other, is something that needs explaining. The explanation, I suggest, is to be

found not in the ideas of the philosophers, still less in theories about the general progress of the human mind, but in the immediate lives of people of the period.

This, then is one way of relating material and intellectual developments, and one that throws a good deal of light on the thinking of such figures as Adam Smith and the exponents of the secular anti-slavery argument generally. For what is striking about the secular case against slavery is the *assumption* that slavery was an economic anachronism. Smith's own attitudes are particularly revealing, because of all eighteenth century commentators he was probably the one best qualified to argue the case against it on strictly economic grounds. Yet... the case he actually presents is not based on economics at all, at least not in any cost-accounting sense, but on the general proposition that greater freedom would lead to greater prosperity. Like other eighteenth century thinkers he expresses himself in terms of universal principles, but at bottom it is a historical argument, derived from his own beliefs about the nature of the historical process. Whatever the objective truths of Smith's arguments, the fact remains that they are very much the product of one kind of society, and indeed of one particular class within that society.

... But until the eighteenth century... slavery was accepted with that fatalism which men commonly reserve for aspects of nature which, whether they are to be celebrated or deplored, have to be borne. To argue against slavery was to argue against the "facts of life." Before slavery could become a political issue—or even, in the proper sense, a moral issue—what needed to be shown was that the world could get along without it. And what better demonstration could there be than the development, within the heartland of Western civilization, of societies which not only did without slavery but which did very well without it, and which furthermore appeared to owe their quite remarkable dynamism to the acceptance of principles which represented the direct negation of the assumptions upon which slavery was founded.

James Walvin, The Public Campaign in England Against Slavery, 1787-1834

In *The Abolition of the Atlantic Slave Trade: Origins and Effects in Europe, Africa and the Americas*, 69-76 (David Eltis and James Walvin, eds., 1981) (most footnotes omitted)

In the years after the war, as in 1791-92, the abolitionist cause was helped by being carried along by the wider political debate about rights [in Great Britain]. These were, after all, the years when the politics of Catholic emancipation, electoral reform, poor relief, unionization, and industrial legislation were at their height. Yet slavery was seen to subsume many of the other political arguments about rights; it was, in fact, the most extreme form of a denial of rights. Throughout these years there was a growing awareness of the facts of slavery... at every level black slavery formed a stark contrast to the very rights demanded by so many groups in Britain. And, in a nation which was itself permeated by the advance of large nonconformist communities (particularly in working-class areas) and by evangelicalism within the established church, slavery seemed to ever more people to be morally offensive.... By the mid-1820s support for slavery had clearly become an electoral liability for parliamentary candidates. Conversely, it was assumed that right-thinking candidates would favour gradual emancipation.

By that time abolitionism had also taken on a new perspective, and one which was to gain in stridency in subsequent years. The question of the economics of slavery became ever more prominent in political argument. Early in 1822 Cropper had privately raised the question of East Indian sugar and the artificial protection which kept West Indian sugar viable and costly to the British consumer. By October 1822 [the economic] issue had broken into print. Within four years, open support for freely imported East Indian sugar had become a major political objection to slave-grown sugar, as one parliamentary candidate noted: "the difference in the duty on East and West India sugars operates as a bounty on slavery, and as a tax on the people of England, which they may reasonably require to be removed."[33] Elsewhere it was argued that slavery was "supported by an annual donation from this county, of *nearly four million sterling*, given in the way of exclusions, bounties, and prohibitory duties..."[34] The message was clear; the British consumer of sugar was maintaining the slave system. As the 1820s advanced, this argument, so consonant with growing contemporary economic ideology, could be found with growing frequency and stridency in abolitionist meetings and literature and in Parliament. Indeed, the economic critique of slavery soon became a plea for free trade, and by April 1827 "the Chambers of Commerce of Manchester and Birmingham and the merchants and manufacturers of Leeds and other places" were demanding both free trade and an end to the sugar duties. The new industrial nation had come to see that slavery was inimical to its wider economic interests....

It was in the slaveholders' interests to undermine the credibility of antislavery and to denounce abolitionist tactics; they belittled the petitions, suggesting that they were rigged, copied, or the result of intemperate excitement. Yet abolitionists never doubted that all the evidence pointed to genuine and a massive popular support. And from June 1825 we are able to trace this support in greater detail through the columns of the *Anti-Slavery Monthly Reporter*, which ran until 1836. Founded by Macaulay, the *Reporter* provided a superb mirror of the world of abolitionism, particularly in the provinces. Indeed, this publication itself became a main focus for activity, for, widely distributed throughout the country, it gave information, guidance, and direction to the national cause.

The most striking contribution of the *Reporter* was the prodigious volume of information about slave society that it fed to the reading public. One issue after another regaled its swelling readership with the minutiae of slave life; the nature of slave work, leisure, housing, family patterns, punishments, and religions—any and all facets of slave society passed through the pages of the *Reporter*. Moreover, this journal provided the invaluable service of distinguishing *between* the slave societies of the different islands. The result was that a much more sophisticated analysis of Caribbean slavery began to emerge in the political debate. Perhaps it is this feature which make the later phase of the abolitionist struggle so appealing to a modern historian. One finds, for example, exemplary analyses of slave populations (from registration returns), with telling comparisons with slavery in the United States. Any plantocratic claim was immediately followed by a detailed and documented abolitionist answer. Equally important was the *Reporter*'s regular

33. Speeches and Addresses of the Candidates for the Representation of the County of York in the Year 1826 (Leeds, 1826), p. 26.

34. Address to the Public on the Present State of the Question Relative to Negro Slavery in the British Colonies (York, 1828), p. 14.

resumé of official government evidence. Government pronouncements, publications, colonial laws, and ministerial missives were reported, analysed, and challenged. The *Reporter* made accessible to the public information which would otherwise have been embalmed in official publications. This was particularly true of correspondence between ministers and the colonies. The sum total of these efforts was to make public what had previously been a private and secretive world of politics. This inevitably made life difficult for the men concerned—but it made for excellent pressure group politics, and it illustrated, to anyone interested, just what could be achieved through such pressures. In the process, the role of the minister began to change, for he was now subjected to pressures from without as well as from within.

The abolitionist argument about rights shows how far the wider political debate had advanced since the 1790s. At that earlier period belief in the "rights of man" had tended to be the preserve of the popular radicals, but by the 1820s this term—given an even wider meaning—had become a central abolitionist belief. Emancipationists in Norwich in 1825 thought slavery "to be utterly inconsistent with the inalienable natural rights of men."[35] Of course, the arguments about slavery were inevitably about the slaves' "Civil and Religious Liberties."[36] Methodists in Yorkshire considered slavery "directly contrary to the natural Rights of Man,"[37] and it is striking that the abolitionist petitions which flooded Parliament—upward of 3,500 by 1832—were steeped in a political vocabulary which, in the 1790s, had been the preserve of artisan radicals. Indeed, in the 1790s men were jailed and transported for seeking such rights for themselves; thirty years later, many thousands of Englishmen demanded these same rights—for black slaves. Some spoke of the slaves' "inalienable Rights of liberty of which they have been barbarously robbed" others of the need to restore their "Constitutional Freedom."[38]

Abolitionists assumed that slaves should enjoy the rights of Englishmen. They even argued that the slaves were in fact Englishmen 5,000 miles away from England, speaking at times of "black Englishmen."[39] A petition of 1830 spoke of the slaves as "British-born Subjects."[40] Another wanted to see slaves raised "to the Enjoyment of all the Civil and Religious Rights and immunities which are the birthright of every British Subject."[41] Furthermore, it was assumed that these rights were divinely ordained "sacred Rights which belong to all the Family of Man."[42] Abolition thus transmuted the concept of social rights from the Paineite, secular model into one which was divinely ordained. As such, of course, it was more difficult to challenge....

If there is one single theme which stands out in the thousands of petitions in the years after 1830 it is the complaint that slavery was offensive to English religious sensibilities—of all persuasions. It was, in the words of Methodists from Barnsley, "repugnant to our Religions."[43] Others thought slavery an "Anti-Christian

35. *Anti-Slavery Monthly Reporter*, no. 6 (November, 1825), p. 57.
36. Journal of the House of Lords, 63:53.
37. Ibid. p. 101.
38. Journal of the House of Lords, 63:22.
39. *Anti-Slavery Monthly Reporter*, no. 29 (October 1827), p. 141.
40. Journal of the House of Lords, 63:22.
41. Ibid., p. 31.
42. Ibid., p. 24.
43. Journal of the House of Lords, 63:24.

system."[44] It was, in the words of women from Hereford, "a System alike revolting to the feelings of Mankind as inconsistent with the Counsels of Heaven."[45] To a degree this may have reflected the influence of the Agency Committee, whose lecturers were pledge to avoid political controversy and to abide by the view that "the system of Colonial Slavery is a crime in the sight of God, and ought to be immediately and for ever abolished."[46]

D. The Rhetoric of Abolition

Simon Bolivar, Message to the Congress of Bolivia (May 25, 1826)

In *Selected Writings of Bolivar, 1810-1830* (Vicente Lecuna and Harold A. Bierck eds., 1951)

Slavery is the negation of all law and a sacrilege.... Examine this crime from every aspect and tell me if there a single Bolivian so depraved as to wish to sanctify by law this shameless violation of human dignity.... No on can violate the sacred doctrine of equality.... God has willed freedom to man, who protects it in order to exercise the divine faculty of free will.

Audrey A. Fisch, *American Slaves in Victorian England: Abolitionist Politics in Popular Literature and Culture*

52-54, 70-71 (2000) (some text references converted to footnotes; others omitted)

...[B]y 1853, tales of slavery were indeed a "staple" in the Victorian literary marketplace: at least twenty American slave narratives appeared in English editions by mid-century, and it is likely that other narratives circulated in American editions.... Slave narratives, R.J.M. Blackett writes, "sold faster than they could be printed...." C. Peter Ripley concurs with Blackett's findings and adds that in England the narratives sold "well, probably better than in American, as a rule.... The slave narratives offered African-American men and women an opportunity to speak their minds, if only through the medium of words on a page.... [P]ictures of slavery by the slave" were calculated to, and did, exert "a very wide influence on public opinion" because they are "a vivid exhibition of the force and working of the native love of freedom in the individual mind."... Under the politically acceptable mantle of abolitionism, then, the slave narrative offered Victorian readers the excitement for which they were eager: graphic scenes of torture, murder, sexual violence, and the thrill of escape.... The titillating entertainment of the narratives was also clothed in the morally acceptable fabric of the Christian odyssey tradition....

...Through lecture tours that varied along a continuum of pomp and politics, African-American abolitionists brought information about American slavery to people from all walks of life throughout the British Isles.... African Americans

44. Ibid.
45. Journal of the House of Lords, 63:33.
46. Report of the Agency Committee (1831), pp. 2-3.

spoke to groups ranging from a few to several thousand people. They spoke often; as Blackett records, the [African American abolitionist Frederick] "Douglass delivered fifty lectures in the first four months of his visit, the number rising by the end of his nineteen-month tour to three hundred". An appearance often involved more than just a lecture; while speaking about their personal life experiences and about the experiences of other black men and women in American slavery, the lecturer might present enormous panoramas depicting scenes of American slavery (none of which are know to have survived), reveal personal scars (Houston A. Baker has called these public displays of the physical markings of slavery the "Negro exhibit"), or display the instruments of torture used in slavery. Even in traditional anti-slavery circles, African-American abolitionists were, as C. Peter Ripley writes, "essential to the cause": the "attraction of rubbing shoulders with the black American abolitions... had no substitute."

... [T]ensions run deep between the "mother-country" and its rebellious child over this "fashion" for Others.... England, casting itself as the land of freedom, sloganeering that each visitor is a "man and [a] brother," competes with the United States, the land of surpassing democratic freedoms, the newly born "model republic." And even though American national security is not literally threatened by the "utter depopulation" of slave plantations, the popularity of visitors like Frederick Douglass in England represents a threat to America's national identity as the "model republic."

Frederick Douglass, The Meaning of July Fourth for the Negro, Rochester, NY (July 5, 1852)

In 2 *The Life and Writings of Frederick Douglass: The Pre-Civil War Decade, 1850-1860*, at 188-92 (Philip S. Foner ed., 1950)

Fellow citizens, pardon me, allow me to ask, why am I called upon to speak here today? What have I, or those I represent, to do with national independence? Are the great principles of political freedom, and of natural justice, embodied in that Declaration of Independence, extended to us? And am I, therefore, called upon to bring our humble offering to the national altar, and to confess the benefits and express devout gratitude for the blessings resulting from your independence to us?

Would to God, both for your sakes and ours, that an affirmative answer could be truthfully returned to these questions!...

But such is not the state of the case. I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common—the rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me. This Fourth of July is *yours*, not *mine*. *You* may rejoice, *I* must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call him to join you in joyous anthems, were inhuman mockery and sacrilegious irony. Do you mean, citizens, to mock me, by asking me to speak today?...

Fellow citizens, above your national, tumultuous joy, I hear the mournful wail of millions! Whose chains, heavy and grievous yesterday, are, to-day, rendered more intolerable by the jubilee shouts that reach them....

What, to the American Slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, and unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, which all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour....

Fellow citizens, I will not enlarge further on your national inconsistencies. The existence of slavery in this country brands your republicanism as sham, your humanity as a base pretence, and your Christianity as a lie. It destroys your moral power abroad; it corrupts your politicians at home. It saps the foundation of religion; it makes your name a hissing and a bye-word to a mocking earth. It is the antagonistic force in your government, the only thing that seriously disturbs and endangers your Union. It fetters your progress; it is the enemy of improvement; the deadly foe of education; it fosters pride; it breeds insolence; it promotes vice; it shelters crime; it is a curse to the earth that supports it; and yet you cling to it as if it were the sheet anchor of all your hopes. Oh! Be warned! Be warned! A horrible reptile is coiled up in your nation's bosom; the venomous creature is nursing at the tender breast of your youthful republic; for the love of God, tear away, and fling from you the hideous monster, and let the weight of twenty millions crush and destroy it forever!

E. The Legal Evolution

One of the most celebrated cases in all of Anglo-American jurisprudence is the case of James Sommersett, in which a British court ordered a ship commander to release a black slave whom the commander held at the behest of the slave's American owner for transport to Jamaica, where he would be sold. The decision itself did not clearly render slave-holding illegal in all circumstances, but it certainly resonated as a statement that the tide was decidedly turning against slavery, not just as a matter of moral conviction, but also as a matter of law, at least in Great Britain.

The Case of James Sommersett

12 George III A.D. 1771-72, Lofft 1-18, 98 Eng. Rep. 499-510 (King's Bench, June 22, 1772)

On the 3d of December 1771, affidavits were made by Thomas Walklin, Elizabeth Cade, and John Marlow, that James Sommersett, a negro, was confined in irons on board a ship called the *Ann and Mary*, John Knowles commander,

lying in the Thames, and bound for Jamaica; and Lord Mansfield, on an application supported by these affidavits, allowed a writ of Habeas Corpus, directed to Mr. Knowles, and requiring him to return the body of Sommersett before his lordship, with the cause of detainer.

Mr. Knowles on the 9th of December produced the body of Sommersett before Lord Mansfield, and returned for cause of detainer, that Sommersett was the negro slave of Charles Stewart, esq. who had delivered Sommersett into Mr. Knowles's custody, in order to carry him to Jamaica, and there sell him as a slave. Affidavits were also made by Mr. Stewart and two other gentlemen, to prove that Mr. Stewart had purchased Sommersett as a slave in Virginia, and had afterwards brought him into England, where he left his master's service; and that his refusing to return, was the occasion of his being carried on board Mr. Knowles's ship.

Lord Mansfield chusing to refer the matter to the determination of the court of King's bench, Sommersett with sureties was bound in recognizance for his appearance there on the second day of the next Hilary term; and his lordship allowed till that day for settling the form of the return [Ed. Note, Defendant's Answer] to the Habeas Corpus....

The determination of the Court was suspended till the following Trinity term; and then the Court was unanimously of opinion against the return, and ordered that Sommersett should be discharged [freed]....

Argument of Mr. Francis Hargrave [1741-1821] for the Negro

The questions arising on this case, do not merely concern the unfortunate person, who is the subject of it, and such as are or may be under like unhappy circumstances. They are highly interesting to the whole community, and cannot be decided, without having the most general and important consequences; without extensive influence on private happiness and public security. The right claimed by Mr. Stewart in the detention of the negro, is founded on the condition of slavery, in which he was before his master brought him into England; and if that right is here recognized, domestic slavery, with its horrid train of evils, may be lawfully imported into this country, at the discretion of every individual, foreign and native. It will come not only from our own colonies, and those of other European nations; but from Poland, Russia, Spain, and Turkey, from the coast of Barbary, from the western and eastern coasts of Africa, from every part of the world, where it still continues to torment and dishonour the human species. It will be transmitted to us in all its various forms, in all the gradations of inventive cruelty: and by an universal reception of slavery, this country, so famous for public liberty, will become the chief seat of private tyranny....

Properties Usually Incident to Slavery

- Slavery always imports an obligation of perpetual service; an obligation, which only the consent of the master can dissolve.
- It generally gives to the master, an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting the life or limb of the slave: sometimes even these are left exposed to the arbitrary

will of the master; or they are protected by fines, and other slight punishments, too inconsiderable to restrain the master's inhumanity.
- It creates an incapacity of acquiring, except for the master's benefit.
- It allows the master to alienate the person of the slave, in the same manner as other property.
- Lastly, it descends from parent to child, with all its severe appendages.

Bad Effects of Slavery

From this view of the condition of slavery, it will be easy to derive its destructive consequences.

- It corrupts the morals of the master, by freeing him from those restraints with respect to his slave, so necessary for control of the human passions, so beneficial in promoting the practice and confirming the habit of virtue.
- It is dangerous to the master; because his oppression excites implacable resentment and hatred in the slave, and the extreme misery of his condition continually prompts him to risk the gratification of them, and his situation daily furnishes the opportunity.
- To the slave it communicates all the afflictions of life, without leaving for him scarce any of its pleasures; and it depresses the excellence of his nature, by denying the ordinary means and motives of improvement.
- It is dangerous to the state, by its corruption of those citizens on whom its prosperity depends; and by admitting within it a multitude of persons, who being excluded from the common benefits of the constitution, are interested in scheming its destruction.
- Hence it is, that slavery, in whatever light we view it, may be deemed a most pernicious situation: immediately so, to the unhappy person who suffers under it; finally so, to the master who triumphs in it, and
- to the state which allows it.

Origin of Slavery, and Its General Lawfulness Considered

The great origin of slavery is captivity in war, though sometimes it has commenced by contract. It has been a question much agitated, whether either of these foundations of slavery is consistent with natural justice. It would be engaging in too large a field of enquiry, to attempt reasoning on the general lawfulness of slavery. I trust too, that the liberty, for which I am contending, does not require such a disquisition; and am impatient to reach that part of my argument, in which I hope to prove slavery reprobated by the law of England as an inconvenient thing.

Here therefore I shall only refer to some of the most eminent writers, who have examined, how far slavery founded on captivity or contract is conformable to the law of nature, and shall just hint at the reasons, which influence their several opinions. The ancient writers suppose the right of killing an enemy vanquished in a just war; and thence infer the right of enslaving him. In this opinion,

founded, as I presume, on the idea of punishing the enemy for his injustice, they are followed by

- Albericus Gentilis,
- [Hugo] Grotius,
- Puffendorf,
- [Cornelius van] Bynkershoek [1673-1743], and
- many others.

But a very great writer of our own country, who is now living, controverts the sufficiency of such a consideration. Mr. [John] Locke [1632-1704] has framed another kind of argument against slavery by contract; and the substance of it is, that a right of preserving life is unalienable; that freedom from arbitrary power is essential to the exercise of that right; and therefore, that no man can by compact enslave himself.

Dr. Rutherforth endeavours to answer Mr. Locke's objection, by insisting on various limitations to the despotism of the master; particularly, that he has no right to dispel of the slave's life at pleasure. But the misfortune of this reasoning is, that though the contract cannot justly convey an arbitrary power over the slave's life, yet it generally leaves him without a security against the exercise of that or any other power.

I shall say nothing of slavery by birth; except that the slavery of the child must be unlawful, if that of the parent cannot be justified; and that when slavery is extended to the issue, as it usually is, it may be unlawful as to them, even though it is not so as to their parents....

Decline of Slavery in Europe

At length however it fell into decline in most parts of Europe; and amongst the various causes, which contributed to this alteration, none were probably more effectual, than experience of the disadvantages of slavery; the difficulty of maintaining it; and a persuasion that the cruelty and oppression almost necessarily incident to it were irreconcilable with the pure morality of the Christian dispensation....

It is sufficient here to say, that this great change began in Spain, according to Bodin, about the end of the eighth century [A.D. 799], and was become general before the middle of the fourteenth century [A.D. 1350].

Bartolus, the most famed commentator on the civil law in that period, represents slavery as in disuse, and the succeeding commentators hold much the same language. However, they must be understood with many restrictions and exceptions; and not to mean, that slavery was completely and universally abolished in Europe. Some modern civilians [laymen], not sufficiently attending to this circumstance rather too hastily reprehend their predecessors for representing slavery as disused in Europe.

The truth is, that the ancient species of slavery by frequent emancipations became greatly diminished in extent; the remnant of it was considerably abated in severity; the disuse of the practice of enslaving captives taken in the wars between Christian powers assisted in preventing the future increase of domestic slavery; and

in some countries of Europe, particularly England, a still more effectual method, which I shall explain hereafter, was thought of to perfect the suppression of it.

Revival of Domestic Slavery in America

Such was the expiring state of domestic slavery in Europe at the commencement of the sixteenth century, when the discovery of America and of the western and eastern coasts of Africa gave occasion to the introduction of a new species of slavery. It took its rise from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the islands, opened a trade between Africa and America for the sale of negro slaves. This disgraceful commerce in the human species is said to have begun in the year 1508, when the first importation of negro slaves was made into Hispaniola from the Portuguese settlements on the western coasts of Africa.

In 1540 the emperor Charles the fifth [1519-1556] endeavoured to stop the progress of the negro slavery, by orders that all slaves in the American isles should be made free; and they were accordingly manumitted by Lagasca the governor of the country, on condition of continuing to labour for their masters. But this attempt proved unsuccessful, and on Lagasca's return to Spain domestic slavery revived and flourished as before.

The expedient of having slaves for labour in America was not long peculiar to the Spaniards; being afterwards adopted by the other Europeans, as they acquired possessions there. In consequence of this general practice, negroes are become a very considerable article in the commerce between Africa and America; and domestic slavery has taken so deep a root in most of our own American colonies, as well as in those of other nations, that there is little probability of ever seeing it generally suppressed.

The Attempt to Introduce the Slavery of Negroes into England Examined

I shall endeavour to shew, that the law of England never recognized any species of domestic slavery, except the ancient one of villenage* now expired, and has sufficiently provided against the introduction of a new slavery under the name of villenage or any other denomination whatever....

I shall not attempt to follow villenage in the several stages of its decline; it being sufficient here to mention the time of its extinction, which, as all agree, happened about the latter end of Elizabeth's reign or soon after the [1603] accession of James....

...If the law of England would permit the introduction of a slavery commencing out of England, the rules it prescribes for trying the title to a slave would be applicable to such a slavery, but they are not so; and from thence it is evident that

* Villenage is a condition in English common law akin to serfdom. A villein, though technically free, was considered to "belong" to his lord; he was bound to render any service demanded of him by his lord, was not permitted to assert rights against his lord in court, and was unable to dispose of property. —Eds.

the introduction of such a slavery is not permitted by the law of England.—The law of England then excludes every slavery not commencing in England, every slavery though commencing there not being ancient and immemorial....

I insist, that the unlawfulness of introducing a new slavery into England, from our American colonies or from any other country, is deducible from the rules of the English law concerning contracts of service. The law of England will not permit any man to enslave himself by contract. The utmost, which our law allows, is a contract to serve for life; and some perhaps may even doubt the validity of such a contract, there being no determined cases [precedents] directly affirming its lawfulness.

In the reign of Henry the 4th [1399-1413], there is [a precedent] a case of debt, brought by a servant against the master's executors, on a retainer to serve for term of life in peace and war for 100 shillings a year; but it was held, that debt did not lie for want [lack] of a speciality; which, as was agreed, would not have been necessary in the case of a common labourer's salary, because, as the case is explained by Brooke in abridging [reporting] it, the latter is bound to serve by statute....

...It may be asked, why it is that the law should permit the ancient slavery of the villein, and yet disallow a slavery of modern commencement?

To this I answer, that villenage sprung up amongst our ancestors in the early and barbarous state of society; that afterwards more humane customs and wiser opinions prevailed, and by their influence rules were established for checking [limiting] the progress of slavery; and that it was thought most prudent to effect this great object, not instantaneously by declaring every slavery unlawful, but gradually by excluding a new race of slaves, and encouraging the voluntary emancipation of the ancient race.

...[I]f the arguments against a new slavery in England are well founded, they reach the king as well as his subjects. If it has been at all times the policy of the law of England not to recognize any slavery but the ancient one of the villein, which is now expired; we cannot consistently attribute to the executive power a prerogative of rendering that policy ineffectual.

It is true, that the law of nations may give a right of retaliating, on an enemy, who enslaves his captives in war; but then the exercise of this right may be prevented or limited by the law of any particular country. A writer of eminence on the law of nations, has a passage very applicable to this subject. His words are, "If the civil law of any nation does not allow of slavery, prisoners of war who are taken by that nation cannot be made slaves." He is justified in his observation not only by the reason of the thing, but by the practice of some nations, where slavery is as unlawful as it is in England.

The Dutch when at war with the Algerines, Tunisians, or Tripolitans, make no scruple of retaliating on their enemies; but slavery not being lawful in their European dominions, they have usually sold their prisoners of war as slaves in Spain, where slavery is still permitted.

To this example I have only to add, that I do not know an instance, in which a prerogative of having captive slaves in England has ever been assumed by the crown; and it being also the policy of our law not to admit a new slavery, there appears neither reason nor fact to suppose the existence of a royal prerogative to introduce it....

It must be agreed, that where the *lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there

was no prohibition, there the greatest inconvenience would ensue from regarding the *lex loc*, and consequently it ought not to prevail. Indeed, by receiving it under such circumstances, the end [purpose] of a prohibition would be frustrated, either entirely or in a very great degree; and so the prohibition of things the most pernicious in their tendency would become vain and fruitless.

And what greater inconveniences can we imagine, than those, which would necessarily result from such an unlimited sacrifice of the municipal law to the law of a foreign country?

I will now apply this general doctrine to the particular case of our own law concerning slavery. Our law prohibits the commencement of domestic slavery in England; because it disapproves of slavery and considers its operation as dangerous and destructive to the whole community.

But would not this prohibition be wholly ineffectual, if slavery could be introduced from a foreign country? In the course of time, though perhaps in a progress less rapid, would not domestic slavery become as general, and be as completely revived in England by introduction from our colonies and from foreign countries, as if it was permitted to revive by commencement here; and would not the same inconveniences follow?

To prevent the revival of domestic slavery effectually, its introduction must be resisted universally, without regard to the place of its commencement; and therefore in the instance of slavery, the *lex loci* must yield to the municipal law....

Hargrave's Conclusion

Upon the whole, the return to the *Habeas Corpus* in the present case, in whatever way it is considered, whether by inquiry into the foundation of Mr. Stewart's right to the person and service of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally unworthy of this court's approbation. By condemning the return, the revival of domestic slavery will be rendered as impracticable by introduction from our colonies and from other countries, as it is by commencement here. Such a judgment will be no less conducive to the public advantage, than it will be conformable to natural justice, and to principles and authorities of law; and this court, by effectively obstructing the admission of the new slavery of negroes into England, will in these times reflect as much honour on themselves, as the great judges, their predecessors, formerly acquired, by contributing so uniformly and successfully to the suppression of the old slavery of villenage.

Arguments of the Other Counsel...

Mr. Wallace's Statement

Mr. Wallace. The question has been stated, whether the right [to own slaves] can be supported here; or, if it can, whether a course of proceedings at law be not necessary to give effect to the right? It is found in three quarters of the globe, and in part of the fourth. In Asia the whole people; in Africa and America far the greater part; in Europe great numbers of the Russians and Polanders.

As to captivity in war, the Christian princes have been used to give life to the prisoners; and it took rise probably in the Crusades, when they gave them life, and sometimes franchised them, to enlist under the standard of the Cross, against the Mahometans. The right of a conqueror was absolute in Europe, and is in Africa.

The natives are brought from Africa to the West Indies; purchase is made there, not because of positive law, but there being no law against it. It cannot be in consideration by this or any other Court, to see, whether the West India regulations are the best possible; such as they are, while they continue in force as laws, they must be adhered to.

As to England, not permitting slavery, there is no law against it; nor do I find any attempt has been made to prove the existence of one. Villenage itself has all but the name.

DUNNING'S ARGUMENT FOR SHIP CAPTAIN KNOWLES

Mr. Dunning. It is incumbent on me to justify captain Knowles's detainer of the negro; this will be effected, by proving a right in Mr. Stewart; even a supposed one: for till that matter was determined, it were somewhat unaccountable that a negro should depart his service, and put the means out of his power of trying that right to effect, by a flight out of the kingdom.

I will explain what appears to me the foundation of Mr. Stewart's claim. Before the writ of Habeas Corpus issued in the present case, there was, and there still is, a great number of slaves in Africa, (from whence the American plantations are supplied) who are saleable, and in fact sold.

Under all these descriptions is James Sommersett. Mr. Stewart brought him over to England; purposing to return to Jamaica, the negro chose to depart the service, and was stopt and detained by captain Knowles, until his master should set sail and take him away to be sold in Jamaica....

Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some at all times, and all places at different times, has been restrained: nor could society otherwise be conceived to exist. For the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is altered to the doing what one ought.

The gentlemen who have spoke with so much zeal have supposed different ways by which slavery commences; but have omitted one, and rightly, for it would have given a more favourable idea of the nature of that power against which they combat. We are apt (and great authorities support this way of speaking) to call those nations universally, whose internal policies we are ignorant of, barbarians; (thus the Greeks, particularly, styled many nations, whose customs, generally considered, were far more justifiable and commendable than their own:) unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly.

There are slaves in Africa by captivity in war, but the number far from great, the country is divided into many small, some great territories, who do, in their wars with one another, use this custom.

There are of these people, men who have a sense of the right and value of freedom, but who imagine that offences against society are punishable justly by the severe law of servitude. For crimes against property, a considerable addition

is made to the number of slaves. They have a process by which the quantity of the debt is ascertained, and if all the property of the debtor in goods and chattels is insufficient, he who has thus dissipated all he has besides, is deemed property himself; the proper officer (sheriff we may call him) seizes the insolvent, and disposes of him as a slave. We don't contend under which of these the unfortunate man in question is, but his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British Legislature confirm this condition, and thus he was a slave both in law and fact.

I do not aim at proving these points; not because they want evidence, but because they have not been controverted, to my recollection, and are, I think, incapable of denial....

Let me take notice, neither the air of England is too pure for a slave to breathe in, nor the laws of England have rejected servitude. Villenage in this country is said to be worn out; the propriety of the expression strikes me a little. Are the laws not existing by which it was created? A matter of more curiosity than use, it is, to enquire when that set of people ceased. The Statute of Tenures did not however abolish villenage in gross; it left persons of that condition in the same state as before; if their descendants are all dead, the gentlemen are right to say the subject of those laws is gone, but not the law; if the subject revives, the law will lead the subject. If the Statute of Charles the 2d ever be repealed, the law of villenage revives in its full force....

It would be a great surprize, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself, in whatever method he might have the luck to invent. He must find his way to London on foot. He tells his servant, Do this; the servant replies, Before I do it, I think fit to inform you, sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands.

Thus neither superior, or inferior, both go without their dinner.

We should find singular comfort, on entering the limits of a foreign country, to be thus at once devested of all attendance and all accommodation. The gentlemen have collected more reading than I have leisure to collect, or industry (I must own) if I had leisure: very laudable pains have been taken, and very ingenious, in collecting the sentiments of other countries, which I shall not much regard, as affecting the point or jurisdiction of this Court....

LORD MANSFIELD. The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here.

But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement.

But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, Whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in

all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England.

We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: it is now about 50 years since the opinion given by two of the greatest men of their own or any times, (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages, is a clear indication they did not think themselves free by coming hither....

Mr. Stewart advances no claims on contract; he rests his whole demand on a right to the negro as slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica.

If the parties will have judgment, '*fiat justitia, ruat cœlum;*' let justice be done whatever the consequence....

The Court is greatly obliged to the gentlemen of the Bar who have spoke on the subject; and by whose care and abilities so much has been effected, that the rule of decision will be reduced to a very easy compass. I can not omit to express particular happiness in seeing young men, just called to the Bar, have been able so much to profit by their reading.

I think it right the matter should stand over [be postponed]; and if we are called on for a decision, proper notice shall be given.

Trinity Term, [Monday], June 22, 1772, 98 ER 510

LORD MANSFIELD. On the part of Sommersett, the case which we gave notice should be decided this day, the Court now proceeds to give its opinion....

...The only question before us is, whether the cause on the return is sufficient. If it is, the negro must be remanded; if it is not, he must be discharged.

Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad.

So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been exceedingly different, in different countries.

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory.

It is so odious, that nothing can be suffered to support it, but positive law.

Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

Suzanne Miers, *Slavery and the Slave Trade as International Issues, 1890-1939*

19(2) Slavery and Abolition 16-37 (1998) (footnotes omitted)

HUMANITARIANISM AND DIPLOMACY, 1890-1919

Slavery became a major international concern from the day in 1807 when the British outlawed their own slave trade [with the Abolition of the Slave Trade

Act subsequent to the Sommersett case]. Once this step was taken it was clearly in Britain's interest to get rival colonial and maritime powers to follow suit in order to prevent this lucrative trade from passing into foreign hands and providing foreign colonies with needed manpower. In 1815 the British tried to get other powers to outlaw it and even to establish a permanent committee to monitor progress. However, their rivals saw this as an attack on their commerce and on their colonies. They would only agree to append a declaration to the Treaty of Vienna [ending the Napoleonic wars] proclaiming that the slave trade was "repugnant to the principles of humanity and universal morality".* This was an important step in the direction of the present human rights movement, but it had no practical value. There followed a long and bitter campaign, during which, by bribery and cajolery, the British secured a network of treaties giving the Royal Navy unique powers to search and seize suspected slavers flying the flags of other nations. As the result of this campaign, the British came to view themselves as the leaders of an international 'crusade' against slavery, the burden of which they had borne almost alone. British statesmen recognized that the cause was popular with the electorate and that Parliament would sanction expenditure and high handed action against foreign countries if these were presented as anti-slavery measures. Thus, the 'crusade' could often be used to further other interests—a fact not lost on rival powers....

By the 1870s the Atlantic slave traffic was a thing of the past. The trade, however, still flourished in Africa and there was an active export traffic to the Muslim world. Attention was forcefully drawn to this by European traders and missionaries penetrating ever further into the interior as the European colonial powers began to partition the coast in the 1880s. Africans took up arms against the intruders and by 1888 the French Cardinal Lavigerie found his missions on the Great Lakes under attack. In response, he launched an anti-slavery 'crusade' of his own, with papal blessing, calling for volunteers to combat this scourge in the heart of Africa.

The British, anxious to retain their leadership of the anti-slavery movement and worried at the prospect of unofficial crusaders rampaging around Africa, persuaded Leopold II of Belgium, ruler of the Congo Independent State, to invite the leading maritime and colonial powers, together with the Ottoman Empire, Persia and Zanzibar, to Brussels to discuss concerted action against the export of slaves from Africa. The colonial powers, led by the wily king, proceeded to negotiate a treaty against the African slave trade on land, as well as at sea, and carefully designed it to serve their territorial and commercial ambitions.

The Brussels Act of 1890† was a humanitarian instrument in so far as it reaffirmed that 'native welfare' was an international responsibility; and bound signatories to prevent slave raiding and trading, to repatriate or resettle freed and fugitive slaves, and to cut off the free flow of arms to the slaving areas. But it had important practical advantages for the colonial rulers. By binding them to end the trade in slaves and arms, it not only dealt a blow to African resistance, but was an attempt to prevent unscrupulous colonial administrations from attracting trade to their territories by allowing commerce in these lucrative products. By stating that the best means of attacking the traffic was to establish colonial administrations in the

* Declaration Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 63 Consol. T.S. 473 (Treaty of Vienna, Annex XV), para. 1. —Eds.

† General Act for the Repression of African Slave Trade, signed at Brussels on July 2, 1890, T.S. 383. —Eds.

interior of Africa, to protect missionaries and trading companies, and even to initiate Africans into agricultural and industrial labour, it put an anti-slavery guise on the colonial occupation and exploitation of Africa.... Finally, the Act broke new ground by establishing the first international supervisory machinery—bureaux in Brussels and Zanzibar—for the exchange of information on the slave traffic and on the antislavery legislation of signatory powers.

It was the first comprehensive international treaty against the slave trade, but it dealt only with the African traffic....

The League of Nations and Slavery

By 1919 the occupation of the African coast by European powers had reduced the export of slaves to a small smuggling traffic to Arabia and the Persian Gulf. Slave raiding had been eradicated in all but the remotest areas of Africa. Slave dealing had been outlawed and in most colonial possessions slavery no longer had a legal status. The Brussels Act had lapsed during the First World War and in 1919 the colonial powers had no desire to renew it. They wished to be free of its commercial clauses and believed that the slave traffic was now so small that it was no longer needed. To the regret of the humanitarians, they abrogated it. Instead a single clause was inserted into one of the treaties signed at St. Germain-en-Laye in 1919 binding signatories to try to secure "the complete suppression of *slavery in all its forms*"* as well as to end the slave trade. Moreover, article 23 of the Covenant of the newly established League of Nations bound members to 'secure and maintain fair and humane conditions of labour and the just treatment of the native inhabitants under their control'. This enlarged the scope of the international obligation to include the suppression of slavery and other abuses of 'native labour' and extended it beyond Africa. Significantly, however, no time limit for action was laid down and no definition of 'fair and humane conditions of labour' was attempted. The major African colonial powers wanted no international supervision of their colonial policies. They could not avoid it in the case of the former German colonies, which were now divided between Britain, France and Belgium to be administered as League Mandates, supervised by the Permanent Mandates Commission. But they were determined not to accept any scrutiny of their policies in other territories. They doubtless hoped that the slavery clauses in the treaty of St. Germain and the League Covenant were a sufficient sop to allay whatever remained of European and American interest in slavery.

...Finding the British government unwilling to take [further action within the League, the Anti-Slavery Society] persuaded the New Zealand delegate to the League, Sir Arthur Steel-Maitland—a British member of Parliament—to raise the question of slavery at the League Assembly in September 1922. As a result, in an entirely new departure, the League launched an investigation into slavery everywhere and asked all members for reports on their own territories. This widening of its scope was a vain attempt to disarm Portuguese suspicions that the inquiry was really directed against their oppressive labour policy, which [the Anti-Slavery

* Convention revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890, signed at Saint-Germain-en-Laye, September 10, 1919, 8 L.N.T.S. 27, art.11. —Eds.

Society] had long attacked. To [the Society's] consternation Britain, the only power with eye-witness accounts from southwest Ethiopia as well as the Hijaz, ducked the whole issue by simply reporting that there was no slavery in the British Empire. When pressed in Parliament, the government published a White Book to show that the slave trade in Ethiopia was declining. [The Society] marshaled [its] cohorts for a debate in the House of Lords, and, in July 1923, the Foreign Secretary was forced to promise to send for up-to-date information for the League. Both the peers and the press reminded him of Britain's traditional role as leader of the anti-slavery movement. The message was clear—the cause was still popular....

The Temporary Slavery Commission (TSC), 1924-25

Meanwhile, the League, set in motion by the resolution of 1922 and finding little response to its appeal for information, appointed the Temporary Slavery Commission in 1924 to inquire into slavery worldwide. This body, carefully designed by the colonial powers to have no bite and very little bark, set the pattern for those that followed.... [I]t was limited to eight experts on slavery—private individuals appointed by the League, not by their governments, hence theoretically 'independent'. But six were nationals of the leading colonial powers—Britain, France, Portugal, Italy, Belgium and Holland.... all of these but the Italian were either serving or retired colonial officials....

...The colonial governments, fearful of damaging revelations, and determined not to allow any supervision of their colonial administrations, insisted that the TSC be both temporary and purely advisory. It had no power to launch investigations and could only take evidence from nongovernmental organizations (NGOs) approved by their own governments. States had to be able to reply to accusations against them before these could be considered. Finally, to limit its only real weapon—publicity—it met in private and the League decided whether or not to publish its reports which, of course, were carefully vetted by the imperial governments.

Circumscribed as it was, the TSC went much further than the colonial powers, including the British, wanted. Led by [the British and International Labour Organization experts], under the rubric 'slavery in all its forms', it condemned serfdom, the sale of children for domestic service, concubinage, and slave dealing under guise of adoption or marriage. In the case of pawning (the pledging of a person for credit) and peonage or debt-slavery, it recommended restricting the amount of labour that could be demanded for the debt, and that the debt be extinguished on the death of the debtor. It discussed child betrothal, inheritance of widows, dowry payments and even polygyny, but shied off condemning them outright. As for slavery, it merely recommended abolition of its legal status so that those slaves who wished to remain with their owners could do so, but it urged that slaves be told that they could leave.

To the surprise of the Foreign Office it also dealt with forced labour. Claiming that this often deteriorated into slavery, it recommended that it be limited to essential public works and be adequately paid, that administrators should not be allowed to recruit labour for private enterprises, and chiefs should not be allowed to use it for themselves. Finally it suggested that the protection of indigenous labour should be taken on by the [International Labour Organization. The British and

ILO experts] had hoped to draw up a 'charter' of rights for native labour but objections from the colonial governments killed the idea....

Its most fruitful recommendation was that the League negotiate a convention against the slave trade, slavery and forced labour. This unwelcome proposal might have died had [the British expert] not forced the hand of the British government by sending them a draft treaty. He opened up a veritable Pandora's box. The Foreign Office was sympathetic—only a few weeks before the House of Lords had again complained that Britain was not playing its traditional role—but his proposals sent alarm signals through other departments.... It was decided, however, that some action was needed to placate the humanitarians and to ensure that no other power stole Britain's thunder as leader of the anti-slavery movement. An interdepartmental committee, therefore, hammered out a watered down version of the treaty, which was presented to the League. The anti-slavery lobby... demanded more, and other colonial powers demanded less than the British asked for, but finally the Slavery Convention of 1926 was signed.

The Slavery Convention of 1926*

This treaty, which is still in force, was the first international instrument specifically directed against slavery....

Slavery, vaguely defined as 'the status of a person over whom all or any of the rights attaching to ownership are exercised', was to be suppressed 'in all its forms'. But the forms were not spelt out and suppression was to be undertaken only 'progressively and as soon as possible'. Thus even Ethiopia, where slavery was still legal, could sign the Convention. New ground, however, was broken by a clause which declared that forced labour was only to be used for public purposes and had to be adequately remunerated and performed from home. Again much of the force was lost because its use for private enterprises was to be phased out 'progressively and as soon as possible'. Significantly, the Convention contained no machinery for enforcement. France and Italy would not even accept a commitment to send reports to the League. All that could be agreed was that each member should keep the League informed of its anti-slavery regulations.

Nevertheless, the Convention had important repercussions. The League invited the ILO to take action against forced labour resulting in the Forced Labour Convention of 1930†—the first in a series of agreements for the protection of indigenous labour. As for slavery, publicity surrounding the meetings of the TSC and the discussion of the Convention kept the question before the public for several years. In the British empire this had an impact at the grassroots level. Colonial administrations were ordered to review their laws to ensure that slavery no longer had any legal status. Hence the spate of new ordinances issued at this time in Sierra Leone, where slaves were now told of their rights, and in the Gold

* Slavery Convention, September 25, 1926, entered into force March 9, 1927. 60 L.N.T.S. 253. The Convention was subsequently amended to refer to the United Nations rather than the League of Nations through the Protocol amending the Slavery Convention, approved by General Assembly resolution 794 (VIII) (1953), entered into force December 7, 1953, 182 U.N.T.S. 51. —Eds.

† Convention (No. 29) Concerning Forced or Compulsory Labour, International Labour Conference (1930), entered into force May 1, 1932. —Eds.

Coast and a number of other territories. In Sudan more vigorous action was taken to end slavery and to resettle fugitive slaves from Ethiopia. In many cases these new laws simply reaffirmed existing ones, while in others results were meager. In Bechuanaland, for instance, administrators had refused to admit that there was any servitude. Now they had to agree that by the League definition the domination of hunters and gatherers by pastoral groups was indeed a form of slavery. But only minimal action was taken.... In most of Britain's African possessions, however, more uniform and stronger laws were now on the statute books, even if they were not always enforced.

[After pointing out that practices in slavery continued in much of the world despite the Convention, the author goes on to discuss the mechanisms developed by the League to promote compliance with the Convention, through information gathering and review of state reports. These include the Committee of Experts on Slavery and its successor, the Advisory Committee on Slavery, which met periodically and issued recommendations until 1938, when the League itself was about to expire under the pressures of the impending war.]

The Impact of the League Committees

In the realm of human rights the League of Nations committees have an important place. They gave notice that slavery was under attack and helped to get the question of forced labour and the protection of native labour taken up by the ILO. In practical terms the TSC resulted in the negotiation of the Slavery Convention of 1926—the first international instrument specifically directed against slavery. Because of the insistence of the committee, this convention also condemned practices 'analogous to slavery'. Although these were not spelt out in the treaty, the TSC report described them. These now, therefore, became international questions. In 1956 the United Nations negotiated a Supplementary Convention on slavery* and related institutions which identified them. As chattel slavery gradually died out—outlawed everywhere by 1970, although not completely ended—so these became the main focus of international attention. Today they are discussed annually at the United Nations Working Group on Contemporary Forms of Slavery which has met every year since 1975.

Comments and Questions

1. The prohibition of slavery and the international slave trade, through a series of treaties beginning in the late nineteenth century, eventually developed into an international norm that is now widely identified to be one of *jus cogens*; that is, a norm binding on all states—whether or not they have subscribed to a particular treaty or custom—and from which states cannot derogate. See Restatement (Third) of the Foreign Relations Law of the United States 702 cmt. n (1987) (slavery is a

* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) (1956), entered into force April 30, 1957, 266 U.N.T.S. 3. —Eds.

jus cogens violation of international law whether committed by a state or a private party under color of law). For a discussion of *jus cogens* norms in international law generally, see Mark W. Janis, *An Introduction to International Law* 61, 62-67 (2003).

2. Well before the antislavery treaties, the Articles of the Treaties of Peace, signed at Munster and Osnabruck in Westphalia on October 24, 1648, ended the Thirty Years War between Protestant and Catholic areas of Europe. While the Treaty of Westphalia is often cited as the beginning of the nation-state system and modern international law, the treaty is also significant for various human rights provisions. First, the treaty declared an amnesty for all offenses committed during the "troubles" (Article II) and provided for restitution of property and ecclesiastical or lay status (Articles VI-XXXIV). Second, freedom of contract was supported by annulling those contracts procured under duress and threats. Freedom of movement and commerce and the right to legal protection also were included. Most important, Article XXVIII protected religious freedom, providing:

> That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624, as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.

The Westphalian Treaty of Osnabruch with Sweden contained a similar provision. Pope Innocent X promptly declared null and void the articles in the treaties of Westphalia relating to religious matters, but a limited principle of religious liberty was established, as was the link between peace and respect for human rights.

3. Many states abolished slavery through domestic legislation or jurisprudence in the years after the English precedent in the Sommersett case, but the last state in the Western Hemisphere to legally ban slavery, Brazil, did not do so until 1898. Taking into account state practice and the progressive adoption of international instruments, at what point could it be said that the slave trade and then slavery became a violation of customary international law? Note that Japan has refused to give an official apology or make reparations to the so-called comfort women, who were forced into brothels during World War II, arguing that there was no customary law against slavery and rejecting the assertion that the women were de facto slaves. See Comm. H.R., Report of Special Rapporteur Gay McDougall, UN Doc. E/CN.4/Sub.2/1998/13, para. 4 (1998). Japan had ratified in 1925 the International Convention for the Suppression of the Traffic in Women and Children (1921); the International Agreement for the Suppression of the White Slave Traffic (1904); and the International Convention for the Suppression of the White Slave Traffic of 1910 as reaffirmed in 1921. But Japan was not a party to the 1926 Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183, 60 L.N.T.S. 253.

Basing its claims on ILO agreements, the Federation of Korean Trade Unions requested the International Labor Organization to rule that "comfort women" were forced laborers. The ILO Committee of Experts agreed, despite Japanese contentions that the agreements did not apply to "colonial territories" such as occupied Korea. See ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention, 1930 (No.

29), Observations (2000). Does it matter whether a practice is denominated forced labor or slavery? How would you distinguish one from the other?

4. The materials above identify philosophical and religious precepts, as well as economic and political considerations, that converged to generate and provide traction to the antislavery movement. It is apparent that the dominant white populations of both Great Britain and the northern U.S. states eventually came to agree on an essentially moral objection to slavery, whether from secular philosophical or religious notions of justice, an objection that was obviously shared by blacks who were slaves or descended from slaves. This moral position coincided with conditions that diminished the appeal of slavery to the economic or political self-interest of the dominant elites. Do you think that moral objection to slavery would have succeeded in shifting dominant opinion without the economic and political factors that cut against or were at least neutral toward slavery? Did moral objections offset competing economic and political factors to encourage the shift in dominant opinion? In examining the end of segregation in the southern United States in the mid-twentieth century, Derrick Bell advances an "interest convergence theory," which holds that nondominant groups are only likely to be successful in achieving major social change when that change also directly or indirectly serves elite self-perceived material interests. See Derrick A. Bell, Jr., *Race, Racism, and American Law*, 212-214 (3d ed., 1992). How, if at all, does this notion illuminate the process of abolition?

5. At the height of the abolitionist movement, leading moral and political philosophers of the time, religious leaders, community organizations, the media, and black activists all articulated the moral objection to slavery in one way or another. As Suzanne Miers's piece shows, the efforts of such nongovernmental actors in Great Britain, in particular, had a political impact that was felt internationally and that influenced British foreign policy against slavery to be implemented with more resolve than it otherwise would likely have been. What was the source of the power or influence of these nongovernmental actors? What lessons about the role of nongovernmental actors can be drawn from this example of international human rights norm-building, an issue to which this book will return frequently?

6. Slavery in the United States was not abolished until after a bloody civil war. The economic and political factors that had made slavery undesirable in the northern U.S. states and Great Britain did not simultaneously have the same impact in the southern U.S. states, where slavery remained legal. See Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 34-40 (1989). The prevailing thinking in the South, including that based on theology, continued to defend slavery as moral. See Drew Gilpin Faust, *The Creation of Confederate Nationalism: Ideology and Identity in the Civil War South* (1988); Larry E. Tise, *Proslavery: A History of the Defense of Slavery in America, 1701-1840* (1987). The major southern religious denominations outwardly defended slavery, including, for example, the Southern Baptists, who in 1995 recognized their historical role in perpetuating slavery and discrimination and issued a request for "forgiveness." See Southern Baptist Convention, Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention (June 1995). It was not until after the Civil War and the effective domestic prohibition of slavery throughout the United States and most other countries that slavery became illegal under international treaties. What does this say about the ability of international law to impose human rights standards where

those standards are not already part of a social consensus or are not already part of domestic law?

7. Reparations for slavery in the United States have been claimed and offered since well before emancipation in 1865. In 1774, Thomas Paine proposed reparations for the injuries caused by "the wickedness of the slave trade," Archive of Thomas Paine, Thomas Paine: African Slavery in America, *http://www.thomaspaine.org/Archives/afri.html*. For more recent proposals, see Bruno Bittker, *The Case for Black Reparations* (1973); Randall Robinson, *The Debt: What America Owes to Blacks* (2000). Between 1890 and 1917, more than 600,000 of the 4 million emancipated slaves in the United States applied for pensions from the government on the basis that their labor subsidized the wealth of the nation. They formed the Ex-Slave Mutual Relief, Bounty, and Pension Association and lobbied without success for 26 years. See Christopher Hitchens, "Debt of Honor," in *Should America Pay? Slavery and the Raging Debate on Reparations* 171 n.12 (Raymond A. Winbush ed., 2003). At the end of the U.S. Civil War there were about 4.5 million slaves of African origin in the United States who were promised 40 acres of land and a mule (the phrase and the promise come from General William Tecumseh Sherman's Special Field Order No. 15 of January 16, 1865), but instead were subjected to disenfranchisement and de jure discrimination during the following century.

Issues of race continue to divide people in the United States, where the descendents of slaves today number about 35 million persons. Many among these descendants continue to seek redress; e.g., by filing claims against individuals and companies for an accounting of their profits and assets acquired exploiting slave labor. See Vern E. Smith, *Debating the Wages of Slavery*, Newsweek, Aug. 27, 2001, at 20. U.S. Congressman John Conyers first introduced a Reparations Study Bill (H.R. 40) in 1989 and renewed the proposal in subsequent sessions of Congress. In 2007, a hearing was held on the bill for the first time in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. In 2009, the Senate passed a resolution apologizing for slavery, but with a disclaimer that the resolution neither authorized a claim against the United States nor served as a settlement. See "Apologizing for the enslavement and racial segregation of African-Americans," S. CON. RES. 26 (June 11, 2009). The House passed a similar apology in 2008, but with no disclaimer. In one interesting development, after studying the historical connections between the slave trade in Rhode Island and its early benefactors, Brown University donated funds to local schools and pledged a permanent $10 million endowment to establish the Fund for the Education of the Children of Providence. Are reparations required or appropriate? See Chapters 5 and 9, pages 351 and 779.

8. Despite treaty and customary law against slavery, the practice continues in some regions of the world and has taken on new forms. On contemporary forms of slavery, including human trafficking and bonded labor, see David Weissbrodt and Anti-Slavery International, Abolishing Slavery and Its Contemporary Forms, UN Doc. HR/PUB/02/4 (2002); Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, Gulnara Shahinian, UN Doc. A/HRC/12/21 (2009). Ethical, strategic, and legal issues arise for human rights activists and nongovernmental organizations when confronted with modern incidents of slavery. One group in Sudan has been severely criticized for buying the freedom of slaves. Is this a legitimate means to emancipate the oppressed, or does it constitute complicity in maintaining the market for human beings?

III. The Philosophical Underpinnings of Human Rights

A. *Natural Law*

The right of every human being not to be enslaved is now firmly entrenched in international law. But as we have seen, this human right was asserted well before it became proscribed by treaties, international custom, or generally accepted international legal principles. Characteristic of human rights discourse, this assertion was grounded in theories of justice or religious conviction that did not depend at their inception on legal authority emanating from the acts of states, but that rather served to challenge that legal authority.

Appeals of this type to theories or notions of justice as "higher authority" are a core element of contemporary human rights discourse. Such appeals also are central to the natural law tradition, which had strong roots in international law even before the antislavery movement. Natural law theory and methodology was at the foundation of the work of early theorists associated with the beginnings of modern international law. These same theorists are often credited with introducing human rights in international law through their examination long ago of the rights of indigenous peoples.

S. James Anaya, *Indigenous Peoples in International Law*

16-19 (2d ed., 2004) (endnotes omitted)

The advent of European exploration and conquest in the Western Hemisphere following the arrival of Christopher Columbus brought on questions of the first order regarding the relationship between Europeans and the indigenous peoples they encountered. Within a frame of thinking traditionally linked to the rise of modern international law, prominent European theorists questioned the legality and morality of claims to the "New World" and of the ensuing, often brutal, settlement patterns. Enduring figures in this discussion were the Dominican clerics Bartolome de las Casas (1474-1566) and Francisco de Vitoria (1486-1547). De las Casas gained notoriety as an ardent defender of the people indigenous to the Western Hemisphere who became known to the world as (the other) Indians. De las Casas, having spent several years as a Roman Catholic missionary among the Indians, gave a contemporaneous account of the Spanish colonization and settlement, vividly describing the enslavement and massacre of indigenous people in the early sixteenth century in his *History of the Indies.* De las Casas was particularly critical of the Spanish *encomienda* system, which granted Spanish conquerors and colonists parcels of lands and the right to the labor of the Indians living on them.

Francisco de Vitoria, primary professor of theology at the University of Salamanca, joined de las Casas in confirming the essential humanity of the Indians of the Western Hemisphere. Never having traveled across the Atlantic, however, Vitoria was less concerned with bringing to light Spanish abuses against the Indians than with establishing the governing normative and legal parameters. Vitoria held that the Indians possessed certain original autonomous powers and entitlements to land, which the Europeans were bound to respect. At the same time, he methodically set forth the grounds on which Europeans could be said validly to acquire Indian lands or assert authority over them. Vitoria's lectures on

the Indians established him among the often cited founders of international law. His prescriptions for European encounters with indigenous peoples of the Western Hemisphere contributed to the development of a system of principles and rules governing encounters among all peoples of the world. Vitoria's influence on later theorists is evident in the seventeenth-century work of Hugo Grotius, the most prominent of the "fathers" of international law.

The early European jurisprudence concerned with indigenous peoples and associated with the early development of international law was the legacy of medieval European ecclesiastical humanism. This jurisprudence perceived a normative order independent of and higher than the positive law or decisions of temporal authority. Conceptions about the source of higher authority, characterized as natural or divine law, varied. For Vitoria and other Spanish school theorists, God figured prominently as the source of legal authority, and law merged with theology. Grotius moved toward a secular characterization of the law of nature, defining it as a "dictate of right reason" in conformity with the social nature of human beings. This perceived higher authority, whatever its source, provided the jurisprudential grounds for theorists to conceive of and examine norms from a fundamentally humanist, moral perspective, and to withhold the imprimatur of law from acts of earthly sovereigns found to violate the moral code. Thus the early international law theorists were prepared to confront official practices and declare unlawful even the acts of monarchs when these acts were at odds with the perceived natural law. Further, the naturalist theorists viewed the law applying to sovereigns as part of an integrated normative order encompassing all levels of human interaction....

Within this historical jurisprudential frame, the threshold question for determining the rights and status of the American Indians was whether they were rational human beings. In his published lectures, *On the Indians Lately Discovered* (1532), Vitoria answered this question in the affirmative. He surmised that

> the Indians are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops and a system of exchange, all of which call for the use of reason; they also have a kind of religion.

From this premise, Vitoria rejected the view that papal donation to the Spanish monarchs provided a sufficient and legitimate basis for Spanish rule over Indian lands in the Western Hemisphere. Pope Alexander VI had purported to grant the Spanish monarchs all territories discovered by their envoys that were not already under the jurisdiction of Christian rulers. And the Spanish monarchy had viewed this donation as establishing legal title to New World lands, in addition to entrusting the Spanish crown with the mission of converting Indians to Christianity. Invoking precepts informed by "Holy Scripture," Vitoria held that the Indians of the Americas were the true owners of their lands, with "dominion in both public and private matters." Neither emperor nor pope, he said, possessed lordship over the whole world. Further, Vitoria maintained that discovery of the Indians' lands alone could not confer title in the Spaniards "anymore than if it had been they who had discovered us."

While unambiguously rejecting title by discovery or papal grant, Vitoria found more palatable the argument that the Spaniards could legitimately assume authority over Indian lands for the Indians' own benefit. Although Vitoria found the

Indians sufficiently rational to possess original rights and dominion over lands, he entertained the view that they

> are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit.

Vitoria pondered this view with ambivalence. He said, "I dare not affirm it at all, nor do I entirely condemn it." Nonetheless, the argument articulated but not adopted by Vitoria to justify Spanish administration over Indian lands was a precursor to the trusteeship doctrine later adopted and acted upon by nineteenth-century states. Of more generally foreboding significance, implicit in Vitoria's pejorative characterization of American Indians, was the measurement of cultural expression and social organization by the European standard: Although they met some standard of rationality sufficient to possess rights, the Indians could be characterized as "unfit" because they failed to conform to the European forms of civilization with which Vitoria was familiar.

Against the backdrop of this Eurocentric bias, Vitoria ultimately constructed a theory of just war to justify Spanish claims to Indian lands in the absence of Indian consent. Within the early naturalist frame, Indians not only had rights but obligations as well. Accordingly to Vitoria, under the Roman *jus gentium*, which he viewed as either "natural law or... derived from natural law," Indians were bound to allow foreigners to travel to their lands, trade among them, and proselytize in favor of Christianity. In his lecture, *On the Indians, or On the Law of War Made by the Spaniards on the Barbarians*, Vitoria concluded that the Indians' persistent interference in Spanish efforts to carry out these activities could lead to "just" war and conquest. Vitoria counseled, however, against sham assertions of "imaginary causes of war."

Thus Vitoria articulated a duality in the normative construct deemed applicable to European contact with non-European indigenous peoples. On the one hand, the American Indians were held to have rights by virtue of their essential humanity. On the other hand, the Indians could lose their rights through conquest following a "just" war, and the criteria for determining whether a war was "just" were grounded in a European value system. The essential elements of this normative duality were advanced by other important European theorists of the period associated with the beginnings of international law, including Francisco Suarez (1548-1617), Domingo de Soto (1494-1560), Balthasar Ayala (1548-1584), and Alberico Gentilis (1552-1608).

Writing a century after Vitoria, Grotius continued in this vein, although without specifically addressing the rights of American Indians. In his famous treatise, *On the Law of War and Peace* (1625), Grotius, like Vitoria, rejected title by discovery as to all lands inhabited by humans, "even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one." Further, Grotius affirmed that the

ability to enter into treaty relationships is a necessary consequence of the natural rights of *all* peoples, including "strangers to the true religion": "According to the law of nature this is no degree a matter of doubt. For the right to enter treaties is so common to all men that it does not admit of a distinction arising from religion." Grotius likewise endorsed the concept of just war, but in keeping with his secularized conception of the law of nature, he discarded the Christian mission as alone constituting grounds for war or conquest. Grotius identified three broad "justifiable causes" for war: "defence, recovery of property, and punishment."

As illustrated by de las Casas, Vitoria, and Grotius, in its classic form the "natural law approach begins with the assumption that there are natural laws, both theological and metaphysical, which confer certain particular rights upon individual human beings. These rights find their authority either in divine will or in specified metaphysical absolutes." Myres S. McDougal et al., *Human Rights and World Public Order* 68 (1980). Especially in its classical form, the natural law tradition is often criticized for its propensity to being captured by a particular religious or cultural perspective, as appears to be the case in Vitoria's assessment of the rights and status of American Indians. Vitoria was able to perceive in the indigenous people of "newly discovered" lands certain inherent rights based on their prior occupancy of those lands, but the same body of natural law that gave rise to those rights was deemed to limit and condition them within a religious and cultural perspective that, according to Professor Anaya, ultimately favored the nonindigenous discoverers. Assuming that Vitoria's ultimate conclusions about the rights and status of indigenous peoples in the Americas were flawed under today's standards of justice, did Vitoria's reasoning and analysis on this subject nonetheless contribute to international human rights? In what way was Vitoria's method of reasoning similar to that invoked by many who challenged the validity of slavery?

B. *Legal Positivism*

The natural law tradition, as well as the analytical method by which human rights proponents of diverse backgrounds converge on common fundamental demands, contrasts with legal positivism. Positivism focuses attention on the state as the relevant source of authority and thus sees norms only or mainly as the positive enactments of states. Legal positivism came to dominate international legal theory in the late nineteenth and early twentieth centuries, as reflected in, for example, John Westlake, *Chapters on the Principles of International Law* (1894); William E. Hall, *A Treatise on International Law*, 47-49, 65 (Alexander P. Higgins ed., 8th ed., 1924); and Charles C. Hyde, *International Law Chiefly as Applied and Interpreted by the United States* (1922). For an overview of legal positivism, see Brian Bix, "Legal Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, 29 (Martin P. Golding & William A. Edmundson eds., 2004).

An extensive body of human rights norms can now be found in numerous treaties adopted by states or can be deemed to have been consented to by states through custom, as this book demonstrates (see especially Chapters 2 and 3). Hence, it is now possible to embrace human rights from even a purely legal positivist perspective; for example, the rights of children as articulated in the Convention

on the Rights of Child have now been accepted as legally binding by the 192 parties to that treaty.

Nonetheless, as we shall see throughout this book, the modern scope of human rights engages not just states but also international institutions, nongovernmental organizations, individual claimants, and other actors; human rights practice involves much more than the straightforward application of existing legal texts or readily discernible custom. Human rights activists continue to propose new human rights norms, and the line between what the law *is* and what the law *ought* to be is often blurred. As a result, human rights discourse inevitably draws heavily on notions of justice very much in the natural law tradition.

C. *Critical Legal Studies*

Another relevant perspective on international law is the body of legal theory commonly known as "critical legal studies" (CLS), which involves inquiry into political context, power structures, and paradigms of thinking related to the articulation of legal norms and to the processes within which they function. See generally David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984); Phillip Trimble, *International Law, World Order, and Critical Legal Studies*, 42 Stan. L. Rev. 811 (1990); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 Harv. Int'l L. J. 81 (1991). While advancing widely disparate avenues of criticism, the CLS movement includes as one of its central contentions that law is indeterminate and ultimately subject to political choice, rather than politically neutral in its conception and application. CLS scholars tend to see international human rights law in particular as limited by or even favoring power structures grounded in the primacy of states within the construct of an international legal order that is perpetuated by the world's political elites, so that the ability of international human rights law to act as a force against oppression in many contexts is hamstrung or nonexistent. For example, David Kennedy, one of the principal proponents of this criticism, has written:

> Although the human rights vocabulary expresses relentless suspicion of the state, by structuring emancipation as a relationship between an individual right holder and the state, human rights places the state at the center of the emancipatory promise. However much one may insist on the priority or pre-existence of rights, in the end rights are enforced, granted, recognized, implemented, their violations remedied, by the state. By consolidating human experience into the exercise of legal entitlements, human rights strengthens the national governmental structure and equates the structure of the state with the structure of freedom. To be free is... to have an appropriately organized state. We might say that the right-holder imagines and experiences freedom only as a *citizen*. This encourages autochthonous political tendencies and alienates the "citizen" from both his or her own experience as a person and from the possibility of alternative communal forms.

David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum. Rts. J. 101, 113 (2002). See also David Kennedy, *Of War and Law* (2006) (criticizing international humanitarian law as ultimately a force complicit with choices by state agents tending toward warfare and violence). How is Kennedy's criticism different from Humphrey's observation, *infra* pages 51-52, that

international treaty regimes for implementing human rights are inherently weak because states cannot be forced to accept them? How do the antislavery movement and its outcome support or detract from Kennedy's criticism? What alternative might there be to the protection of human rights by the state? For a rejoinder to Kennedy, see Hillary Charlesworth, *Author! Author!: A Response to David Kennedy*, 15 Harv. Hum. Rts. J. 127 (2002).

D. Feminist Perspectives

Feminist legal scholars offer additional criticism of international human rights law, some of which are summarized in the following extract.

Hilary Charlesworth, *Feminist Methods in International Law*

93 Am. J. Int'l L. 379, 382-83, 387-88 (1999) (footnotes omitted)

...Feminist methods emphasize conversations and dialogue rather than the production of a single, triumphant truth. They will not lead to neat "legal" answers because they are challenging the very categories of "law" and "nonlaw." Feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis. The term "gender" here refers to the social construction of differences between women and men and ideas of "femininity" and "masculinity"—the excess cultural baggage associated with biological sex....

One technique for identifying and decoding the silences in international law is paying attention to the way that various dichotomies are used in its structure. International legal discourse rests on a series of distinctions; for example, objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence....

The operation of public/private distinctions in international law provides an example of the way that the discipline can factor out the realities of women's lives and build its objectivity on a limited base. One such distinction is the line drawn between the "public" world of politics, government and the state and the "private" world of home, hearth and family. Thus, the definition of torture in the Convention against Torture requires the involvement of a public (governmental) official. On this account, sexual violence against women constitutes an abuse of human rights only if it can be connected with the public realm; for example, if a woman is raped by a person holding a public position for some type of public end. The Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993, makes violence against women an issue of international concern but refrains from categorizing violence against women as a human rights issue in its operative provisions. The failure to create a nexus between violence against women and human rights was due to a fear that this might dilute the traditional notion of human rights. It was said that the idea of human rights abuses required direct state involvement and that extending the concept to cover private behavior would reduce the status of the human rights canon as a whole.

This type of public/private distinction in international human rights law is not a neutral or objective qualification. Its consequences are gendered because in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family. Its effect is to blot out the experiences of many women and to silence their voices in international law....

Another public/private distinction incorporated (albeit unevenly) in international criminal law—via human rights law—is that between the acts of state and nonstate actors. Such a dichotomy has gendered aspects when mapped onto the reality of violence against women. Significantly, the ICC statute defines torture more broadly than the Convention against Torture, omitting any reference to the involvement of public officials. Steven Ratner has suggested, however, that some sort of distinction based on "official" involvement is useful as a criterion to sort out those actions against human dignity that should engender state and individual international criminal responsibility and those (such as common assault) that should not. The problem, from a feminist perspective, is not the drawing of public/private, or regulated/nonregulated, distinctions as such, but rather the reinforcement of gender inequality through the use of such distinctions. We need, then, to pay attention to the actual operation of boundary drawing in international law and whether it ends up affecting women's and men's lives differently. For example, the consequence of defining certain rapes as public in international law is to make private rapes seem somehow less serious. The distinction is made, not by reference to women's experiences, but by the implications for the male-dominated public sphere.

For additional reading on feminist perspectives, see Hillary Charlesworth, Christine Chinkin, and Shelly Wright, *Feminist Approaches to International Law*, 85 Am J. Int'l L. 613 (1991); Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); *Human Rights of Women: National and International Perspectives* (Rebecca Cook ed., 1994); Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 U. Mich. J. Int'l L. 144 (1991); but cf. Catherine Harries, *Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom*, 25 Colum. Hum. Rts. Rev. 493 (1994) (criticizing the standard feminist perspective for its Western orientation at the expense of the problems of women in underdeveloped countries).

A number of authors have built on the feminist critique by adding to it perspectives of racial identity. The voices of minority women, or women of color, are advanced by these authors who portray failings of the international legal system in regard to them. See, e.g., Penelope Andrews, *Globalization, Human Rights, and Critical Race Feminism: Voices from the Margins*, 3 J. Gender & Just. 373 (2000); Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and International Black Women*, 50 Maine L. Rev. 309 (1998). See generally Adrien K. Wing, *Global Critical Race Feminism: An International Reader* (2000); Special issue, *Women's Rights as Human Rights: Intersectional Issues of Race and Gender Facing Women of Color*, 28 So. U. L. Rev. 201 (2001). This literature is related to a broader body of work known as critical race theory, which seeks to uncover in law and legal process embedded racially discriminatory and oppressive patterns. See, e.g., Symposium, *Critical Race Theory and International Law: Convergence and*

Divergence, 45 Vill. L. Rev. 827 (2000); Michael Freemen, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 295 (1988).

E. Cultural Relativism

Finally, the very idea of universal human rights norms has been criticized on the ground that it is necessarily linked to a particular cultural perspective to the exclusion or at the expense of others. In essence, critics assert that the moral assessments implicit in identifying and asserting human rights, like the assessments for discerning natural law, are inevitably driven by cultural conditioning. The diversity of cultures in the world is said to give rise to diverse moral assessments, the existence of which undermine the concept of human rights as universal and inherent.

This point is often illustrated by comparing the human rights norms articulated in contemporary international documents to entrenched cultural practices that on their face seem to violate those norms, such as the practice of female circumcision. In many parts of Africa, girls or young women have their clitoris or other genitalia painfully cut and removed as part of a ritualistic right of passage with deep historical and cultural roots. See Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 Law & Ineq. 367 (1991). For an overview of and response to criticisms based on cultural relativism, see Fernando Teson, *International Human Rights and Cultural Relativism*, 25 Va. J. Int'l L. 869 (1985); Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 Human Rts. Q. 315 (1993).

Today's international human rights movement, as pointed out earlier, draws on the natural law tradition and its embrace of a universal normative order. In contemporary human rights discourse, moral and ethical standards are articulated across national boundaries by reference to values and normative assessments beyond the rules adopted by states. See David Sidorsky, "Contemporary Reinterpretation of the Concept of Human Rights," in *Essays on Human Rights* 88, 89 (D. Sidorsky ed., 1979). Human rights discourse, like natural law theory, is dynamic, admitting new truths or notions of justice within ever evolving patterns of thought. What may distinguish the modern human rights movement from the natural law tradition is its aspiration to universality not just in the application of norms across cultural divides, but also in its attempts to ground those norms in the value systems of diverse cultures. While thus drawing on the natural law tradition, modern human rights discourse is less dogmatic or absolutist in the assessment of the source, nature, and content of norms than classical natural law theory. It professes to be open to different cultural perspectives and to reason from first principles, without necessarily ascribing to them unchanging divine or metaphysical roots. Effectively answering the critique of cultural relativism, Professors McDougal, Laswell, and Chen have written of "fundamental demands" associated with a "world public order of human dignity" that are now common across the globe:

> Different peoples located in different parts of the world, conditioned by varying cultural traditions and employing divergent modes of social organization, may of course

> assert these fundamental demands in many different modalities and nuances of international practice. There would appear, however, to be an overriding insistence, transcending all cultures and climes, upon the greater production and wider distribution of basic values, accompanied by increasing recognition that a world public order of human dignity can tolerate wide differences in specific practices by which values are shaped and shared, so long as all demands and practices are effectively appraised and accommodated in terms of common interest.

McDougal et al., *supra*, at 5-6.

Many of the arguments asserting that specific regional or cultural values differ from human rights norms have come from Asia. Compare, for example, Bilahari Kausikan, *Asia's Different Standard*, 92 Foreign Pol'y 24 (Fall 1993), with Aryeh Neier, *Asia's Unacceptable Standard*, 92 Foreign Pol'y 42 (Fall 1993). For similar relativist views from an African perspective, see, e.g., Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 Hum. Rts. Q. 309 (1987); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. Int'l L.J. 201 (2001).

Nobel laureate Amartya Sen responds to some of these critiques in the following extract.

Amartya Sen, *Human Rights and Asian Values*

The New Republic, July 14-July 21, 1997

I want to examine the thesis that Asian values are less supportive of freedom and more concerned with order and discipline, and that the claims of human rights in the areas of political and civil liberties, therefore, are less relevant and less appropriate in Asia than in the West. The defense of authoritarianism in Asia on the grounds of the special nature of Asian values calls for historical scrutiny....

II....

The size of Asia is itself a problem. Asia is where about 60 percent of the world's population lives. What can we take to be the values of so vast a region, with so much diversity? It is important to state at the outset that there are no quintessential values that separate the Asians as a group from people in the rest of the world and which fit all parts of this immensely large and heterogeneous population. The temptation to see Asia as a single unit reveals a distinctly Eurocentric perspective. Indeed, the term "the Orient," which was widely used for a long time to mean essentially what Asia means today, referred to the positional vision of Europe, as it contemplated the direction of the rising sun....

Still, the recognition of heterogeneity in the traditions of Asia does not settle the issue of the presence or the absence of a commitment to individual freedom and political liberty in Asian culture. The traditions extant in Asia differ among themselves, but they may share some common characteristics. It has been asserted, for example, that the treatment of elderly members of the family (say, aged parents) is more supportive in Asian countries than in the West. It is possible to argue about this claim, but there would be nothing very peculiar if some similarities of this

kind or other kinds were to obtain across the diverse cultures of Asia. Diversities need not apply to every field. The question that has to be asked, rather, is whether Asian countries share the common feature of being skeptical of freedom and liberty, while emphasizing order and discipline. The advocates of Asian particularism allow internal heterogeneity within Asia, but in the context of a shared mistrust of the claims of political liberalism. Authoritarian lines of reasoning often receive indirect backing from certain strains of thought in the West itself. There is clearly a tendency in America and Europe to assume, if only implicitly, the primacy of political freedom and democracy as a fundamental and ancient feature of Western culture, one not to be easily found in Asia. There is a contrast, it is alleged, between the authoritarianism implicit in, say, Confucianism and the respect for liberty and autonomy allegedly deeply rooted in Western liberal culture. Western promoters of personal and political freedom in the non-Western world often see such an analysis as a necessary preliminary to bringing Western values to Asia and Africa.

In all this, there is a substantial tendency to extrapolate backwards from the present. Values that the European enlightenment and other relatively recent developments have made widespread cannot really be seen as part of the Western heritage as it was experienced over millennia. In answer to the question, "at what date, in what circumstances, the notion of individual liberty... first became explicit in the West," Isaiah Berlin has noted: "I have found no convincing evidence of any clear formulation of it in the ancient world." This view has been disputed by Orlando Patterson, among others. He points to particular features in Western culture, particularly in Greece and Rome, and in the tradition of Christianity, which indicate the presence of selective championing of individual liberty.

The question that does not get adequately answered—it is scarcely even asked—is whether similar elements are absent in other cultures. Berlin's thesis concerns the notion of individual freedom as we now understand it, and the absence of "any clear formulation" of this can certainly co-exist with the advocacy of selected components of the comprehensive notion that makes up the contemporary idea of individual liberty. Such components are found in the Greco-Roman world and in the world of Jewish and Christian thought. But such an acknowledgment has to be followed up by examining whether these components are absent elsewhere-that is, in non-Western cultures. We have to search for the parts rather than the whole, in the West and in Asia and elsewhere....

In the terms of such an analysis, the question has to be asked whether these constitutive components can be found in Asian writings in the way they can be found in Western thought. The presence of these components must not be confused with the absence of the opposite, that is, with the presence of ideas and doctrines that clearly do not emphasize freedom and tolerance. The championing of order and discipline can be found in Western classics as well. Indeed, it is by no means clear to me that Confucius is more authoritarian than, say, Plato or Augustine. The real issue is not whether these non-freedom perspectives are present in Asian traditions, but whether the freedom-oriented perspectives are absent from them.

This is where the diversity of Asian value systems becomes quite central. An obvious example is the role of Buddhism as a form of thought. In Buddhist tradition, great importance is attached to freedom, and the traditions of earlier Indian thinking to which Buddhist thoughts relate allow much room for volition and free

choice. Nobility of conduct has to be achieved in freedom, and even the ideas of liberation (such as moksha) include this feature. The presence of these elements in Buddhist thought does not obliterate the importance of the discipline emphasized by Confucianism, but it would be a mistake to take Confucianism to be the only tradition in Asia—or in China. Since so much of the contemporary authoritarian interpretation of Asian values concentrates on Confucianism, this diversity is particularly worth emphasizing.

Indeed, the reading of Confucianism that is now standard among authoritarian champions of Asian values does less than justice to Confucius's own teachings, to which Simon Leys has recently drawn attention. Confucius did not recommend blind allegiance to the state. When Zilu asks him "how to serve a prince," Confucius replies: "Tell him the truth even if it offends him." The censors in Singapore or Beijing would take a very different view. Confucius is not averse to practical caution and tact, but he does not forgo the recommendation to oppose a bad government. "When the [good] way prevails in the state, speak boldly and act boldly. When the state has lost the way, act boldly and speak softly." ...

IV.

It is important to recognize that many of these historical leaders in Asia not only emphasized the importance of freedom and tolerance, they also had clear theories as to why this is the appropriate thing to do....

The point of discussing all this now is to demonstrate the presence of conscious theorizing about tolerance and freedom in substantial and important parts of the Asian traditions. We could consider many more illustrations of this phenomenon from writings in early Arabic, Chinese, Indian and other cultures. Again, the championing of democracy and political freedom in the modern sense cannot be found in the pre-enlightenment tradition in any part of the world, West or East. What we have to investigate, instead, are the constituents, the components, of this compound idea. It is the powerful presence of some of these elements—in non-Western as well as Western societies—that I have been emphasizing. It is hard to make sense of the view that the basic ideas underlying freedom and rights in a tolerant society are "Western" notions, and somehow alien to Asia, though that view has been championed by Asian authoritarians and Western chauvinists.

V.

I would like to conclude with a rather different issue, which is sometimes linked to the debate about the nature and the reach of Asian values. The championing of Asian values is often associated with the need to resist Western hegemony. The linkage of the two issues, which has increasingly occurred in recent years, uses the political force of anticolonialism to buttress the assault on civil and political rights in post-colonial Asia.

This linkage, though quite artificial, can be rhetorically quite effective. Thus Lee Kuan Yew has emphasized the special nature of Asian values, and has made powerful use of the general case for resisting Western hegemony to bolster the argument for Asian particularism. The rhetoric has extended to the apparently

defiant declaration that Singapore is "not a client state of America." This fact is certainly undeniable, and it is an excellent reason for cheer, but the question that has to be asked is what this has to do with the issue of human rights and political liberties in Singapore, or any other country in Asia.

The people whose political and other rights are involved in this debate are not citizens of the West, but of Asian countries. The fact that individual liberty may have been championed in Western writings, and even by some Western political leaders, can scarcely compromise the claim to liberty that people in Asia may otherwise possess. As a matter of fact, one may grumble, with reason, that the political leaders of Western countries take far too little interest in issues of freedom in the rest of the world. There is plenty of evidence that the Western governments have tended to give priority to the interests of their own citizens engaged in commerce with the Asian countries and to the pressures generated by business groups to be on good terms with the ruling governments in Asia. It is not that there has been more bark than bite; there has been very little bark, too. What Mao once described as a "paper tiger" looks increasingly like a paper mouse.

But even if this were not the case, and even if it were true that Western governments try to promote political and civil rights in Asia, how can that possibly compromise the status of the rights of Asians? In this context, the idea of "human rights" has to be properly understood. In the most general form, the notion of human rights builds on our shared humanity. These rights are not derived from citizenship in any country, or membership in any nation. They are taken as entitlements of every human being. These rights differ, therefore, from constitutionally created rights guaranteed for specified people (such as American citizens or French nationals). The human right of a person not to be tortured is affirmed independently of the country of which this person is a citizen, and also irrespective of what the government of that country—or any other country—wants to do. Of course, a government can dispute a person's legal right not to be tortured, but that will not amount to disputing what must be seen as the person's human right not to be tortured.

Since the conception of human rights transcends local legislation and the citizenship of the individual, the support for human rights can come from anyone—whether or not she is a citizen of the same country as the individual whose rights are threatened. A foreigner does not need the permission of a repressive government to try to help a person whose liberties are being violated. Indeed, insofar as human rights are seen as rights that any person has as a human being (and not as a citizen of any particular country), the reach of the corresponding duties can also include any human being (irrespective of citizenship)....

To conclude, the so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense. Nor is it easy to see how they could be made, by the mere force of rhetoric, into an Asian cause against the West.

The people whose rights are being disputed are Asians, and, no matter what the West's guilt may be (there are many skeletons in many closets throughout the world), the rights of Asians can scarcely be compromised on those grounds. The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. And this case is as strong in Asia as it is elsewhere.

There is a great deal that we can learn from studies of values in Asia and Europe, but they do not support or sustain the thesis of a grand dichotomy (or a

"clash of civilizations"). Our ideas of political and personal rights have taken their particular form relatively recently, and it is hard to see them as "traditional" commitments of Western cultures. There are important antecedents of those commitments, but those antecedents can be found plentifully in Asian cultures as well as Western cultures.

The recognition of diversity within different cultures is extremely important in the contemporary world, since we are constantly bombarded by oversimple generalizations about "Western civilization," "Asian values," "African cultures," and so on. These unfounded readings of history and civilization are not only intellectually shallow, they also add to the divisiveness of the world in which we live. The authoritarian readings of Asian values that are increasingly championed in some quarters do not survive scrutiny. And the grand dichotomy between Asian values and European values adds little to our understanding, and much to the confounding of the normative basis of freedom and democracy.

Comments and Questions

1. Recall that Lord Mansfield surmised, as a predicate to ordering Sommersett's release, that the "state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory." Contrast this with Chief Justice John Marshall's opinion for the U.S. Supreme Court several years later in *The Antelope*, 23 U.S. 10 (Wheat.) 66 (1825), a case that arose from the seizure in international waters off the coast of Florida of *The Antelope* by a U.S. revenue cutter for suspected violations of federal statutes prohibiting the international slave trade. Spain and Portugal claimed the Africans on board the ship as property of citizens of their countries, arguing that U.S. law could not apply to infringe upon the trade in that property because they were being transported on the high seas for delivery to Brazil, where the slave trade remained legal. The Court agreed that the United States must recognize the claims of Spain and Portugal to the return of the slaves on the basis of the applicable rules of admiralty and international law. Distinguishing between natural and positive law, Justice Marshall opted for the latter in justifying the Court's decision:

> That [the slave trade] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission....
>
> Throughout Christendom...war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?
>
> Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages,

> the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.
>
> It follows that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by and American Cruiser, and brought in for adjudication, would be restored.

Id. at 120-123. In contrast to Justice Marshall in *The Antelope*, was Lord Mansfield in Sommersett's case exercising judicial authority inappropriately by giving primacy to precepts of natural law? Or was Justice Marshall's reasoning flawed? Did it matter that Sommersett was being held in British territory, while *The Antelope* was seized on the high seas? See the discussion of the territorial scope of human rights treaties in Chapter 8, pages 681-696.

2. During the drafting of the Universal Declaration of Human Rights, the French Jesuit philosopher Teihard de Chardin opined that the process could reach agreement on a catalog of human rights provided it did not have to agree on why humans had them. What are the advantages and disadvantages of the various theories discussed above with respect to the actual or desirable sources of international human rights law? Would it be a persuasive answer that, in light of the plethora of norms discussed in this book, it just doesn't matter any more? For an excellent overview of positivist, natural law, and other philosophical approaches to human rights, see Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 Hum. Rts. Q. 201 (1998).

3. Is the cultural basis of the practice of female circumcision a proper defense against the charge that it is a violation of human rights? See generally UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14, UN Doc. A/45/38 (1990) (recommending that states "[t]ake appropriate and effective measures with a view to eradicating the practice of female circumcision"). Could the practice of slavery be defended on cultural grounds, given its grounding in cultural and religious perspectives and lifestyles of earlier periods?

4. Do you agree or disagree with the proposition that there are certain basic values that are common to all or most cultures of the world? Is the concept of "human dignity" advanced by Professor McDougal and his colleagues, *supra* pages 39-40, an advance over natural law in attempting to capture the source of these values? Assuming that human rights proponents of diverse cultural backgrounds do in fact converge on common "fundamental demands," what explains this?

5. The issue of relativism versus universality was debated thoroughly at the UN's 1993 World Conference on Human Rights, held in Vienna. The conference adopted the following statement by consensus:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic

> and cultural systems, to promote and protect all human rights and fundamental freedoms.

World Conference on Human Rights, Final Declaration and Programme of Action, UN Doc. A/CONF.157/23 (July 12, 1993), sec. I, para. 5.

Contrast this with article 4 of the Universal Declaration on Cultural Diversity, proclaimed by the UN Educational, Scientific, and Cultural Organization (UNESCO) in 2001:

> The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

Are the two declarations consistent? To what extent can respect for cultural diversity coexist with the application of universal human rights? Note that Article 1 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, CLT-2005, provides as follows:

> Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

6. Is it possible to distinguish between the human rights obligations imposed on states and cultural practices that individuals may choose to follow? Which does international human rights law address? See generally the discussion in Chapter 5.

7. Do you agree with Charlesworth's criticism of the public/private distinction? If the distinction is abolished, does any difference remain between international human rights law and national criminal law?

8. Many works raise various aspects of cultural relativism. See, e.g., Abdullah Ahmend An-Na'im, *Human Rights in the Muslim World*, 3 Harv. Hum. Rts. J. 13 (1990); Mashood A. Baderin, *International Human Rights and Islamic Law* (2003); Edna Boyle-Lewicki, *Need Worlds Collide: The Crimes of Islamic Law and International Human Rights*, 13 N.Y. Int'l L. Rev. 43 (2000); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 Hum. Rts. Q. 136 (1997); Chris Brown, *Universal Human Rights: A Critique*, 1 Int'l J. Hum. Rts. 41 (no. 2, 1997); *Confucianism and Human Rights* (Wm. Theodore de Bary and Tu Weiming eds., 1998); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 Hum. Rts. Q. 400 (1984); *The East Asian Challenge for Human Rights* (Joanne R. Bauer and Daniel A. Bell, eds., 1999); Ann Elizabeth Mayer, *Islam and Human Rights: Traditions and Politics* (3rd ed., 1999); Chandra Muzzafar, "Human Rights and Hypocrisy in the International Order," in *Dominance of the West over the Rest* (Chandra Muzzafar ed., 1995); Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 Hum. Rts. Q. 286 (1996); Alison Dundes Renteln, *The Cultural Defense* (2004). Torben Spaak, *Moral Relativism and Human Rights*, 13 Buff. Hum. Rts. L. Rev. 73

(2007). Burns H. Weston, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 Me. L. Rev. 317 (2008).

IV. A Brief History of Human Rights in International Law and Institutions

John P. Humphrey,* The International Law of Human Rights in the Middle Twentieth Century

In *The Present State of International Law and Other Essays* 75 (Maarten Bos ed., 1973)

[Professor Humphrey's essay was a contribution to the centenary celebration of the International Law Association, a nongovernmental association composed of academic scholars, practitioners, and government lawyers.]

I. Traditional Doctrine and Practice

When, a hundred years from now, the International Law Association celebrates its bicentenary, legal historians will surely be saying that one of the chief characteristics of mid-twentieth century international law was its sudden interest in and concern with human rights. The founding fathers of the Association had no such special interest. Since human rights were—and indeed still are—essentially a relationship between the State and individuals—usually its own citizens—residing in its territory, they were, in traditional theory and practice, considered to fall within domestic jurisdiction and hence beyond the reach of international law, the norms of which governed the relations of States only. But there were some exceptions or at least it could be argued that there were....

[The author proceeds to discuss the customary rules of international law governing the treatment of aliens and the doctrine of humanitarian intervention, discussed in Chapter 10.]

But if customary international law was only minimally and indirectly concerned with human rights, in the nineteenth and early twentieth centuries an increasing number of treaties were entered into the purpose of which was to protect, if only indirectly, the rights of certain classes of people. The most important of these were the treaties aimed at slavery and the slave trade.... Steps were also taken in the nineteenth century for the relief of sick and wounded soldiers and prisoners of war. By the Geneva Convention of 22 August, 1864, twelve States undertook to respect the immunity of military hospitals and their staffs, to care for wounded and sick soldiers and to respect the emblem of the Red Cross. The Convention was revised in 1929 and has been widely ratified.

In 1866, the second Berne Conference opened two conventions for signature which were forerunners of the many labour conventions which, after the first World War, would be adopted by the International Labour Organization: the International

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Convention respecting the Prohibition of Night Work for Women in Industrial Employment and the International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches.

II. The League of Nations

The peace settlement at the end of the First World War brought still more important developments. Attempts were made to enshrine human rights in the Covenant of the League of Nations. President Wilson sponsored an article on religious freedom; but when the Japanese suggested that mention also be made of the equality of nations and the just treatment of their nationals (which frightened some countries the laws of which restricted Asiatic immigration) both suggestions were withdrawn. Wilson put into his second draft an article under which the League would have required all new States to bind themselves, as a condition precedent to their recognition, to accord all racial and national minorities "exactly the same treatment and security, both in law and in fact, that is accorded the racial and national majority of their people." But the Peace Conference decided that the protection of minorities—though only in certain countries—would be dealt with not in the Covenant but by other treaty provisions and by declarations which certain States were required to make on their admission to the League.

Two articles dealing with human rights did find their way into the Covenant. One of these, Article 22, enunciated the principle that colonies and territories which as a consequence of the war had ceased to be under the sovereignty of the States which formerly governed them and which were inhabited by "peoples not yet able to stand by themselves under the strenuous conditions of the modern world," were to be put under the tutelage of advanced nations, who, as mandatories on behalf of the League, would be responsible for their administration under conditions which would guarantee amongst other things freedom of conscience and religion and the prohibition of abuses such as the slave trade. Provision was made for the creation of a permanent mandates commission to receive and examine the reports which the mandatories undertook to make.

The League's mandates system was taken over by the United Nations under a different name and subject to different rules. The Charter expressly says [in Article 76(c)] that one of the purposes of the Trusteeship system is to "encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." The language used in Articles 73 and 74 relating to non-self-governing territories is not so forthright, but at a very early date, the General Assembly invited the administering powers to include, in the information to be transmitted under Article 73(e), a summary of the extent to which the Universal Declaration of Human Rights was being implemented in the non-self-governing territories under their administration. The work of the committee set up to receive reports on the administration of non-self-governing territories has now been taken over by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples....

Human rights were also expressly dealt with in Article 23 of the Covenant. Members of the League, it said, would "endeavour to secure and maintain" fair and humane labour conditions, undertake to secure just treatment for the native

inhabitants of territories under their control, and entrust the League with the supervision of agreements relating to the traffic in women and children.

Although President Wilson's suggestion that the Covenant contain a provision protecting minorities was not pursued, the Allied and Associated Powers did require certain newly created States and States, the territory of which had been increased by reason of the war, to grant the enjoyment of certain human rights to all inhabitants of their territories and to protect the rights of their racial, religious and linguistic minorities. These obligations were imposed by treaty and by the declarations which certain States were required to make on their admission to the League—provisions relating to minorities being put under the guarantee of the League Council.

[Professor Humphrey explains how the United Nations system did not initially establish an elaborate system for the protection of minorities such as that developed by the League.] The exception was the adoption in 1948 of the widely ratified Convention on the Prevention and Punishment of the Crime of Genocide, which is aimed at the worst kind of treatment that can be meted out to minorities, namely, "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such."... [The mechanisms subsequently developed by the UN to address issues concerning minorities and indigenous peoples are discussed in Chapter 3, pages 189-199.]

The League of Nations also did important work on slavery. It created a special committee to study the question, was responsible for the drafting of the Slavery Convention of 1926, and, when Ethiopia applied for admission to the League, it required from her an undertaking to make special efforts to abolish slavery and the slave trade, Ethiopia recognizing that this was not a purely internal matter but one on which the League had a right to intervene.

The work of the League [against slavery] was continued by the United Nations....

Like the League of Nations the International Labour Organization was created by the peace treaties after the First World War. This Specialized Agency, which now has a history of over half a century of achievement, has adopted well over a hundred conventions which fix international standards many of which deal with human rights and some of which were inspired by the United Nations. It also possesses elaborate systems for the implementation of these standards. Some of them, particularly those relating to reporting, could be well emulated by the United Nations. Other Specialized Agencies, including UNESCO and the World Health Organization have also done important work for the promotion of human rights.

To sum up, international law recognized, by the beginning of the Second World War, a whole series of rules and institutions, as well as some procedures for their implementation, the effect of which was to protect the rights of individuals and groups, even though, in the dominant theory, the individual was neither a subject of international law nor directly protected by it. International law protected the rights of aliens through their States. There may have been a right of humanitarian intervention. Slavery and the slave trade were outlawed. The League of Nations had developed a system for the protection of certain racial, religious and linguistic minorities. There were provisions in the Covenant of the League of Nations for the protection of the rights of the natives of colonial [territories], and the inhabitants of mandated territories and of women and children. And the International

Labour Organization had adopted an impressive number of labour conventions, for the enforcement of which it possessed elaborate procedures.

III. The Impact of the Second World War and the United Nations

The Second World War and the events leading up to it was the catalyst that produced the revolutionary developments in the international law of human rights that characterize the middle twentieth century. So potent was this catalyst that it produced not only an unprecedented growth in human rights law, but the very theory of international law had to be adapted to the new circumstances. The individual now becomes a subject of international law which henceforth would more properly be known as "world law." He is directly protected by this law and can even in some cases seek his own remedy. And States can no longer rely on the plea of domestic jurisdiction. It was not only a matter of new norms being added within the confines of an existing order, but the very nature of that order had changed. What had happened was revolutionary. The Second World War was, as no other war has ever been, a war to vindicate human rights. This was recognized by the leaders of the Grand Alliance and perhaps best expressed by President Roosevelt when, in January 1941, before the United States entered the war, he defined four freedoms: freedom of speech, freedom of worship, freedom from want, freedom from fear—"everywhere in the world." These he said, were the "necessary conditions of peace and no distant millennium." Yet, when the Dumbarton Oaks Proposals were published in the fall of 1944 they contained only a general reference to human rights. The United Nations would, the Proposals said in a chapter on arrangements for international economic and social cooperation, "promote respect for human rights and fundamental freedoms"—something which considering its context and the generality of the language used hardly met the expectations of a public opinion shocked by the atrocities of the war.

The relatively strong human rights provisions in the Charter through which they run, as someone has said, like a golden thread, were largely, and appropriately, the result of determined lobbying by non-governmental organizations at the San Francisco Conference. Some of the countries represented at San Francisco would have accepted even stronger human rights provisions than found their way into the Charter. There was even an attempt, which failed, to incorporate in the Charter an International Bill of Rights. But the Charter did provide for the creation of a Commission on Human Rights which, as President Truman said in the speech by which he closed the Conference, would, it was generally understood, draft the bill.

This is not the place to analyse the human rights provisions of the Charter. But it should be said that Article One puts the promotion of respect for human rights on the same level as the maintenance of international peace and security as a purpose of the United Nations. And by Articles 55 and 56 member states pledge themselves to take joint and separate action "in cooperation with the Organization" for the promotion and universal respect of human rights, an undertaking which, according to a recent advisory opinion of the International Court of Justice (Advisory Opinion on the Continued Presence of South Africa in Namibia, [1977] I.C.J. 16), binds member states to observe and respect human rights. Reference has already

been made to Article 68 which provided for the creation of a Commission on Human Rights.

The Commission on Human Rights [which in 2006 was replaced by the Human Rights Council—see Chapter 7] held its first regular session in February, 1947 and, later in the same year, decided that the International Bill of Human Rights would have three parts: a declaration, a convention or conventions (later called the Covenants) and measures of implementation. Under the chairmanship of the late Eleanor Roosevelt, it worked so efficiently that the first part of the bill was ready for consideration by the General Assembly at its third session and was adopted by it without dissenting vote, on 10 December 1948, as the Universal Declaration of Human Rights.

The Declaration was not meant to be a legally binding instrument. This is apparent from the form in which it was adopted (resolutions of the General Assembly ordinarily have the force of recommendations only), the decision to include substantially the same norms in a convention which would be binding on the states which ratified it, and the many explanations of votes which delegations made when the Declaration was adopted. That was a quarter of a century ago. Many international lawyers now say that, whatever the intentions of its authors may have been, the Declaration is now binding as part of customary law. The point has yet to come squarely before the International Court of Justice although the separate opinion of Judge Fuad Ammoun in the Advisory Opinion mentioned above is indicative. [Judge Anunoun stated that "[a]lthough the affirmations of the Declaration are not binding qua international convention..., they can bind States on the basis of custom..., whether because they constituted a codification of customary law Y, or because they have acquired the force of custom through a general practice accepted as law...."] But whether the Declaration is now legally binding or not, it has great moral and political authority and its impact on the theory and practice of both international and national law has been profound. [The issue of the legal character of the Declaration is taken up in Chapter 3.]

In 1952, the General Assembly decided that there would be not one but two multilateral conventions or covenants on human rights, one on civil and political rights and the other on economic, social and cultural rights—a decision motivated chiefly by ideological considerations which split the United Nations down the middle. The Human Rights Commission completed its work on the two instruments in 1954, but it was only in 1966 that they were approved by the General Assembly and opened for signature. The long delay is partly explained by the fact that the debates on the drafts in the Third Committee were used for the ventilation of political controversies. [The Covenants came into force in 1976.] Apart from the fact that they... undoubtedly bind the states which ratify them, the Covenants are distinguished from the Declaration by the procedures which they contemplate for their implementation. If the Universal Declaration of Human Rights is now part of customary law, the chief raison d'etre of the Covenants... is now the presence in them of these enforcement procedures....

[The author proceeds to survey the implementation mechanisms contained in the two Covenants, which he believes are inadequate, matters that are considered in Chapter 7.]

It is vastly more difficult to obtain international agreement on procedures for implementation than on substantive norms. For, while states with disparate social systems may agree without too much difficulty on objectives, they have radically

different methods for translating these objectives into reality. Implementation involves basic philosophical approaches and ultimate social goals. It was, therefore, to be expected that there would be fundamental disagreement in the United Nations on the establishment of international machinery for the enforcement of norms agreed on as expressions of immediate goals....

V. A New Catalogue of Rights

This essay has been chiefly concerned with structural or institutional arrangements for the promotion and protection of human rights. In a sense, we have been discussing *Hamlet* without the Prince of Denmark. There are two reasons for this. In the first place, there is now relative agreement on the definition of human rights, something which appears most clearly, perhaps, from the fact that the Universal Declaration of Human Rights, which covers the whole gamut of rights, was adopted without dissenting vote. Something must be said, however, about the catalogue and nature of the human rights now recognized by international law.

The principal characteristic of the twentieth century approach to human rights has been its unambiguous recognition of the fact that all human beings are entitled to the enjoyment not only of the traditional civil and political rights but also of the economic, social and cultural rights without which, for most people, the traditional rights have little meaning. One of the chief claims of the Universal Declaration of Human Rights to a place in history is its recognition of this simple truth. The United Nations, however, has always recognized that there is a difference between what can be expected from States in the implementation of economic and social rights and in the enforcement of civil and political rights. The former are looked upon as programme rights, the implementation of which is to be progressive. This is particularly true of economically underdeveloped countries with large populations to feed, which can hardly be expected to guarantee the immediate implementation of all economic and social rights. Even highly industrialized States will hesitate before guaranteeing the right, for example, to work—on any literal interpretation of the meaning of that right. The decision of the General Assembly in 1952 to have two covenants instead of one was rationalized by such considerations; but it is probable that there were also other influences at work, including the fear, in some countries, of socialism. It would have been technically possible to include both categories of rights in the same instrument with different systems for their implementation, and thus to retain the essential unity of the two categories of rights recognized by the Universal Declaration of Human Rights....

VI. Conclusion

[One comes finally] to the question of the increasing politicization of human rights in the United Nations. Human rights cannot, nor is it desirable that they should, be divorced from politics. To do so would be to divorce them from reality. And as a matter of fact there has always been a good deal of political controversy in the debates on human rights in organs like [those of the United Nations]....

But there are also some encouraging developments. One of these is the expansion of the concept of human rights to cover new values... and new threats to human dignity. The Universal Declaration of Human Rights speaks, for example, of the right to privacy. But privacy was not threatened in 1948 as it now is by new developments in science and technology, including the computer. These and other contemporary challenges to human dignity are aggravated by their increasing transnational character and national measures will not be able to cope with them. It may be safely predicted, therefore, that, if the international community has a future, the United Nations will have to adjust itself to new circumstances and that the body of international human rights law will continue to grow.

...[I]t is still possible, notwithstanding temporary reverses in the United Nations, to speak of an ever growing interest of lawyers in international human rights law. But that interest no longer has as its chief source the [World War II] and the events which led up to it, which are already beyond the experience of many international lawyers and other actors. The need to strengthen greatly the guarantees which international law can provide for the rights of individuals and groups is still paramount. More and more the individual stands alone in the face of an all-pervading State. Majorities are still intolerant. People are still discriminated against because of their race, sex, language, religion and other attributes. The great majority of people do not enjoy the economic, social and cultural rights without which there can be little human dignity. And... men and women are faced with new threats to their human dignity, including some unexpected byproducts of an advancing and otherwise beneficial technology. One thing is certain. The increasing contemporary interest in, and concern for, human rights does not necessarily mean that the men and women of the middle twentieth century, are more enlightened than their ancestors were or their descendants may turn out to be. Concern for the rights of the individual is more likely to be, as it has usually been in history, a sign that his rights are in special jeopardy and of a deep social malaise.

V. Final Comments and Questions

1. In his historical overview, Professor Humphrey predicts that international human rights law will continue to grow as additional challenges are taken on or arise. That prediction has held true, as numerous new human rights instruments and specialized procedures have been promulgated by the United Nations and other international institutions since Humphrey's piece was published in 1973. These new instruments and procedures cover an array of categories, including the rights of women, children, indigenous peoples, minorities, migrant workers, and human rights defenders, as well as a number of specific issues, such as torture, forced disappearances, religious intolerance, the environment, and the responsibilities of non-state actors. Additionally, regional human rights systems with parallel institutions and standard-setting instruments have developed in the Americas, Africa, and Europe, and a limited structure has been created by the Association of Southeast Asian Nations (ASEAN); see Chapters 5, 8, and 9. For additional background and a succinct overview of the UN and regional human rights regimes, see Thomas Buergenthal, *The Evolving International Human Rights System*, 100 Am. J. Int'l. L. 783 (2006).

2. What does it mean to say that human rights are "inherent," and why are they so? Consider that elephants mourn their dead, bonobos transmit learning (i.e., cultural practices) to their young, chimpanzees use tools and can communicate in sign language, and dolphins as well as primates have exhibited altruistic behavior. See *Minding Animals: Awareness, Emotions, and Heart* (Marc Bekoff ed., 2002); Jeffery Moussaieff Masson and Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* (1995). We share 98 percent of our genome with higher primates. At the end of the film *Blade Runner,* the dying replicant (i.e., robot) reaches out to save the life of the person who has been hunting him in order to kill him. What defines human? Cf. Stephen P. Marks, *Tying Prometheus Down: The International Law of Human Genetic Manipulation,* 3 Chicago J. Transnat'l L. 115 (2002).

3. Humphrey mentions the human rights challenges that may be faced in the future by advances in science and technology. See generally *New Technologies and Human Rights* (Thérèse Murphy ed., 2009). In 2005, the General Conference of UNESCO adopted by acclamation the Universal Declaration on Bioethics and Human Rights, which addresses "ethical issues related to medicine, life sciences and related technologies as applied to human beings." The Declaration affirms that "[t]he interests and welfare of the individual should have priority over the sole interest of science or society" (art. 3.2). In light of this proposition, consider the quickly developing technology and research that, if continued, could lead to the capacity to clone humans. There appears to be general agreement worldwide that human reproductive cloning should be banned, although governments are deeply divided on the validity of research cloning of human embryos, which scientists claim could yield important medical advances. See generally National Research Council, *Scientific and Medical Aspects of Human Reproductive Cloning* (2002).

In 2005, the UN General Assembly adopted, by a vote of 84 to 34 with 37 abstentions, a Declaration on Human Cloning, GA Res. 59/280 (Mar. 8, 2005). The declaration calls upon states to "prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life." Id., para. (b). Because of the nonbinding character of the declaration and the fact that it does not reflect a consensus of states, it is not likely to impede the progress of research on embryonic cloning in many countries. Given that this ongoing research is likely to result in advances in embryonic cloning that would make reproductive cloning medically safe, many speculate that it is only a matter of time before human reproductive cloning will occur. See Kerry Lynn Mcintosh, *Illegal Beings: Human Clones and the Law* (2005); Stephen P. Marks, *Human Rights Assumptions of Restrictive and Permissive Approaches to Human Reproductive Cloning,* 6 J. Health & Hum. Rts. 81 (2002).

Contrary to popular belief, human clones would not be exact replicas of existing or dead persons; the identity in DNA would yield fewer similarities than those that exist between identical twins. Id. at 12-14. Nonetheless, if human clones are produced, they may be stigmatized by a continuing aversion to reproductive cloning. Do current efforts to ban research contribute to stigmatizing potential human clones? Assuming that human clones may one day exist, how should the international human rights movement respond to any such stigmatization of clones or other difficulties they may encounter? Would extending human rights protections to clones in some way validate human cloning? Consider the following lyrics from

the Pat Benatar song, "My Clone Sleeps Alone," familiar to many among the baby boomer generation, which reflects likely stereotypes:

You know and I know my clone sleeps alone
She's out on her own—forever
She's programmed to work hard, she's never profane
She won't go insane, not ever....

Your clone loves my clone, but yours cannot see
That's no way to be, in heaven
No sorrow, no heartache, just clone harmony
So, obviously, it's heaven.

No naughty clone ladies allowed in the eighties
No bed names, no sex games, just clone names and clone games
And you know and I know my clone sleeps alone....

But they won't remember or ever be tender
No loving, no caring, no program for pairing
No VD, no cancer, on TV's the answer
No father, no mother, she's just like the other....
And you know and I know my clone sleeps alone....