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# UNIVERSAL HUMAN RIGHTS: A GENERATIONAL HISTORY

ERIC ENGLE\*

Human rights are universal. Not in the sense of being the same positive laws, at all times and places, but rather as being aspirational goals, at all times and places, and also as containing core values which are indeed universal, such as the right to life (no irrational deprivation of life). Histories of human rights usually propose that the concept has evolved through at least three separate historical waves. This historical account, while roughly accurate, must be clarified as a theoretical construction which corresponds only partially to the historical reality: the rights of women and of non-white persons, in fact, arose relatively late in history. With that qualification, however, the historical description is roughly accurate, and also explains why we can speak of human rights as “universal” in a meaningful sense. While human rights are a possible, and not necessary, consequence of economic development, there is nothing uniquely “western” about human rights. Indeed, all cultures aspire to what Aristotle described as “the good life.” At least in this sense, human rights are universal as all humans are rational animals gifted with speech.

## I. INTRODUCTION

The world has undergone a transformation of international systems, from a Westphalian system of nation-states, to a post-Westphalian international system based on transnational institutions. This post-Westphalian system sees state power devolve to local, or even private, entities and

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assigns rights and duties under international law to non-state actors.<sup>1</sup> Because human rights law assigns legal rights and duties under international law to non-state actors, it is a key feature of the post-Westphalian system. In order to determine whether, and how, human rights serve as an element in post-Westphalian global governance, we must examine first whether human rights are universal. If human rights are, or can be, universal then we must examine the historical development of human rights.

## II. THE PARADIGM SHIFT: FROM SOVEREIGN STATES TO INDIVIDUAL RIGHTS

The paradigm shift from a system which regarded only states as subjects of international law,<sup>2</sup> enjoying absolute and inviolable power within their own borders, to a system which constrained the absolute power of the state, recognized non-state actors as having rights and duties under international law, and ultimately protected individuals against state and private actors<sup>3</sup> by recognizing non-state actors as having both rights and duties under international law,<sup>4</sup> occurred in several fields simultaneously. As a result<sup>5</sup> of the horrors of the Second World War,<sup>6</sup> the second failure of the Westphalian system to maintain global peace in as many generations, individuals and organisations were tried for crimes under international law:<sup>7</sup> crimes against peace, crimes against humanity<sup>8</sup> and war crimes<sup>9</sup> at the Nuremberg Trials.<sup>10</sup> The defences raised by the accused -

1. The "shift in sovereignty accompanying globalisation has meant that non-state actors are more involved than ever in issues relating to human rights." Dinah Shelton, *Protecting Human Rights In A Globalized World*, 25 B.C. INT'L. COMP. L. REV. 273, 273 (2002) available at: <[http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bciclr/25\\_2/06\\_TXT.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/06_TXT.htm)>.

2. Individuals and non-state actors in the Westphalian system were considered mere "objects" of international law. ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD*, 14 (Polity Press 1990).

3. International Human Rights protects individuals against state action and even against private action. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW*, 98 (Oxford: Clarendon 1989).

4. International Human Rights law assigns rights and even duties to individuals. *Id.* at 101.

5. Louis B. Sohn, *The New International Law: Protection Of The Rights Of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

6. ANTONIO CASSESE, *supra* note 2, at 15 (arguing that the second world war inaugurated a radical reconceptualization of international law).

7. Robert D. Sloane, *The Changing Face Of Recognition In International Law: A Case Study Of Tibet*, 16 EMORY INT'L L. REV. 107, 144 (2002) (human rights documents founded sprang from the ruins of the Second World War).

8. For a discussion of contemporary issues in crimes against humanity see: Simon Chesterman, *An Altogether Different Order: Defining The Elements Of Crimes Against Humanity*, 10 DUKE J. OF COMP. & INT'L L. 307 (2000) available at: <<http://www.law.duke.edu/shell/cite.pl?10+Duke+J.+Comp.+&+Int'l+L.+307>>.

9. Louis B. Sohn, *supra* note 5, at 11.

sovereign immunity, official immunity,<sup>11</sup> *nullum crimen sine lege*,<sup>12</sup> *respondeat superior*,<sup>13</sup> compulsion<sup>14</sup> and one's duty to obey<sup>15</sup> the orders of a lawfully appointed superior<sup>16</sup> - were all, for various reasons, rejected.

Knowingly or not, however, in assigning a legal duty to individuals to obey certain norms entailing an obligation *erga omnes*<sup>17</sup> - to *disobey*, under certain circumstances, the command of the sovereign - the International Military Tribunal broke from the Westphalian model.

Just as noteworthy as the break from the Westphalian system, the Tribunal also was forced to recognize universal principles of natural justice.<sup>18</sup> The non-retroactivity of law (no *ex post facto* criminal laws) was a principle of law since at least the French *Déclaration des Droits de l'Homme*,<sup>19</sup> although Hobbes did mention the principle earlier.<sup>20</sup> These breaches of the enlightenment principle of legality, crime would be defined only prior to its commission, and the Westphalian principle of the hermetic nature of sovereignty, might have been regarded as particular exceptions resulting from unique circumstances. Philosophically however they could only be justified *via* a theory of natural law:<sup>21</sup> the war crimes were such a basic, and self-evident, violation of the inherent dig-

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10. Charter Of The International Military Tribunal August 8, 1945, art. 6, [hereinafter IMT] available at: <<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>>. Nuremberg in German is Nürnberg.

11. IMT art. 7.

12. Paul Feuerbach, *Lehrbuch des gemeinen in Deutschland gueltigen peinlichen Rechts* (1st ed. 1801) cited in: *The Trial of Adolf Eichmann*, Defence Submission 2, available at: <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Defence-Submission-02-01.html>>.

13. Jeanne L. Bakker, *The Defense Of Obedience To Superior Orders: The Mens Rea Requirement*, 17 AM. J. CRIM. L. 55, 57 (1989).

14. *Id.* at 62.

15. *Id.* at 58.

16. IMT art. 8. This is perhaps the most counterintuitive problem posed by the Nuremberg principles: the duty of an individual to disobey the sovereign under international law is incongruent with the rationale of the Westphalian system. Once a duty was imposed on individuals to disobey the orders of the sovereign, the argument that only the sovereign should be the intermediary of the individual in the international arena becomes illogical. How can one be required at once to disobey the sovereign and expected to rely on that sovereign for protection internationally? By implication, Nuremberg ended the monopoly of the state as representative of the individual internationally.

17. Alfred P. Rubin, *Actio Popularis, Jus Cogens, and Offenses Erga Omnes*, 35 N. ENG. LAW REV. 265, 267 (2001) available at: <<http://www.nesl.edu/lawrev/Vol35/35-2/rubin.pdf>>.

18. Nuremberg Trial Proceedings Vol. 19, One Hundred And Eighty-Seventh Day, Friday, 26 July 1946 available at: <<http://www.yale.edu/lawweb/avalon/imt/proc/07-26-46.htm>>.

19. Déclaration des droits de l'homme, art. 8.

20. HOBBS, LEVIATHAN (1651), chs. XXVII-XXVIII.

21. "Lex mala, lex nulla" - an evil law is no law at all. THOMAS AQUINAS, SUMMA THEOLOGICA, (2d Ed., 1920) citing Augustine "that which is not just seems to be no law at all" (De Lib. Arb. i, 5) available at: <<http://www.newadvent.org/summa/209502.htm>>.

nity of humans that they were implicitly prohibited under *ius naturale*.<sup>22</sup> Thus, in order to escape accusations of violating the principle *nullum crimen, nulla poena, sine praevia lege*,<sup>23</sup> the court had to acknowledge arguments based on a theory of universal law – natural justice.

The courts at Nuremberg and in *Eichmann* thus could not escape from the idea of morality. Nor could they escape from the idea that all that is moral, is also lawful (and possibly even from the idea that all that is immoral, is also unlawful - because the defense of many of the criminals was that they were following orders). And this, despite the fact that until then the entire tendency of legal theory, at least since the year 1880, tended toward positivism, with theories of natural law dismissed as pre-scientific, wishful thinking or even naiveté. However, looking at legislation, clearly much immorality is perfectly legal. This aporism explains why these cases are problematic, and why natural law will continue to haunt positivism. The only way out of this dilemma is to recognize law is about force; justice is about morality. Positivism and natural law can, in fact, be linked (as Hobbes and Aristotle did)<sup>24</sup> by distinguishing natural law (*lex naturale*)<sup>25</sup> from natural *justice*. Justice is about morality, and an unjust law, while positively obligatory, is not legally binding – as Cicero,<sup>26</sup> Aquinas,<sup>27</sup> and many others discussed. Only through distin-

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22. For example, when Eichmann was tried for “crimes against the Jewish people,” the trial court’s judgment (not necessarily the appeal!) relies on Blackstone arguing that *mala in se* can be prohibited *ex post*, because they are violations of natural law and are attempts to make a questionable distinction between *ex post facto* and retroactive laws. In contrast, the Appellate judgment relies on the positivist Kelsen. “There is no rule of general customary international law forbidding the enactment of norms with retrospective force, so called *ex post facto* law.” HANS KELSEN, *PEACE THROUGH LAW*, 87 (1944). The judgment also relied on Stone, “[t]here is clearly no principle of international law embodying the maxim against retroactivity of criminal law.” JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT*, 369 (1959). The court even points out: “...it is hardly necessary to invoke natural law to condemn the mass slaughter of helpless human beings. Murder is generally taken to be a crime in positive international law.” FRIEDMANN, *LEGAL THEORY*, 316 (Columbia University Press, 4th ed.). Despite these positivist references the Israeli supreme court *still* felt compelled to contradict its positivism and rely, finally, on: “universal moral values and humanitarian principles which are at the root of the systems of criminal law adopted by civilized nations.” *Israel v. Eichmann*, Criminal Case No. 40/61 (district court) available at: <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-001.html>>; *Israel v. Eichmann* (S. Ct.) available at: <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Appeal/Appeal-Session-07-01.html>>.

23. James Poppo, *The Right to Protection from Retroactive Criminal Law*, 13 CRIM. L. JNL. 4, 251-62 (1989); 2 AUSTRALASIAN LAW STUDENTS’ ASSOC’N J., 5-18 (1989) available at: <<http://cs.anu.edu.au/~James.Poppo/publications/articles/retroactive/2.shtml>>.

24. ARISTOTLE, *POLITICS*, Book V.

25. HOBBS, *LEVIATHAN*, Ch. XIV, para. 3. Hobbes’ *lex naturalis* is the law of self-preservation, implicitly *via* the use of force if necessary.

26. CICERO, *THE REPUBLIC* at III, XXII (Loeb Classical Library, 1950), available at: <<http://www.thelatinlibrary.com/cicero/repub.shtml>> (lat.).

27. THOMAS AQUINAS, *SUMMA THEOLOGICA*, SECUNDA SECUNDAE PARTIS §57 (Right), available at: <<http://www.newadvent.org/summa/3.htm>>.

guishing the two, can the supposed dichotomy between positivism and natural law be resolved.<sup>28</sup>

Nuremberg was not only remarkable because it broke from the Westphalian model and raised serious theoretical implications, it was also problematic. The victorious powers had also committed acts of dubious legality - mass aerial bombardment of civilian populations,<sup>29</sup> the use of chemical weapons (specifically, white phosphorous) and even atomic bombardment.<sup>30</sup> The shadow of Nuremberg points an accusing finger at those who judged, but were not themselves judged.<sup>31</sup> Perhaps for this reason (i.e. the need to provide legitimacy to the post-war order and the decisions at Nuremberg), and certainly because of the depth of devastation, the international legal system was irrevocably changed through the establishment of limitations on sovereign power: states would no longer have the right to launch wars of aggression, and could only resort to force in self-defense.<sup>32</sup> An international governing body, the United Nations, with the power to approve or disapprove of the use of force,<sup>33</sup> arose like a Phoenix out of the ashes of the failed League of Nations, and devastated continents.

Ultimately the post-war system outlawed wars of aggression;<sup>34</sup> recognized a right to humanitarian assistance<sup>35</sup> and a right of humanitarian

28. See, Eric Engle, *Critical Legal Studies in America* (2000) available at: <<http://www.gradnet.de/alt/pomo2.archives/pomo2.papers/engle00.htm>>.

29. The League of Nations had already condemned aerial bombardment of civilians: Protection of Civilian Populations Against Bombing From The Air In Case Of War, Unanimous resolution of the League of Nations Assembly, Sept. 30, 1938, available at: <[http://lessons.ctaponline.org/~murphy\\_s/Nuclear/Text%20Evidence/international\\_law\\_on\\_the\\_bombing.htm](http://lessons.ctaponline.org/~murphy_s/Nuclear/Text%20Evidence/international_law_on_the_bombing.htm)>.

30. The use or threat to use nuclear weapons is probably a war crime and/or a crime against humanity. See, *On the Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, The Hague, 8 July 1996; Resolution On Nuclear Weapons United Nations, November 24, 1961, General Assembly Resolution 1653.

31. See, e.g., Alfred P. Rubin, *supra* note 17, at 280. “[N]o such tribunal existed outside of various victors’ tribunals (like the post-WWII allied tribunals at Nuremberg, Tokyo and elsewhere), which did not apply the same ‘law’ to the victors’ leaders that they applied to the leaders of the vanquished state or forces.”

32. “Article 2(4) of the UN Charter comprehensively prohibits the use of force, thereby surpassing the 1928 Kellogg-Briand Pact’s prohibition of going to war as a political means.” Jost Delbruck, *A More Effective International Law Or A New "World Law"? – Some Aspects Of The Development Of International Law In A Changing International System*, 68 *IND. L.J.* 705, 707-708 (1993).

33. Charter of the United Nations, ch. VII, art. 41, available at: <<http://www.un.org/aboutun/charter/>>.

34. Jost Delbruck argues that in the post-cold war era the definition of “aggression” is becoming broader. See, Jost Delbruck, *supra* note 32, at 708.

35. Humanitarian assistance appears undefined in international law. For attempts at definitions see, Noëlle Quéniévet, *Humanitarian assistance: a right or a policy?*, *J. HUMANITARIAN ASSISTANCE* (June, 2000), at: <<http://www.jha.ac/articles/a030.htm>> and also, Songiee Song, *NGOs and UN System in Humanitarian Assistance in War Zones: Focusing on Somalia and Rwanda*, (M.A. thesis, 2000) at: <<http://gias.snu.ac.kr/i/i-thesis/i-0008thesis/sisong.pdf>>. In the U.S., domes-

intervention;<sup>36</sup> accorded rights and duties to non-state actors, including non-governmental organisations (NGOs);<sup>37</sup> recognized individual and corporate liability in crime, or in tort, under international human rights law; and guaranteed human rights in international declarations, resolutions, and conventions. At the same time, universal<sup>38</sup> jurisdiction expanded.<sup>39</sup> State powers at the national level have simultaneously 1) devolved “downward” to regional, provincial, and municipal entities; 2) transferred “upward” to *supra*-national economic and political organisations; and 3) privatised “outward” to corporations. Meanwhile, individuals and other non-state actors increasingly are accorded rights and duties under international law. All of these changes have imposed real limits on, and expose the greatly reduced role of, the, formerly, absolute sovereign power of “The State.”

Any of these facts alone might be seen as mere derogations from the Westphalian system. But, taken together, it is similar to the problem of the ship of Theseus: if enough planks are replaced in Theseus' ship (here the Westphalian system), is it still his ship?<sup>40</sup> The author is of the opinion that the rise of continental and global free-trading regimes such as MERCOSUR, the E.U., the Andean Pact, NAFTA, ASEAN, coupled

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tic law humanitarian assistance is defined (22 U.S.C. § 2296 (b)(2)) as “assistance to meet humanitarian needs, including needs for food, medicine, medical supplies and equipment, education, and clothing.” Available at: <[http://caselaw.lp.findlaw.com/cascode/uscodes/22/chapters/32/subchapters/i/parts/xii/sections/section\\_2296.html](http://caselaw.lp.findlaw.com/cascode/uscodes/22/chapters/32/subchapters/i/parts/xii/sections/section_2296.html)>.

36. “Humanitarian intervention is the threat or use of force by a state, group of states, or international organisation primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.” Tania Voon, *Closing The Gap Between Legitimacy And Legality Of Humanitarian Intervention: Lessons From East Timor And Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 34 (2002). Some historical precedents exist even prior to the world wars for the right of humanitarian intervention in order to protect human rights. See Louis B. Sohn, *supra* note 5, at 5.

37. The extent of NGO's appears to be growing, and NGOs are even implicated in the question of whether states have a right of intervention to provide humanitarian assistance. See C. STAHN, NGO'S AND INTERNATIONAL PEACEKEEPING, 61 ZaÖRV 379 (2003).

38. William C. Plouffe, *Sovereignty In The "New World Order": The Once And Future Position Of The United States, A Merlinesque Task Of Quasi-Legal Definition*, 4 TULSA J. COMP. & INT'L L. 49, 54 (1996). Recognizing at least five bases for jurisdiction under international law “(1) the territorial principle, (2) the nationality principle, (3) the protective principle, (4) the passive personality principle, and (5) the universality principle.”

39. *But see*: D. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY (R. Macdonald, D. Johnston eds., (1986)). Acknowledges the existence of universal jurisdiction under the passive and active personality principle and the protective principle (560-562), but argues that while universal jurisdiction exists in cases of piracy and air piracy, that (despite *Eichmann* and the 1949 Geneva Conventions!) universal jurisdiction does not, or should not, exist as to war crimes, terrorism, or apartheid (563-564).

40. The philosophical problem of the ship of Theseus is not “which ship belongs to Theseus.” Instead it is, “what do we mean by identity?” (or even, “what do we mean by possession?”). See, e.g., *Theseus*, (2003) at: <<http://www.angelfire.com/ga/Jaimeisms/tst.html>>.

with global trading regimes (WTO, GATS and TRIPS), each featuring binding adjudication and governance mechanisms, implies the present system is a post-Westphalian system. States are no longer primary actors, but rather one actor among many others. The post-Westphalian system could be compared, speaking very approximately, to the Holy Roman Empire or perhaps even the Austro-Hungarian Empire; several different peoples and religions subject to nominal political entities (the E.U., MERCOSUR, the U.N.) which guarantee liberal trade and protect minorities. However, the contemporary multinational system is not merely continental – it is global. Today, international law, led by the U.N., recognizes, and to some extent even guarantees, human rights. What caused this paradigm shift? How were these new rights – now inherent in individuals and groups, not in states – grounded?

#### A. ELABORATION OF GLOBAL HUMAN RIGHTS NORMS: OPINIO JURIS

Historically, the legal imputation to, and acquisition of rights by, individuals in the post-war world, can be analyzed as having been driven by trans-national and conventional global systems.<sup>41</sup> Because human rights claim to be universal, and because individual human rights most seriously challenge the assumptions of the Westphalian system, our primary focus will be on the discovery of individual rights at the global level. In fact, trans-national efforts, such as the European Court of Human Rights, have been even more successful at imputing rights to individuals than global efforts. However, the claim that the post-Westphalian order imputes legal rights to individuals can be best demonstrated by analysing the claim at its boldest, and weakest, point – the creation of weak, but universal, human rights protections under the *aegis* of the U.N. and regional convention systems.

One feature of the post-Westphalian world is the rise of a series of interlocking U.N. conventions based on universal norms,<sup>42</sup> which this author refers to as “the U.N. convention system.”<sup>43</sup> These conventions, which can also be found at the regional level, whether continental<sup>44</sup> or hemispheric,<sup>45</sup> are promulgated by international organizations seeking to pro-

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41. ANTONIO CASSESE, *supra* note 2, at 22.

42. Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 69, 136 (Oxford Univ. Press, 2d ed., 2000).

43. Philip Alston, *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system*, Geneva: UN, (1997).

44. [European] Convention For The Protection Of Human Rights And Fundamental Freedoms, 213, available at: <<http://heiwwww.unige.ch/humanrts/instree/z17euroco.html>>.

45. For example, the [Inter] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, available at: <<http://heiwwww.unige.ch/humanrts/oasinstr/zoas3con.htm>>.



tect human rights and guarantee freedom of commerce. These organizations promulgate these conventions because liberal economic theory postulates that free trade increases prosperity and reduces the likelihood of war by de-linking economy and territory.

The transformation of the Westphalian system has occurred *via* a functionalist proliferation of treaties,<sup>46</sup> which are either general or specific as to their subject matter, are either regional<sup>47</sup> or global<sup>48</sup> in jurisdiction, and which aspire to attract voluntary, universal membership.<sup>49</sup> The convention system is, in fact, widely adhered to: “three-quarters or more of United Nations member states have ratified five of the six human rights treaties.”<sup>50</sup> These networks of norms have been constantly expanding and are interlocking, i.e. they are mutually reinforcing.<sup>51</sup>

The various human rights treaties usually feature enforcement mechanisms including, generally, an expert monitoring body with power to hear petitions from state parties, and sometimes even from individuals<sup>52</sup> or other non-state actors.<sup>53</sup> These usually include an obligation to submit reports<sup>54</sup> to a committee,<sup>55</sup> and a right (sometimes optional)<sup>56</sup> of states against other states and, possibly, individual rights of action. For example, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture, all offer indi-

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46. Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 216-217 (2002) (notes proliferation in treaties and that the proliferation of treaties is accompanied by the rise in international organizations).

47. *Id.* at 217-218 (nearly half of all multilateral treaties developed by the U.N.).

48. Elsa Stamatopoulou, *The Development Of United Nations Mechanisms For The Protection And Promotion Of Human Rights*, 55 WASH. & LEE L. REV. 687, 688-689 (1998). Describes the global U.N. convention system – CEDAW, CAT, ICCPR, CESC, and CERD.

49. Jose E. Alvarez, *supra* note 46, at 220 (describes formative processes of multilateral treaties).

50. Caroline Dommen, *The U.N. Human Rights Regime: Is It Effective?* 91 AM. SOC'Y INT'L L. PROC. 460, 466 (1997). (Remarks By Anne F. Bayefsky).

51. *Id.* at 462-463. (Remarks by Thomas Buergenthal, U.N. human rights system of web of treaties, mechanisms and instruments seeking to “ratchet-up” human rights).

52. The fact that individuals have rights and duties under international law is so clear that the more interesting question is whether such rights and duties can be implied in the treaty or must be expressly stated. See Jordan J. Paust, *The Other Side Of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 51-52 (1992). Given the state practice of recognizing rights and duties inhering in individuals, and the fact that treaties are to be construed liberally, the better argument is that it is possible to imply an individual right or duty in the terms of a treaty.

53. Monica Pinto, *Fragmentation Or Unification Among International Institutions: Human Rights Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 833, 833 (1999).

54. *E.g.*, ICCPR, art. 40, available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.

55. *E.g.*, ICCPR, art. 28, available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.

56. *E.g.*, ICCPR, art. 41, available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.

vidual complaint procedures.<sup>57</sup> However, these conventions are often subject to reservations.<sup>58</sup>

Nevertheless, this process can be properly called the constitutionalization of a new body of international law, international human rights law, with very different presumptions and goals than the now defunct Westphalian system.<sup>59</sup> This system,<sup>60</sup> an interlocking network of conventions, thus contributes to the post-Westphalian system of global governance.<sup>61</sup> For example, the function of the International Bill of Rights - i.e. the UDHR, the ICCPR and the CESCRR - is to change the behavior of states.<sup>62</sup> The supplementary treaties on race (Convention on the Elimination of Racial Discrimination - CERD),<sup>63</sup> gender (Convention on the Elimination of All Forms of Discrimination against Women - CEDAW)<sup>64</sup> and children,<sup>65</sup> similarly seek to change the behavior of states. National courts regard the decisions, for example of the HRC, as at least persuasive evidence<sup>66</sup> of law,<sup>67</sup> and should, and sometimes do, interpret domestic law as necessarily consistent with international obligations.<sup>68</sup>

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57. Caroline Dommen, *supra* note 50, at 463. (Remarks by Thomas Buergenthal).

58. U.S. practice in making extensive reservations to treaties is often criticised. *See, e.g.,* Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, ASIL INSIGHTS (May, 2003) at: <<http://www.asil.org/insights/insigh105.htm>>.

59. Nigel David White, *The United Nations System: Conference, Contract Or Constitutional Order?* 4 SING. J. INT'L & COMP. L. 281, 298 (2000).

60. Claire Moore Dickerson, *Human Rights: The Emerging Norm Of Corporate Social Responsibility*, 76 Tul. L. Rev. 1431, 1449 (2002) (describes U.N. convention system as democratic global governance).

61. Jose E. Alvarez, *supra* note 46, at 232-233 (describes world as evolving toward institutions and processes of global governance).

62. Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1957-1958 (2002) (describes processes of multilateral treaty making).

63. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; available at: <<http://www.tufts.edu/departments/fletcher/multi/texts/BH490.txt>>.

64. Available at: <<http://www.hrweb.org/legal/cdw.html>>.

65. Deborah E. Anker, *Refugee Law, Gender, And The Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 134 (2002).

66. E.C.H.R. cited by an Indian court as evidence of a general principle of law: *Hussainara Khatoon and Others v. Home Secretary, State of Bihar* (1980), 1 SCC 81 (Indian Supreme Court). *But see, Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds* 105 S. Ct. 2992 (1985). (Custom not found in conventions, resolutions); *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (DC Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *Cf. Fernandez Roque v. Smith*, 622 F. Supp. 887 (ND Ga. 1985) *modified sub nom. Fernandez-Roque v. Meese*, 781 F.2d. 1450 (11th Cir. 1986). *See also, Ishtyaq v. Nelson*, 627 F. Supp. 13 (EDNY 1983) and *Soroa-Gonzalez v. Civiletti*, 515 F. Supp. 1049 (ND Ga. 1981); THEODOR MERON, *supra* note 3, at 126.

67. Caroline Dommen, *supra* note 50, at 463. (Remarks by Thomas Buergenthal).

68. *See, e.g., Ram Chand Birdi v. Secretary of State for Home Affairs* (1975) 61 INT'L L. REP. (UKCA) 250 (1981). Holding that courts must interpret national laws to be consistent with prior international laws because the national legislature is presumed to legislate with international obligations in mind.

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Thus, the implementation of human rights<sup>69</sup> by the U.N. is one more functionalist success story. Rather than trying to achieve the immediately unattainable, the U.N. has consistently, and practically, chosen to achieve the possible – all the while seeking to expand the reach of the laws it has sponsored<sup>70</sup> and to ultimately achieve goals which at the time of promulgation were unattainable. Compare this aspect of functionalism to a ratchet: the U.N. has actively pushed incrementally in a single direction to expand and extend human rights<sup>71</sup> while successfully resisting any reversionary efforts to restrict or push back those human rights protections already achieved. Thus, while human rights are still far from secure, the, admittedly limited, protection human rights offer is constantly, albeit gradually, expanding.<sup>72</sup>

While all the above is true, serious limitations to this system still exist. For example, the conventions generally permit reservations<sup>73</sup> and enforcement protocols are usually optional.<sup>74</sup> There are practical reasons for this, mainly to ensure that as many states as possible<sup>75</sup> will participate.<sup>76</sup> Permitting reservations and making enforcement protocols optional is defensible because it permits the formation of the *opinio juris*<sup>77</sup>

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69. Jennifer A. Downs, *A Healthy And Ecologically Balanced Environment: An Argument For A Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351, 361 (1993). Acceptance of human rights into international law occurred *via* acceptance of UDHR as customary international law, and the Covenant on Civil and Political Rights, and of the Covenant on Economic, Social, and Cultural Rights.

70. *E.g.*, art. 2 of the ICESCR links human rights protection to economic development and imposes a duty on states to augment the protection of human rights as the state's economic capacity increases.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>.

71. *E.g.*, art. 12 of the ICESCR states, "1. [t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Thus, as technology improves, so does the obligation of the state. Available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>.

72. The obligation of states under the conventions is clear - not merely guaranteeing existing human rights but also affirmatively seeking to augment the level of protection. *E.g.*, art. 13 of the ICESCR mandates the progressive introduction of free public higher education, not merely primary and secondary education, but also university and technical training. Available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>.

73. With exceptions, *e.g.*, the Optional Protocol to CEDAW specifically prohibits reservations to the protocol. Art. 17, CEDAW Op. Prot. (G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000).

74. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, Optional Protocol, 999 U.N.T.S. 302.

75. Jennifer A. Downs, *supra* note 69 (ICESCR and ICCPR are binding law).

76. Monica Pinto, *supra* note 53, at 836.

77. *Opinio juris* is found in "verbal statements of governmental representatives to international organisations, in the content of [U.N.] resolutions, declarations, and other normative instruments

needed to create customary<sup>78</sup> and binding international law,<sup>79</sup> of which the conventions<sup>80</sup> are evidence.

In practical terms, how can the U.N. be said to have “ratcheted” human rights up? To speak of the “crystallisation” of human rights law is to describe this process. International human rights law often finds its origin as universal ideals – not as binding law. These ideals, however, are expressed in non-binding, universal instruments.<sup>81</sup> This is not merely hypocritical<sup>82</sup> whitewash of brutal realities: universal, non-binding instruments are promulgated in order to form the *opinio juris* of an international custom,<sup>83</sup> which may then ripen into customary law.<sup>84</sup> Further, the ideals presented in human rights declarations, resolutions and conventions represent moral goals and standards which cannot be resisted because of their universal appeal and the legitimising power of democracy. Democracy, or at least popular consent, is theoretically the legitimating norm<sup>85</sup> *sine qua non* of almost all regimes. Even the undemocratic are attracted to universalist human rights ideals. Thus, in practice, international human rights norms, such as the Universal Declaration of Human Rights,<sup>86</sup> are identified in hortatory declarations by the U.N. These hortatory declarations “merely” identify goals – of the entire global community.

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adopted by such organisations, and in the consent of states to such instruments.” THEODOR MERON, *supra* note 3, at 42, citing *Nicaraguan (Nicaragua v. U.S.)* merits, 1986 ICJ Rep. 14 (Judgement of 27 June).

78. It must be remembered that customary law is binding upon states, even those states which regard treaties as non-self executing. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*) *supra* note 77.

79. *N.b.*: customary international law is, unlike treaty law, regarded by the United States as self-executing. This also explains the vitality of customary international law even in this era of conventional systems such as the WTO and UN. Jordan J. Paust, *Customary International Law And Human Rights Treaties Are Law Of The United States*, 20 MICH. J. INT'L L. 301, 336 (1999).

80. *Opinio juris* can arise out of U.N. General Assembly resolutions and Conventions. MERON, *supra* note 3, at 86.

81. Thus the conventions are open to all U.N. member states, state parties to the statute of the ICJ, and any other state the General Assembly of the U.N. invites. *E.g.* ICCPR, art. 48 and ICESCR, art. 26, available at: <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>.

82. There is, of course, plenty of hypocrisy in international relations. *See, e.g.*, GABE VARGES, *THE NEW INTERNATIONAL ECONOMIC ORDER LEGAL DEBATE*, 1 (Peter Lang, Frankfurt 1983).

83. *The North Sea Continental Shelf Cases* (FRG/Den.; FRG Neth.), 1969 ICJ Rep. 3, 44 (Judgment of 20 Feb.) stated that international law defines custom as a universal or near universal state practice coupled with a sense of legal obligation.

84. But Bin Cheng, argues against the transformationist thesis that international custom can be constituted from international conventions. Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 515 (R. Macdonald, D. Johnston eds., 1986).

85. The right to democracy is also guaranteed in the U.N. convention system. Thus, *e.g.* art. 21, art 25 (a) ICCPR, art. 1 ICESCR, art. 4 ICESCR.

86. Richard Klein, *Cultural Relativism, Economic Development And International Human Rights In The Asian Context*, 9 TOURO INT'L L. REV. 1, 2 (2001) (rise of human rights a conscious rejection of the former state system due to world wars).

Paradoxically, however, the non-binding human rights, goals and ideals thus constitute *opinio juris*,<sup>87</sup> one element of customary law.<sup>88</sup> States believe that they “ought” to observe human rights; creating the sense of obligation required for the *opinio juris* needed to form customary international law,<sup>89</sup> which, in turn, is evidenced by states adhering or acceding to the instruments, and even by their silence in the face of universal adoption of such instruments.<sup>90</sup>

States at this stage could present objections to human rights. They could present themselves as persistent objectors,<sup>91</sup> and thus avoid being the subject of any customary law later developing out of those norms. However, to be persistent objectors, states must manifest dissent to the international custom openly, notoriously and objectively.<sup>92</sup> No state can do this and retain credibility and legitimacy in the international arena. No state wishes to go on record as favouring torture. No state wishes to affirm the inferior status of women. No state will admit to being racist – because to do so would be to de-legitimize that state, both before its own people, and before the international community. The idea of human rights is, in fact, so attractive, that it is literally impossible for all but the most tyrannical of states to deny their existence and retain credibility as legitimate expressions of popular will.<sup>93</sup> Thus there are rarely, if ever, persistent objectors to the normative goals of the hortatory declarations of human rights.

Human rights are also attractive because of practical reasons. The eventuality that a binding norm might arise out of a non-binding one seems so remote that states did not, and do not, object to hortatory, non-binding

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87. Some argue, erroneously, that *opinio* is logically the only element needed to constitute international custom. See Bin Cheng, *supra* note 84, at 530-531.

88. Other elements than *opinio juris* and practice may be needed to form customary international law. In describing national customary law, the eminent Judge Blackstone noted that custom must: “(1) have been ‘used so long, that the memory of man runneth not to the contrary;’ (2) be continued without interruption; (3) be peaceably acquiesced (4) be reasonable; (5) be certain in its terms; (6) be accepted as compulsory; and (7) be consistent with other customs.” Jo Lynn Slama, *Opinio Juris In Customary International Law*, 15 OKLA. CITY U. L. REV. 610 (1990).

89. Ivan Poullaos, *The Nature Of The Beast: Using The Alien Tort Claims Act To Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 333 (2002) (custom with *opinio juris* can ripen from mere practice into international customary law).

90. Customary law can evolve “without express universal consent.” Jo Lynn Slama, *supra* note 88, at 626.

91. Custom may arise out of acquiescence by non-signatories, i.e. absence of objective objection. THEODOR MERON, *supra* note 3, at 89.

92. The principle of the “persistent objector” in international law provides that a state is not bound to a rule of customary law where it has expressly and persistently objected to that rule. Jo Lynn Slama, *supra* note 88, at 627.

93. Paul W. Kahn, *American Hegemony And International Law Speaking Law To Power: Popular Sovereignty, Human Rights, And The New International Order*, 1 CHI. J. INT'L L. 1, 12 (2000) (all modern states combine democracy and human rights).

human rights goals. Because states dare not call into question their own legitimacy; because the remote prospect of future obligation is so slight as compared to the cost of risking legitimacy; and even for reasons of power politics, states cannot, and do not, attack the legitimacy of human rights and thus rarely, if ever, can be seen as persistent objectors.

States support human rights not merely for defensive legitimation purposes but also for the instrumentalist reasons of *Realpolitik*.<sup>94</sup> Human rights can be an instrument of foreign policy.<sup>95</sup> The state that supports human rights has a weapon. That weapon may be weak. It may be readily discarded. However, the weapon of human rights can be wielded in negotiations which appear, at first glance, to have nothing to do with human rights or in surprising<sup>96</sup> contexts.<sup>97</sup> The U.S.-Chinese trade relations is but one example where, even if human rights are only a pretext for substantive goals, they are, nevertheless, supported and defended.<sup>98</sup> No state wishes to renounce a potential tool in its diplomatic toolkit. The cost of observing most human rights is relatively low. Consequently, states observe human rights and even claim to promulgate them for reasons of *Realpolitik*.<sup>99</sup> Conversely, states do not reject human rights norms, at least as merely hortatory goals, because to do so would deny them the ability to criticize other states credibly when those other states violate human rights. However, the *Realpolitik* of human rights can only partly validate the realist position because a realist analysis would have to ignore the role of the U.N., ignoring the facts. Regardless of methodological disputes, human rights have acquired the *opinio juris* needed to ripen into customary law for the above-mentioned reasons.<sup>100</sup> The first step in the evolution of a binding legal norm from non-binding political

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94. Daniel W. Drezner, *On The Balance Between International Law And Democratic Sovereignty*, 2 CHI. J. INT'L L. 321 (2001) (notes the *Realpolitik* nature of human rights law).

95. For example, President James Carter made human rights a key plank in his foreign policy. Harlan Cleveland, *Introduction: The Chain Reaction of Human Rights*, in HUMAN DIGNITY: THE INTERNATIONALISATION OF HUMAN RIGHTS IX (Alice Henkin ed., 1979).

96. William C. Plouffe, *supra* note 38, at 79; also see Lois E. Fielding, *Taking The Next Step In The Development Of New Human Rights: The Emerging Right Of Humanitarian Assistance To Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995) (supporting humanitarian intervention in Haiti).

97. See, e.g., Lisa L. Bhansali, *New Customary Law: Taking Human Rights Seriously?* 87 AM. SOC'Y INT'L L. PROC. 229, 240 (1993) which discusses a case where two rival warlords in the horn of Africa were intent on mutual destruction without regard to civilian casualties until the reality that as a consequence whoever would win would have no credibility in the outside world.

98. For a concise compelling account of the use of human rights in statecraft verifying the customary nature of international human rights instruments including the UDHR and the ICCPR, see Louis B. Sohn, *supra* note 5, at 16.

99. Thus, for example, U.S. foreign policy is unilateralist only when unilateralism serves U.S. interests.

100. Even the U.S. recognizes that non-binding norms may evolve into custom. "[N]orms ... may ripen in the future into rules of customary international law." H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S. C.C.A.N. 84, 86.

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statements is the identification of a universal norm that, even if non-binding, is universally recognized as a goal to be striven towards.

B. ENFORCEMENT OF GLOBAL NORMS: STATE PRACTICE

*Opinio juris* is, however, only one element of customary international law. The other aspect is state practice. In order for a custom to become binding law, it must, in practice, be obeyed and be considered obligatory. At least within the developed world, the norms of international human rights law are, generally, already observed in domestic law. Further, the U.N. has created a series of conventions which also reflect an increasing practice of states recognizing international human rights. The ICCRP<sup>101</sup> and ICESCR,<sup>102</sup> as well as the CEDAW and CAT, include optional enforcement clauses or optional enforcement protocols. It is through these conventions and the practice of national law that the praxis required to support the finding of a customary law can be recognized.

This two-step approach to human rights shows why the U.N. conventions can be seen as operating as a “ratchet.” This approach also has the advantage that, over time, it may lead to the crystallisation of a customary rule in international law, going further than that of the treaty norm to bind non-parties, also.

C. INDIVIDUAL RIGHTS

Determining who has a claim to a right, the state or an individual, is as important in the genealogy of rights as determining the content of that right. Further, in practice, the question “who has a right” is logically antecedent to the question “what right exists.” Sometimes the U.N. conventions (ICCPR, ICESCR, CEDAW, CAT, CERD etc.) recognize rights already inhering in individuals, which they may now enforce against states, sometimes the conventions merely create duties on the part of states toward each other.

The question whether, and when, individual legal rights or duties shall be recognized turns on the goals of international law and whether such rights and duties hinder or help achieve those goals. The primary goal of international law is to impose order.<sup>103</sup> Order does not necessarily entail

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101. International Covenant on Civil and Political Rights, Dec. 16, 1966, Optional Protocol, 999 U.N.T.S. 302.

102. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 993 U.N.T.S. 3.

103. “[T]he goal of international law—namely the achievement of a stable, just international order.” Lucas W. Andrews, *Sailing Around The Flat Earth: The International Tribunal For The*

justice. The primacy of legal order is generally justified for practical reasons: without order there can be neither peace, nor justice. Consequently, claims of individual justice are generally secondary in the international hierarchy of norms to claims of order. But is that view entirely correct?

In fact, claims for justice may strengthen the international legal order. That is, a claim for justice and a fact of order are generally mutually reinforcing. While it is true that order and peace are necessary prerequisites to justice; peace and order are also consequences of justice. Thus, a just system is also orderly, but an orderly system is not necessarily just. Furthermore, a tyrannical order is inherently unstable. At some point, repression gives way to resistance and rebellion. Thus, where claims of justice and order are mutually reinforcing, the international legal system will seek to impose not only order, but also justice.

This argument is based on the general principle that law is logically structured (both by principles of hierarchy and symmetry); is guided by practical reasoning; and follows a teleology favoring peace and prosperity. Thus, the international legal system may even be said to defend justice when its defense does not hinder the maintenance of order. That may be the case of humanitarian intervention or of the right to national self-determination. Granting individuals a legal right to a remedy for violations of human rights will discourage tyrannical orders from violating human rights, thereby assuring that the stability of the international order is not founded on terror. Rather than insuring the false stability of tyrannical orders, the international system protects individuals against injustice by according them protections against the most egregious violations of international *jus cogens* norms. International law sees order as a general precondition for peace and prosperity. However, this general principle does admit some exceptions, and its *telos*, peace and prosperity, explains the limits of the principle that the international system seeks to create and maintain a stable, peaceful and prosperous world order.

Recognizing that individuals have rights and duties under international law is not only contemporary practice, it is also logical. This transformation - from a system predicated on maintaining order prior to justice, toward a system predicated on justice in order to preserve order - can be seen in the third-generation rights<sup>104</sup> to democracy, peace and develop-

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*Former Yugoslavia As A Failure Of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471, 513 (1997).

104. Gudmundur Alfredsson, *The United Nations And Human Rights*, 25 INT'L J. LEGAL INFO. 17, 21 (1997).



ment.<sup>105</sup> It can also be seen in the rights to humanitarian assistance<sup>106</sup> and humanitarian intervention. It can even be seen in the right to national self-determination.<sup>107</sup> While that transformation is far from complete, it is clear that the international system is moving from a logic of “order will ensure peace and eventually obtain justice” to a logic that “justice will encourage peace.” As the international system moves toward justice as its primary goal, and away from order as its primary goal, any pretensions that the world is still Westphalian become increasingly untenable.

Recent case law is increasingly recognizing that both natural and legal persons can owe duties under international law toward other individuals (*Flick*,<sup>108</sup> *Krupp*),<sup>109</sup> or even have rights against individuals (*Marcos*<sup>110</sup>; Alien Tort Claims Act) which arise out of the law of nations, both in civil (*Kadic v Karadzic*)<sup>111</sup> and penal law (*Eichmann*).<sup>112</sup> These cases show the resolution of tension between state and individual claims and the evolution of binding custom from non-binding hortatory declarations. According rights and duties to individuals, with corresponding remedies, will serve the goal of achieving and maintaining a just, and thus stable, international order.

Despite limitations on the protection of human rights, the U.N. convention system does protect individual rights by granting a remedy to both states and non-state actors. Note that these protections are constantly expanding. The U.N. convention system constitutes part of an interna-

105. J. Oloka-Onyango, *Human Rights And Sustainable Development In Contemporary Africa: A New Dawn, Or Retreating Horizons?* 6 BUFF. HUM. RTS. L. REV. 39, 43 (2000).

106. The right to humanitarian intervention is attributed to Grotius and can be traced even further back to Suarez. “The 1579 *Vindiciae Contra Tyrannos* asserted that ‘it is the right and duty of princes to interfere in behalf of neighbouring peoples who are oppressed on account of adherence to the true religion, or by any obvious tyranny,’” W. DUNNING, *A HISTORY OF POLITICAL THEORIES FROM LUTHER TO MONTESQUIEU*, 55 (1905).

107. U.N. Charter arts. 1, 2, 55.

108. *U.S. v. Flick and Others*, 9 WAR CRIMES REPORTS 1.

109. *U.S. v. Krupp and Others*, 10 WAR CRIMES REPORTS 69.

110. *In re Estate of Ferdinand E. Marcos Human Rts. Litia.*, 978 F.2d 493 (9th Cir. 1992).

111. *Kadic v. Karadzic* (Part III: Justiciability) discusses in detail the requirements of the political question doctrine. Note that in *Kadic* no political question was found. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), cert. denied 518 US 1005 (1996) available at: <<http://www.yale.edu/lawweb/avalon/diana/karadzic/4298-12.html>>.

112. Interestingly, *Eichmann* is not the only case where a national was kidnapped in a foreign state by a prosecuting state but had no remedy because the remedy was held by the state where he was kidnapped. See *Crim. 4 juin 1964, Argoud*, JCP. 1964, II, 13806, rapport Comte (France: Cour de Cassation, Chambre Criminelle). See also, Brigitte Belton Homrig, *Abduction As An Alternative To Extradition--A Dangerous Method To Obtain Jurisdiction Over Criminal Defendants*, 28 WAKE FOREST L. REV. 671 (1993). Manuel Noriega also complained of abduction in *U.S. v. Noriega*, 117 F.3d 1206, 1222 (11<sup>th</sup> Cir. 1997) – and just as unsuccessfully.

tional system of global governance<sup>113</sup> using functionalist methods, which breaks from the Westphalian model of states as hermetic monopolists of legitimate authority. For, under the Westphalian system, only states could have rights and duties under international law, and could not be held accountable for their acts *vis-à-vis* their subjects within their borders. These treaties, in contrast, recognize rights inhering in individuals. This constitutes more evidence of the fact that the international system has definitively broken from the Westphalian system to create institutions of global governance, a fact which is also proven by the proliferation of treaties by intergovernmental organizations changing inter-state relations since 1945.<sup>114</sup>

The principle of sovereignty has declined at exactly the same moment as the principle of human rights has risen. How do these facts influence our theoretical perspective?

### III. THE UNIVERSALITY OF HUMAN RIGHTS<sup>115</sup>

The idea of human rights is, at first glance, a vague and ambiguous concept.<sup>116</sup> For this very reason, though, the idea has a universal appeal, being all things to all men. Though problematic,<sup>117</sup> the claim of human rights to universalism is valid – and indeed globalism and universalism can, in theory, be complementary movements and certainly correlate in practice.<sup>118</sup> Humanists point to the common needs and aspirations of all persons as evidence of a common humanity, which is the foundation of universal rights. This humanist ideal has undergone much historical development over time. Is the idea of human rights universal, and if so, in

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113. Ulrich K. Preuss, *The Force, Frailty, And Future Of Human Rights Under Globalisation*, 1 THEORETICAL INQUIRIES L. 283, 304 (2000) (argues that the international community is in transition from nation state to global community).

114. Jose E. Alvarez, *supra* note 46 at 216, available at: <[http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bciclr/25\\_2/03\\_FMS.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/03_FMS.htm)>.

115. Some argue that the incoherence within human rights is inherent in the concept of human rights and not merely due to cultural splits. Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301, 302 (1997) (arguing that the dualisms and ambiguity of international human rights law can be resolved via resort to history).

116. John King Gamble, Teresa A. Bailey, Jared S. Hawk, Erin E. McCurdy, *Human Rights Treaties: A Suggested Typology, An Historical Perspective*, 7 BUFF. HUM. RTS. L. REV. 33, 34 (2001) (ineluctability of human rights).

117. For a discussion of how human rights may be a tool of western imperialism see JOHAN GALTUNG, THE UNIVERSALITY OF HUMAN RIGHTS REVISITED: SOME LESS APPLAUDABLE CONSEQUENCES OF THE HUMAN RIGHTS TRADITION IN HUMAN RIGHTS IN PERSPECTIVE 152 (Asbjorn Eide, Bernt Hagtvet, eds. 1992) (arguing that human rights are not only a key to liberation but also a vector of state control).

118. PETER FITZPATRICK, GLOBALISATION AND THE HUMANITY OF RIGHTS 2000 (1) Law, Social Justice and Global Development (LGD) at: <<http://elj.warwick.ac.uk/global/issue/2000-1/fitzpatrick.html>> (arguing that globalism, like human rights, is a universalist ideology and, thus globalism permits human rights to escape the limits of the nation state).

what sense? If, and only if, human rights are universal, can they be a pillar of the post-Westphalian order. Furthermore, because the historical transformations in the conception of human rights influence the positive law, they condition, limit, and even direct the content of the law.

The imputation of legal rights and duties to individuals under international law often occurs *via* human rights. However, while human rights are a key feature of the post-Westphalian state system, human rights will only be a stable structural element of that system if they are, in fact, universal.<sup>119</sup> Despite theoretical confusion<sup>120</sup> and cultural clash,<sup>121</sup> which obscure their sources,<sup>122</sup> resulting in difficulty in defining rights,<sup>123</sup> the idea of human rights is indeed universal. Consequently, human rights can impute rights and duties to non-state actors and will be a key feature of the post-Westphalian order.<sup>124</sup>

Our first demonstration of the universality of human rights<sup>125</sup> is a negative proof. The universality of human rights is, in fact, demonstrated by the very existence of these debates. Were human rights not an idea with universal aspects, these debates would not exist. However, merely acknowledging a universal concept of "human rights" does not help determine what that concept is, and whether that concept is also universal.

Fortunately, this negative proof<sup>126</sup> of the universality of human rights is not the only one available. A more ambitious, affirmative demonstration

119. The universality debate has been presented as a "clash of civilisations" (describing the debates between the 'politics of universalism' and the 'politics of difference.' and 'identity politics' in international criminal law on the basis of group affiliation). Martha C. Nussbaum, *In Defense Of Universal Value*, 36 IDAHO L. REV. 379, 447 (2000).

120. Brenda Cossman, *Reform, Revolution, Or Retrenchment? International Human Rights In The Post-Cold War Era*, 32 HARV. INT'L L.J. 339, 340 (1991) (rights are superior in the hierarchy of norms because they are universal in space and time).

121. Jennifer Nedelsky, *Communities Of Judgment And Human Rights*, 1 THEORETICAL INQUIRIES L. 245 (2000) (universality debate must be seen as a discourse between different communities).

122. Makau Wa Mutua, *The Ideology Of Human Rights*, 36 VA. J. INT'L L. 589, 589-590 (1996) (human rights are ambiguous as to their scope, content, and philosophical bases).

123. John King Gamble, et al., *supra* note 116, at 34 (ineluctability of human rights).

124. ANTONIO CASSESE, *supra* note 2 at 51 (argues that universality is a myth).

125. "The concept of the universality of human rights is based on the notion that: (a) there is a universal human nature; (b) this human nature is knowable; (c) it is knowable by reason; and (d) human nature is essentially different from other reality." Yash Gha, *Universalism And Relativism: Human Rights As A Framework For Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1094, 1096 (2000) available at: <<http://www.cardozo.yu.edu/cardlrev/v21n4/ghai.pdf>>.

126. Another negative proof is the fact that while the contents of the rights are disputed their existence is not. Some even go so far as to venture to isolate a "common core" of human rights at the global level reflected from national law. See L. Amede Obiora, *Reconstituted Consonants: The Reach of A "Common Core" Analogy In Human Rights*, 21 HASTINGS INT'L & COMP. L. REV. 921, 955 (1998).

of the universality of human rights is also possible;<sup>127</sup> founded upon a neo-Aristotelian understanding of human nature. This understanding (unlike Aristotle), which posits a mutually reinforcing relationship between human rights and the rule of law,<sup>128</sup> also posits gender and racial equality. But this relationship is not determined by the formal legalism of the methods of the rule of law. Rather it is determined by the substantive achievements of human rights - i.e. whether those rights function as a means to obtain and secure what Aristotle termed "the good life."<sup>129</sup> Human rights are, thus, a means to the end of political society, which insure and obtain not merely life, but the good life, for the members of the polity.<sup>130</sup> For this reason, human rights are universal.<sup>131</sup> All humans have universally common capacities, needs, desires, and an interest in prospering. Human rights are the means to a universally desired end. While admitting variation for practical reasons, a common teleology ensures that certain core elements are universal.

Finally, a pragmatic argument for the universality of human rights is also possible. Looking at positive law, the universality of human rights is a legal fact recognized by international law.<sup>132</sup> This argument, like the first argument that human rights must exist since everyone is talking about them, is not, alone, particularly strong. Even tyrants assert the justice of their tyranny. However, the negative argument and the practical argument complement and strengthen the teleological argument. This argument can be further strengthened by inquiring into the nature of rights.

#### A. RIGHTS AND DUTIES

Are human rights an inherent and inalienable consequence of humanity? Or, are human rights essentially conditioned on acquiescence in, or performance of, societal duties? To some extent, this is a false dichotomy. For every right, there is a corresponding duty.<sup>133</sup> If I have a right to life,

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127. ANTONIO CASSESE, *supra* note 2 at 64 (argues for the existence of a common core of human rights recognized globally).

128. SAMUEL HUNTING, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER*, 70 (Simon & Schuster 1996).

129. *E.g.*, Aristoteles, *Nikomachische Ethik*, Buch I, Kap. 2, 3, 5. Available at: <<http://www.uni-rostock.de/fakult/philfak/fkw/iph/strobach/hroseminare/mkethik/arist1.pdf>>.

130. ARISTOTLE, *POLITICS* (c. 350 b.c.) Book I, Part II, available at: <<http://classics.mit.edu/Aristotle/politics.1.one.html>>.

131. It is also for this reason that human rights are inherently cosmopolitan and international. Robin West, *Is The Rule Of Law Cosmopolitan?*, 19 QLR 259 (2000).

132. Elsa Stamatopoulou, *supra* note 48, at 692.

133. Mahatma Gandhi, from *Yervada Mandir* (1930), *excerpt at*: <<http://meadev.nic.in/Gandhi/economics.htm>>; H.R. Khanna, *Rule of Law*, 4 SCC JOUR. 7 (1977) available at: <<http://www.ebc-india.com/lawyer/articles/77v4a3.htm>>. This principle has also been recognized in the case law. *See, e.g., Medical Review Committee v. Lim*, 8 MAN. R. 2d 407 (Q.B. 1981). (Canada, province of Manitoba).

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you have a duty not to kill me. Nonetheless, this debate persists. Because to say, simply, that rights and duties are two sides of the same coin, does not tell us exactly what those rights and duties are. It also does not tell us how to resolve doubtful cases where rights and duties are in conflict. However, when questioning whether the third world believes in human rights, it may help to remember that the third world sponsored "New International Economic Order" (NIEO) by a resolution before the U.N. General Assembly NIEO<sup>134</sup> in 1974,<sup>135</sup> proposing a charter of economic rights and duties.<sup>136</sup> Third world scholars accept the idea of economic development, one of the keystones of modernity, as the *sine qua non* of existence.<sup>137</sup>

The question whether rights arise from duties reflects the north-south debate. Representing the global south, Asian<sup>138</sup> schools of thought,<sup>139</sup> whether Islamic,<sup>140</sup> Hindu,<sup>141</sup> Confucian,<sup>142</sup> or Buddhist,<sup>143</sup> tend to see not rights, but rather duties as primary, and to recognize rights only as a consequence of duty fulfilled.<sup>144</sup> In contrast, western schools of thought, notably *ius naturale*,<sup>145</sup> tend to see the foundation of human rights on certain inalienable, inherent capacities of humans,<sup>146</sup> generally speaking

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134. See GABE VARGES, *supra* note 82, at 5.

135. See CLAUDE NIGOUL, MAURICE TORRELLI, *LES MYSTIFICATIONS DU NOUVEL ORDRE INTERNATIONAL*, 105 (Paris: PUF 1982).

136. See GABE VARGES, *supra* note 82 at 17.

137. Tesfatsion Medhanie, *Lomé: Can it help reverse Africa's marginalisation?* 16 STAAT UND GESELLSCHAFT IN AFRIKA 397, 402 (1996).

138. This view is not however without critique: See, e.g., Michael C. Davis, *Constitutionalism And Political Culture: The Debate Over Human Rights And Asian Values*, 11 HARV. HUM. RTS. J. 109, 147 (1998).

139. ANTONIO CASSESE, *supra* note 2, at 53.

140. There is no absence of Islamic scholarship in the west on this topic. Further the Islamic scholars do not question the idea of human rights as such but rather the western view of what those rights are. See, e.g., Ebrahim Moosa, *The Dilemma Of Islamic Rights Schemes*, 15 J.L. & RELIGION 185, 215 (2000); Ann Mayer, *Universal Versus Islamic Human Rights: A Clash Of Cultures Or A Clash With A Construct?*, 15 MICH. J. INT'L L. 307, 307 (1994); ABDULAZIZ OTHMAN ALTWAJRI, *HUMAN RIGHTS IN ISLAMIC TEACHINGS* 4 (2000) available at: <<http://www.isesco.org.ma/pub/Eng/humanrights/page.htm>>.

141. Editorial, *Human Rights: Knots and Webs*, *Hinduism Today* (1996) available at: <<http://www.hinduism-today.com/1996/6/1996-6-07.html>>.

142. Joseph Chan, *Human Rights and Confucian Virtues*, IV HARVARD ASIA QTLY. (2000) available at: <<http://www.fas.harvard.edu/~asiactr/haq/200003/0003a006.htm>>.

143. Damien Keown, *Are There "Human Rights" in Buddhism?* 2 J. BUDDHIST ETHICS (1995) available at: <<http://www.urbandharma.org/udharma/humanrights.html>>.

144. See, e.g., Mahatma Gandhi, *Letter to the Director General of UNESCO*, 25 May 1947, IV Human Rights Teaching 4 (1985).

145. See, e.g., Alfred Verdross and Heribert Franz Koeck *Natural Law: The Tradition of Universal Reason and Authority in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 17 (R. Macdonald, D. Johnston eds., 1986).

146. See, e.g., *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, ICJ Reports 1966 250, 297 (1966) (dissenting opinion of Judge Tanaka). But see DR. H. AGARWAL, *IMPLEMENTATION OF HUMAN RIGHTS COVENANTS WITH SPECIAL REFERENCE TO INDIA*, 17-18

rationality, though Christian theologians<sup>147</sup> would combine that theory with the idea that that rationality is a reflection of divine perfection.<sup>148</sup>

*Ius naturale* is generally contrasted with positivism,<sup>149</sup> not only in national law but also in international law.<sup>150</sup> That split can also be traced to the treaty of Westphalia.<sup>151</sup> However, the opposition of positivism to naturalism is usually inexact, and often leads to confusion.<sup>152</sup>

As Sohn concisely demonstrates, the split between positivism and natural law is a false dichotomy. Positive law and natural law can be complementary.<sup>153</sup> *Per* Sohn, this is because natural law concerns those inalienable rights, whereas positive law concerns alienable rights.<sup>154</sup> Sohn further draws the logical conclusion that those elements of international law which are *jus cogens* are a reflection of natural law, whereas those human rights that are derogable are a reflection of positive law.<sup>155</sup> This, of course, could be an extension of Aristotle. For Aristotle, nature (*physis*) concerns that which is unchangeable (i.e. natural law), that which cannot be otherwise; nature is to be contrasted, *per* Aristotle, from *tekhne* (gr.) or *arte* (lat.), that which can be other than it is (i.e. man made, or positive law). For Sohn, natural law concerns the unchangeable and positive law that which is variable.

Rubin also accurately described the same splits<sup>156</sup> as Sohn. However, unlike Sohn, Rubin does not appear to synthesize them. Whether Rubin realises it or not, determining where one stands on these splits is a matter of science, not opinion. A scientific position is an objective reflection of material facts, not a subjective expression of feelings.

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(1983) (arguing that human rights are universal because they arise out of the common equality of all persons).

147. THOMAS AQUINAS, *SUMMA THEOLOGICA*, SECUNDA SECUNDAE PARTIS §57 (Right) available at: <<http://www.newadvent.org/summa/3.htm>>.

148. Fr. Joseph M. de Torre, *Human Rights, Natural Law, And Thomas Aquinas*, VI Catholic Social Scientist Review (2001) available at: <<http://www.catholicsocialscientists.org/Article--deTorre--Human%20Rights.htm>>.

149. For a brief brilliant summary of the (only illusory) contradiction between natural law and positivism by the late Louis B. Sohn. See Louis B. Sohn, *supra* note 5, at 17.

150. Nigel Purvis, *Critical Legal Studies In Public International Law*, 32 HARV. INT'L L.J. 94, 81-83, (1991) (describes "naturalist" "positivist" dichotomy in international law).

151. *Id.* at 82-83 (describes the supposed decline of *ius naturale* theory).

152. Unless the two schools of thought take a great deal of care to define their starting point, they find themselves talking about quite different things. *Id.* at 115.

153. Louis B. Sohn, *supra* note 5, at 17.

154. *Id.*

155. *Id.*

156. Alfred P. Rubin, *Actio Popularis, Jus Cogens And Offenses Erga Omnes?* 35 NEW ENG. L. REV. 265, 280, (2001).

The science of law is sometimes challenged, though generally only implicitly, by post-modern denials of the existence of objectivity, truth, and *in ultimo*, western culture (its existence or values). Post-modernism can, however, pose radical questions: such as, why roughly 80 percent of the world controls roughly 20 percent of global resources, and whether war is inevitable. However, in rejecting objectivity, and thus knowledge, post-modernism throws out the good with the bad. Because of its presumptions, post-modernism cannot benefit from the earlier work of any social theory. For the post-modernist, objectivity does not, and cannot, exist. Taking the post-modernists seriously is difficult: their presumptions are contrary to common sense. However, one must take post-modernism seriously, because the post-modernists' denial of basic presumptions of modernity such as objectivity, science, and progress, permits them to pose serious questions. However, the rejection of the presumptions of modernity prevents post-modernists from formulating coherent answers to the fundamental questions posed.

Returning to the natural law/positivism dichotomy, the usual supposition, of an opposition between positivism and naturalism, is also inapposite for less brilliant reasons than Sohn provides. For example, a naturalist theory, such as Hobbes' theory, proposes that natural law is nothing other than the law of the jungle, that is, the law of the strong, survival of the fittest.<sup>157</sup> An alternate school of *ius naturale*, put forward most famously by Cicero,<sup>158</sup> and later Aquinas,<sup>159</sup> argues that, only laws which are founded in morality or rationality, are valid. The author regards the former theory (Hobbes) as natural law (*per* Hobbes, *lex naturale*), and the latter (Cicero and Aquinas) as natural justice. Both are branches of *ius non scripta*.

Just as there is a descriptive and prescriptive theory of *ius non scripta* (natural law and natural justice respectively) there are also descriptive and prescriptive versions of positivism. Descriptive positivism limits itself to describing law as it is. Prescriptive positivism does not prescribe what the law should be; rather, it describes what it perceives as correct methods of legal science. Kelsen,<sup>160</sup> following Weber<sup>161</sup> is an example of

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157. "[T]he condition of man (as hath been declared in the precedent chapter) is a condition of war of every one against every one, in which case every one is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies." HOBBS, *LEVIATHAN*, Ch. XIV (1656). Hobbes also distinguishes between natural law and natural right.

158. CICERO, *THE REPUBLIC* at III, XXII (Loeb Classical Library, 1950) available at: <<http://www.thelatinlibrary.com/cicero/repub.shtml>> (lat.).

159. THOMAS AQUINAS, *supra* note 27.

160. See, e.g., HANS KELSEN, *ALLGEMEINE STAATSLHRE* (1925).

a prescriptive positivist. Much of the supposed conflict between positivism and naturalism can be resolved by correctly understanding which strand of theory is being considered. Prescriptive theories of natural law are, necessarily, in conflict with prescriptive theories of positivism. Purely descriptive theories however cannot be in conflict methodologically, since they only claim to describe reality as it is.

As Nigel Purvis notes, the claim that positivism is purely descriptive explains some of its success in capturing the legal imagination.<sup>162</sup> Most natural law theories, with the notable exception of Hobbes,<sup>163</sup> are, in fact, theories of natural justice, and, as such, are prescriptive. However, Purvis, like many others, may be underestimating the methodological difficulties which plague naturalism due to an all too common failure among natural law theorists to clearly distinguish prescription from description. Since a descriptive positivism has a more limited task than a prescriptive naturalism, it necessarily generates a simpler theory, which is less open to criticism. However, this theory is descriptively incomplete (no cognition of whole entities, i.e. the sum is always equal and never greater than its parts thus no synergies)<sup>164</sup> and is, essentially, powerless (except in its implicit affirmation of the status quo) because it does not prescribe. Positivism, like “realism,” pursues a much less ambitious theoretical objective than naturalism or holism, but for this very reason, it is also less influential. In contrast, when naturalist and holist theories fail, their failures tend to be glaringly obvious, even spectacular, due to “pure”

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161. MAX WEBER, DER SINN DER „WERTFREIHEIT“ DER SOZIOLOGISCHEN UND ÖKONOMISCHEN WISSENSCHAFTEN (1917). In: Ders.: *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen 1988).

162. Nigel Purvis, *supra* note 150, at 81-83 (1991) (describes the naturalist riposte to positivism).

163. Hobbes clearly describes a natural law theory – but his natural law is the law of the jungle, which like Rousseau, must be escaped by a social contract, i.e. a positive law:

The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.

HOBBS, LEVIATHAN, Ch. XIV (1660) available at:

<<http://www.orst.edu/instruct/phl302/texts/hobbes/leviathan-contents.html>>. The work of both Hobbes and Rousseau (and Locke for that matter) is, however, flawed because they presume an impossibility, namely the state of nature. Hobbes's theory of natural law – the law of the jungle, *droit de plus fort*, does however carefully distinguishes between natural law and natural right, and thus should be distinguished from other theories of natural law which usually do not make this distinction and thus confuse prescription and description.

164. Perhaps the first and best-known example of a synergy arising, where a whole is greater than the sum of its parts, is Adam Smith's famous needle factory. Smith pointed out that a factory using laborers specialized in different tasks would be far more efficient at needle production than the same number of individuals working in isolation. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, B.I, Ch.1, paragraph I.1.3 (1776). Available at: <<http://www.econlib.org/library/Smith/smWN1.html>>.



*eidetic noesis*, i.e. philosophical idealism divorced from material reality. Positivist theories, in contrast, are confined to safer positions.<sup>165</sup>

Methodologically,<sup>166</sup> the split between positivism and naturalism tracks and parallels the splits between materialism and idealism, between atomism and holism, and between realism and transformationism. However, though materialism, atomism, positivism and realism tend to be reinforcing, and though historically holism and idealism are usually associated with each other, the connection of these different theories to each other is not a necessary one. This author, for example, takes a holistic, materialistic view that compels him to a transformationist theory. Hobbes, in contrast, is a materialist atomist who, however, takes a position of natural law, though his "natural law" is in fact, the law of the jungle!<sup>167</sup> Only by expressing these theoretical differences, and clearly delineating them, can post-Westphalian theorists hope to transcend the failures and limitations of the Westphalian state theory.

This relationship between positivism and natural justice contextualizes and guides this paper's theory of human rights. The rights and duties theories appear at first to present a fundamentally irreconcilable duality. However, though there are mutually exclusive dualities, there are also dualities which are, in fact, not absolutely opposite and mutually exclusive (discontinuous entities), but rather which are different, not in kind but in degree. Such dualities are continuous entities.<sup>168</sup> Logically, a materialist atomist must believe that the universe is discontinuous, since only discontinuous entities resolve into discrete elements. Similarly, holists usually see the universe as a continuity, where each microcosm reflects the macrocosm (the *aporie* of light as both a particle and wave may be a useful analogy or model to understand this problem). However, for this reason atomists, perhaps unknowingly, reiterate Pythagorean theories which mathematics has long rejected. Suppose, however, that mathematical representation is not an arbitrary, pure, formal system (though that is in fact the assumption of contemporary mathematics).

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165. See Purvis, *supra* note 150.

166. For a good discussion of different methodologies see, Anne-Marie Slaughter, Steven R. Ratner, *The Method Is The Message*, 93 AM. J. INT'L L. 410 (1999).

167. In fairness to Hobbes, we must note that his first natural law, the law of self preservation, by any means necessary, is only his point of departure. He goes on to develop other consequential rights which he considers just as "natural" as the right of self preservation. *E.g., pacta sunt servanda (inter alia)*. HOBBS, LEVIATHAN, Ch. XV "Of Other Laws of Nature" (1660) available at: <[http://www.orst.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTER XV](http://www.orst.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTER_XV)>.

168. To understand the theoretical distinctions between analog and digital conceptualisation see GOTTFRIED LEIBNIZ, A NEW METHOD FOR MAXIMA AND MINIMA AS WELL AS TANGENTS, WHICH IS IMPEDED NEITHER BY FRACTIONAL NOR BY IRRATIONAL QUANTITIES, AND A REMARKABLE TYPE OF CALCULUS FOR THIS (1684); ISAAC NEWTON, FLUXIONS (1666 - then unpublished working paper, later published), ISAAC NEWTON, ANALYSIS WITH INFINITE SERIES (1711).

Suppose, instead, that mathematical representation, rather than being an arbitrary and purely formal system, is somehow a reflection of material reality. Now, clearly irrational numbers such as radical two exist, the ratio between a hypotenuse and one of the equilateral legs of a right equilateral triangle is, in fact, radical two. However, the decimal representation of this ratio is non-terminating and non-repeating. This implies that the holist representation of material reality is correct, and that the atomist representation is incorrect, because, if a line segment could be split into atoms, then ratios, such as radical two, could be represented as whole numbers, or at least as whole fractions. The holist theory appears to be more accurate here because it permits a representation of a ratio of two wholes, which, though paradoxical, clearly exists. In contrast, the atomist representation of discrete digital numbers cannot adequately describe this ratio. A similar analysis also holds true for  $\pi$ , namely the ratio of a circumference of a circle and the radius of a circle. There, however, the ratio is complicated by the fact that a circumference is a curve. Therefore, the example of radical two is easier to illustrate the limitations of atomistic thinking.

If ideas are merely a reflection of material reality, and not an abstract model divorced from material reality, then the atomist model, that the universe can be divided into ultimate discrete elements which cannot be further subdivided, and which serve as the fundamental basis of analysis, is incorrect. An ever-smaller point can always be imagined. This is why geometry presumes that any line segment is made of an infinite number of points. Atomists, in contrast, presume that the process of division must end somewhere. But assuming the opposite position, that the universe is a discontinuous whole, presumably, as in integral calculus, the possibility of an infinite series converging upon a limit. The presumption of continuity, which, like radical two is paradoxical, is consistent with holism, and leads to empirically verifiable, and useful, conclusions. The presumption of discontinuity leads to contradiction. Consequently, the holist position is again better able to represent reality and is probably more correct than the atomist position. This argument, of course, relies on the materialist presumption that ideas reflect material reality, and do not exist independently of material reality. It also relies on the presumption – which, again, is not the presumption of modern mathematics – that mathematics, like any idea, is a reflection of material reality, and thus, not a purely formal system.

Pointing out the mathematical deficiencies in atomism does not say there is no place for analysis in scientific thought. It is intended, rather, to temper the role that such analysis is given in a comprehensive theory. Obviously, both continuity and discontinuity have their place in mathe-

matics. The fact that holism can consistently integrate atomism as a special theory, and maintain the presumptions of holism as a general theory, explains why it is the more powerful theory, despite the risks inherent either in complex theorization or normative prescriptions. Those risks are inevitable in law.

How is this understanding of continuity at the theoretical level pertinent? The contradiction between rights theories ("western" theories) and duties theories ("eastern" theories) of human rights is only apparent. Both western and eastern schools of thought are elements in a continuity, as both are linked by the common element, humanity. As expressions of degrees of continuity, these apparent opposites are, in fact, reconcilable.

Looking at western thinkers, when exploring the thoughts of Plato, he clearly postulates duties as primary in his Republic.<sup>169</sup> To the extent that Aristotle acknowledges the idea of "right" (and thus of "rights"),<sup>170</sup> he posits them as a consequence of human rationality.<sup>171</sup> But Aristotle's conception of rights is balanced by his understanding of the inherently social nature of humans. For Aristotle, like Rousseau,<sup>172</sup> the state finds its origins in the family and it, unlike its individual members, the state (an extended family) is self sufficient. Because the state is self-sustaining, it has priority over any one of its members.<sup>173</sup> Thus, Aristotle's conception of rights, like Rousseau's, would necessarily contextualize rights by the society in which they are found. Indeed, it is only relatively late in western thought that Locke presented the possibility of rights divorced from society. Locke's labor theory of value permits an a-social man, because property, according to Locke, is not a social relation, but the consequence of individual labor<sup>174</sup> - which is empirically defensi-

169. PLATO, REPUBLIC, Book IV, available at: <<http://classics.mit.edu/Plato/republic.5.iv.html>>.

170. Aristotle does speak of "civil rights" i.e. *Bürgerrechte*; Aristotle, *Athenian Constitution* - Part 7, Sections 61 - 69 (translated by Sir Frederic G. Kenyon) available at: <[http://www.ekloges.com.cy/nqcontent.cfm?tt=article&a\\_id=1540](http://www.ekloges.com.cy/nqcontent.cfm?tt=article&a_id=1540)>.

171. This can be seen by the example of the slave: Aristotle regards the slave as only capable of apprehending but not forming ideas. ARISTOTLE, POLITICS, Book I, Part 5, Para. 3 (c. 350 b.c.) available at: <<http://classics.mit.edu/Aristotle/politics.1.one.html>>. Consequently the slave has few rights. However the slave, like the drunkard, also has fewer duties, and for a similar reason - at least per Aristotle.

172. "La plus ancienne de toutes les sociétés et la seule naturelle est celle de la famille. ... La famille est donc si l'on veut le premier modèle des sociétés politiques" JEAN JACQUES ROUSSEAU, *CONTRAT SOCIAL*, Livre I, Ch. II (1762) available at: <[http://un2sg4.unige.ch/athena/rousseau/jjr\\_cont.html#L1/2](http://un2sg4.unige.ch/athena/rousseau/jjr_cont.html#L1/2)>.

173. See ARISTOTLE, POLITICS, Book I, Part II (translated by Benjamin Jowett) available at: <<http://classics.mit.edu/Aristotle/politics.1.one.html>>.

174. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Ch. V Sec. 28 (1698) available at <<http://history.hanover.edu/early/locke/j-12-007.htm>>.

ble (as well as being the position of Karl Marx)<sup>175</sup> - unlike the subjective theories of value offered by Rothbard<sup>176</sup> and Mises<sup>177</sup> or the post-modernists. Admittedly, roots of theoretical atomism can also be found in Hobbes,<sup>178</sup> and even Rousseau.<sup>179</sup> But it is only with Locke that the individual can be divorced from society, because property is now a product, not a relation.<sup>180</sup> However for Aristotle<sup>181</sup> and Rousseau<sup>182</sup> the autonomous, autarchic, and thus independent, human of the social contract postulated by Hobbes<sup>183</sup> and Locke, in any of the various shades of that theory, is simply impossible.<sup>184</sup>

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175. KARL MARX, *MORCEAUX CHOISIS* 263 (Nizan, P. et Duret, J. eds., Paris: Librairie Gallimard, 1934) (citing the Karl Marx work, *SALAIRES, PRIX ET PROFIT*). Marx and Locke also agree on the distinction between use value and exchange value: JOHN LOCKE, *OF CIVIL GOVERNMENT*, Book II, Ch. V §46-51 eps. §50; KARL MARX, *CONTRIBUTION A LA CRITIQUE DE L'ECONOMIE POLITIQUE* (Paris, Editions Sociales); KARL MARX *CAPITALE* 40 (Paris: Presses Universitaires Français 1993).

176. See e.g., MURRAY N. ROTHBARD, ED., *THE LOGIC OF ACTION ONE* 78-99 (Edward Elgar Publishing Ltd. 1997).

177. See, e.g., LUDWIG MISES, *MONEY, METHOD AND THE MARKET PROCESS*, Ch. 3, "Epistemological Relativism in the Sciences of Human Action" (Richard M. Ebeling, ed., Amsterdam: Kluwer Academic Pubs. 1990) (Article first published in 1962) available at: <<http://www.mises.org/mmmp/mmmp3.asp>>.

178. Hobbes' natural law (the law of the jungle) is clearly atomist.

The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.

According to Hobbes, in the state of nature, "right" is equivalent to "power," irrespective of society or family. HOBBS, *LEVIATHAN*, Ch. XIV, *Of The First And Second Natural Laws, And Of Contracts* (1660) available at: <<http://www.uoregon.edu/~rbear/hobbes/leviathan.html>>.

179. Only in so far as the *pacte social* constitutes society out of individuals, adhesion to the supposed contract. This, however, contradicts Rousseau's recognition that all states arise out of extended families. JEAN-JACQUES ROUSSEAU, *DU PACTE SOCIAL*, chs. II,VI (1762).

180. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Ch. V, § 28 (1764) available at: <<http://history.hanover.edu/early/locke/j-12-007.htm>>. This is incidentally the alienation of which Marx speaks - our alienation from the product of our labor; our commodification.

181. "He who thus considers things in their first growth and origin, whether a state or anything else, will obtain the clearest view of them. In the first place there must be a union of those who cannot exist without each other; namely, of male and female... The family is the association established by nature for the supply of men's everyday wants... But when several families are united, and the association aims at something more than the supply of daily needs, the first society to be formed is the village... When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life." ARISTOTLE, *POLITICS*, *supra* note 173.

182. « La plus ancienne de toutes les sociétés et la seule naturelle est celle de la famille. » JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE*, Livre I, Ch. II (1762) available at: <[http://un2sg4.unige.ch/athena/rousseau/jjr\\_cont.html](http://un2sg4.unige.ch/athena/rousseau/jjr_cont.html)>.

183. "[T]he condition of man (as hath been declared in the precedent chapter) is a condition of war of every one against every one, in which case every one is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies." HOBBS, *LEVIATHAN*, Ch. XIV, para. 4 (1660) available at: <<http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html>> (searchable).

184. "The philosophers, who have examined the foundations of society, have, every one of them, perceived the necessity of tracing it back to a state of nature, but not one of them has ever arrived there." JEAN JACQUES ROUSSEAU (1712-1778), *On the Inequality among Mankind* (The

Yet, though the social contract is not a historical fact, and the state of nature<sup>185</sup> an impossible fiction. Social contract theory appears to have influenced realist state theory. This theory sees the state as self-sufficient, but living in the state of nature as to other states,<sup>186</sup> and, as such, having only one law, the law of the strongest. This “vision” (nightmare seems more exact) is every bit as unrealistic as the social contract theory, which appears to have spawned it and, like social contract theory, must be rejected for empirical reasons: it does not correspond to material reality. Social contract theory and realist state theory do not even have much heuristic utility, for the presumptions of these theories are so contrary to fact that they cannot provide even an approximate or simplified view of how states are actually formed, or actually behave.<sup>187</sup>

A credible argument can be made that, in pursuing the autarchic individualist ideal of enlightenment, western society sowed the seeds of its own deracination and alienation, as Marx noted.<sup>188</sup> Still, while there are, certainly, real points of divergence, even within western theories of rights, the fact is both west and east see individual rights as a consequence of rationality, and as implying, or even being grounded upon, social duties i.e. as a consequence of a commonality and personhood. Consequently, they can serve a key role in the post-Westphalian world.

Turning from legal theory to legal practice, again, western theory does not ignore duties. For example, the first part of the state constitution of the Free Hanseatic City of Bremen is entitled “Fundamental rights and duties.”<sup>189</sup> The East German Constitution granted both a right and duty to work.<sup>190</sup> Again, in the Swiss Federal Constitution, the duties are also

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Harvard Classics, 1909–14) available at: <<http://www.bartleby.com/34/3/1002.html>>. See also, Jiri Priban, *Stealing the Natural Language: The Function of the Social Contract and Legality in the Light of Nietzsche's Philosophy*, 24 CARDOZO L.REV. 663, 664 (2003) available at: <<http://www.cardozo.yu.edu/cardlrev/v24n2/Priban%20Final%20Version.pdf>>.

185. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Ch. II (1764) available at: <<http://history.hanover.edu/early/locke/j-12-004.htm>>

186. KENNETH N. WALTZ, MAN, THE STATE, AND WAR (Columbia Univ. Press 1954).

187. In contrast, the simplified model of the economy provided by the “homo economicus” does, roughly, approximate how economic actors in fact behave. Like the states in IR realism, economic actors are posited as rational maximisers of their utility. However, the economic game is positive sum, whereas IR theory generally proposes that IR is a zero sum game. In economic theory, altruists can be safely ignored as they are a distinct minority. In contrast, realist IR assumptions do not in fact reduce the variables which influence state behavior in a meaningful way because the variables eliminated (economic factors) are more relevant than the ones retained (military factors!).

188. KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, “*The Alienation of Labour*” (1844) available at <<http://www.wsu.edu:8080/~dee/MODERN/ALIEN.HTM>>.

189. Landesverfassung der Freien Hansestadt Bremen, Artikel 1 - 20, Erster Hauptteil: Grundrechte und Grundpflichten, available at: <<http://www.bremen.de/info/skp/1v/Vrfssngl.htm>>.

190. Verfassung der DDR, Artikel 24 available at: <<http://www.ddr-im-www.de/Gesetze/Verfassung.htm>>.

underlined.<sup>191</sup> This is not limited to the German-speaking world. The French constitution also speaks of rights and duties as concomitant.<sup>192</sup>

#### B. MORAL RELATIVISM<sup>193</sup> AND CULTURAL IMPERIALISM<sup>194</sup> VERSUS UNIVERSALISM

One attack on human rights argues they are not universal,<sup>195</sup> either because no universal values exist (post-modernism)<sup>196</sup> or because human rights represent western values<sup>197</sup> (cultural relativism).<sup>198</sup> Both these attacks are erroneous.<sup>199</sup>

As in the question whether duties are *a-priori* a-rights, the question whether human rights is a universal concept can be posited in terms of a geographic schism between the industrialised north and the developing

(1) Jeder Bürger der Deutschen Demokratischen Republik hat das Recht auf Arbeit. Er hat das Recht auf einen Arbeitsplatz und dessen freie Wahl entsprechend den gesellschaftlichen Erfordernissen und der persönlichen Qualifikation. Er hat das Recht auf Lohn nach Qualität und Quantität der Arbeit. Mann und Frau, Erwachsene und Jugendliche haben das Recht auf gleichen Lohn bei gleicher Arbeitsleistung.

(2) Gesellschaftlich nützliche Tätigkeit ist eine ehrenvolle Pflicht für jeden arbeitsfähigen Bürger. Das Recht auf Arbeit und die Pflicht zur Arbeit bilden eine Einheit.

191. Schweizerische Bundesverfassung, art. 6, Individuelle und gesellschaftliche Verantwortung:

Jede Person nimmt Verantwortung für sich selber wahr und trägt nach ihren Kräften zur Bewältigung der Aufgaben in Staat und Gesellschaft bei.

available at: <<http://www.admin.ch/ch/d/sr/101/a6.html>>.

192. *Déclaration Des Droits De L'homme Et Du Citoyen De 1789*

Les Représentants du Peuple Français, constitués en Assemblée Nationale, considérant que l'ignorance, l'oubli ou le mépris des Droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements, ont résolu d'exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l'Homme, afin que cette Déclaration, constamment présente à tous les Membres du corps social, leur rappelle sans cesse leurs droits et leurs devoirs.

available at: <<http://www.assemblee-nat.fr/connaissance/constitution.asp>>.

193. Guyora Binder, *Cultural Relativism And Cultural Imperialism In Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 221 (1999) (describes the universalism/relativism debate).

194. Makau Mutua, *Savages, Victims, And Saviors: The Metaphor Of Human Rights* 42 HARV. INT'L L.J. 201, 204 (2001) (points out the irony of brutalizing colonial powers pushing for the Nuremberg trials and adopting the UDHR).

195. For a discussion of the contours (and limits) of the universality/relativism debate in an intercultural comparative context see Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L.R. 1095 (2000) available at: <<http://www.undp.org.fj/elections/reports/ghai.pdf>>.

196. See, e.g., Zühtü Arslan, *Taking Rights Less Seriously: Postmodernism and Human Rights*, 5 RES PUBLICA 195 available at: <<http://www.philosophy.ru/library/pdf/234617.pdf>>.

197. Richard Klein, *supra* note 86, at 4 (UDHR rooted in western values).

198. ANTONIO CASSESE, *supra* note 2, at 52; Sarah Joseph, *A Rights Analysis Of The Covenant On Civil And Political Rights*, 5 J. INT'L LEGAL STUD. 57, 74-75 (1999) (arguing that the distinction between rights and duties is artificial).

199. "[T]he cultural relativist theories of the academy are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse." Michael C. Davis, *supra* note 138, at 110.

south.<sup>200</sup> Very different challenges to the universality of human rights arise in each of these regions due to differing economic conditions. However, neither challenge alone, or in combination, is sufficiently strong to defeat the theory that there are universally common characteristics of human nature, which in turn, are the foundation of a similarly universal theory of human rights, which, in turn, engenders a legally binding practice of human rights.

These challenges are the result of cultural relativism in the north, and accusations, or fears of accusations, of cultural imperialism<sup>201</sup> by the south.<sup>202</sup> Not unsurprisingly, the moral relativists<sup>203</sup> are essentially westerners.<sup>204</sup> But those who argue there is no moral knowledge ignore the fact that the prototypic liberals, Aristotle and Locke, do believe in objective moral knowledge. Neo-liberals (i.e. ultra-capitalists) abuse the term "liberal." Neo-liberals, such as Posner,<sup>205</sup> believe there are no moral values; there are only market values. This is one of the splits between classical liberalism and neo-liberalism. Thus post-modernists are mistaken if they believe that moral relativism somehow advances "left" or "classical" liberal agendas. Quite the opposite, moral relativism, like "value neutrality," implicitly affirms the *status quo*.

The West seems to have a monopoly on moral relativism because of economics. Westerners are products of societies of such superabundance that they can afford the luxury of entertaining ideas<sup>206</sup> such as "all truths

200. See, e.g. Dianne Otto, *Rethinking The "Universality" Of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997).

201. Makau Mutua, *Savages, Victims, And Saviors*, *supra* note 194, at 204-205 (argues that human rights is Eurocentric, though well-meaning, and unknowingly reiterates colonial paradigms).

202. See, e.g., Jonathan C. Goltzman, *Cultural Relativism or Cultural Intrusion? Female Ritual Slavery in Western Africa & the International Covenant on Civil and Political Rights: Ghana as a Case Study*, 4 N.ENG. INT'L & COMP. L. ANN. 53, 66 (1998) available at: <<http://www.nesl.edu/intljournal/vol4indx.cfm>>.

203. For a good explanation of the problems of moral relativism (which, however, fails to recognize the fact that in any formal system axioms are necessary to formal representation and necessarily tautological) see Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1003-1009 (1986) (proposing a method for valid normative inference using practical reasoning i.e. phronesis but discussing although only obliquely Hume's position on normative inference).

204. A cogent but extreme reply to moral relativism points out that for liberals like Rawls, Ackerman, and Dworkin there is no moral knowledge. *Id.* at 995. That view may go too far. Clearly, the prototypic liberals Aristotle and Locke do believe in objective moral knowledge. So, what Perry is identifying is actually the neo-liberal (i.e. ultra-capitalist) abuse of the idea of liberality.

205. See, e.g., RICHARD POSNER, *THE ECONOMICS OF JUSTICE*, (Boston: Harvard 1981).

206. The failure of the moral relativists to grasp reality can be shown by a crude *reductio*: genital mutilation. Who cares to argue for it? There is no absence of literature. See, e.g., Adam Karp, *Genitort In The Global Context: Female Genital Mutilation As Tort Under The Alien Tort Claims Act, The Torture Victim Protection Act, And The Foreign Sovereign Immunities Act*, 18 WOMEN'S RTS. L. REP. 315 (1997); Sylvia Wynter "Genital Mutilation" Or "Symbolic Birth?"

are relative."<sup>207</sup> Of course, if truth were only relative, then no objective truth could exist. That, however, creates a paradox. A truth statement that no truth statements exist is itself a truth statement. Relativist arguments, whether as to epistemology, i.e. truth scepticism, or axiology, i.e. moral relativism, can be seen either as the product of confused<sup>208</sup> reasoning,<sup>209</sup> or as a product of a culture<sup>210</sup> so blinded by its own wealth that it cannot see the starvation and death that are all too common in the third world.

Because moral relativists often suffer<sup>211</sup> from having never been confronted with genuine moral choices, let alone a genuine moral dilemma, they threaten the very existence of the rights that generated the abundance that they consume. One might consider this, like most errors, to be a self-correcting problem. However, due to the economic plight of the third world, one might question whether self-correction is the best correction in this case. Further, an accusation that the human rights discourse of the west is cultural imperialism<sup>212</sup> is probably not self-

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*Female Circumcision, Lost Origins, And The Aculturalism Of Feminist/Western Thought*, 47 CASE W. RES. L. REV. 501 (1997); L. Amede Obiora, *Bridges And Barricades: Rethinking Polemics And Intransigence In The Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997). A moral relativist cannot oppose genital mutilation (or any other act) since all cultures are (to the relativist) equally valid.

207. Epistemologically, truth scepticism must be distinguished from post-modernist truth abnegationism. Truth scepticism with roots in Nietzsche merely challenges whether what we are told is "truth" is in fact "true." FRIEDRICH NIETZSCHE, *JENSEITS VON GUT UND BÖSE*, (1887) available at: <<http://www.gutenberg2000.de/nietzsch/jenseits/0html/dir.htm>>. Truth abnegation denies the existence of truth.

208. Much of the confusion lies in the belief that statements must be either true or false. Aristotle himself noted that some statements, such as prayers, have no truth value.

Every sentence has meaning, not as being the natural means by which a physical faculty is realized, but, as we have said, by convention. Yet every sentence is not a proposition; only such are propositions as have in them either truth or falsity. Thus a prayer is a sentence, but is neither true nor false.

ARISTOTLE, *ON INTERPRETATION* (c. 350 B.C.) (translated by E. M. Edghill) Section 1, Part IV, para. 2, available at: <<http://classics.mit.edu/Aristotle/interpretation.1.1.html>>. Also see Sanford Shieh, *Undecidability, Epistemology, and Anti-Realist Intuitionism*, 2 NORDIC J. PHILOSOPHICAL LOGIC 55, available at: <<http://www.hf.uio.no/filosofi/njpl/vol2no2/decidable/decidable.pdf>>.

209. One root of the confusion is the recognition by Kurt Gödel that the truth value of some propositions of formal logic cannot be determined by a formal system. KURT GÖDEL, *ON FORMALLY UNDECIDABLE PROPOSITIONS OF PRINCIPIA MATHEMATICA AND RELATED SYSTEMS*, (1931) available at: <<http://nago.cs.colourado.edu/~hirzel/papers/canon00-goedel.pdf>>.

210. The best attacks on the universality of human rights focus on the cultural flaws of the north and question its moral legitimacy. E.g., "The human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other." Makau Mutua, *supra* note 194, at 201. But even the best attacks criticise not the idea of human rights as such, but rather the legitimacy of the north/west to claim to be the fountain of human rights.

211. "According to the naturalist conception, moral knowledge is knowledge of how to live so as to flourish, to achieve well-being." Michael J. Perry, *supra* note 203, at 997. Those who lack moral knowledge literally suffer from their ignorance, as Aristotle notes.

212. Surya P. Subedi, *Are The Principles Of Human Rights "Western" Ideas? An Analysis Of The Claim Of The "Asian" Concept Of Human Rights From The Perspectives Of Hinduism*, 30 CAL.



correcting. Because of colonialism, the third world's critique of the first world's use of human rights as a tool of imperialism may have some merit. Further, these two challenges could be mutually reinforcing. Thus, a coherent defense of the universality of human rights is crucial, if human rights are to serve as a key feature in the post-Westphalian world.

The critique that human rights are merely cultural imperialism is not entirely without merit. Given the west's history of attempts at "civilising"<sup>213</sup> the third world - its justification for third world labor exploitation - the wariness,<sup>214</sup> or skepticism,<sup>215</sup> of the third world intellectual toward the conflation of western human rights with universal human rights<sup>216</sup> and the charge that human rights are a merely a smokescreen for imperialism is understandable.<sup>217</sup> However, despite historical and economic distortion, a basic fact of humanity is true: all healthy humans are rational and seek to enjoy the good life in society.<sup>218</sup> Thus, there is a genuinely universal human archetype. Moreover, that rationality is precisely the foundation of fundamental rights. Humans have rights, as rational beings and because structures of rights allow that rationality to be deployed practically, not only in order to survive, but also to attain the good life of peace, happiness and social discourse.<sup>219</sup>

Again, the supposed theoretical divergence of rights discourse is largely illusory, in as much as it is a consequence of economic conditions. Were Europe a victim of Indian imperialism, and Africa overfed and underworked, Europe would be expressing fears of cultural imperialism and

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W. INT'L L.J. 45 (1999) (arguing that the idea that human rights is the product of Western Christian civilisation is reiteration of selective nineteenth-century values).

213. Literally: imposing the civil law. GABE S. VARGES, *supra* note 82.

214. Surya P. Subedi, *supra* note 212, at 46. However once again that is not a dispute as to whether there are human rights but rather what is the content of those rights. As such, it is no argument against the universality of human rights.

215. For example, Nestlé sells powdered milk in the third world erroneously arguing that it will make babies more intelligent than mother's milk. Further powdered milk requires sterilised water – and the water in the third world is often impure. Worse, powdered milk is often diluted leading to malnutrition and even death from starvation. When Nestlé was criticised for this in print, Nestlé sued for defamation, specifically for *Verleumdung* and *üble Nachrede*. Nestlé's claim for *üble Nachrede* was upheld. ANTONIO CASSESE, *supra* note 2, at 138-139.

216. "[N]ot all human rights principles have their roots in Western civilisation nor are all human rights principles necessarily mere Western principles." Surya P. Subedi, *supra* note 212, at 45.

217. Martha Minow, *Rights and Cultural Difference*, in IDENTITIES, POLITICS AND RIGHTS 355 (Sarat and Kearns eds., 1995) (example of human rights used as tool of domination of First Nations in North America).

218. See ARISTOTLE, POLITICS, Book I Part II (translated by Benjamin Jowett) (350 B.C.) available at: <<http://classics.mit.edu/Aristotle/politics.1.one.html>>.

219. The good life is, of course, defined by Aristotle as the end of life in political society. *Id.*

India preaching some variety of moral relativism.<sup>220</sup> Rights are, to a certain extent, defined by a society's level of economic development.<sup>221</sup> Relatively impoverished pre-industrial or nascent industrial states simply cannot afford to impose affirmative claims posited by second-generation rights. However, that does not change the fact that the ultimate foundation and vector of rights is our inherent value as rational social beings.<sup>222</sup>

### C. HUMAN RIGHTS AND THE RULE OF LAW?<sup>223</sup>

Just as human rights can be seen as universal in their conception and applicability, so also is the foundation of human rights on the rule of law not at all unique to white, Christian or western society. This raises the question of the relationship between the rule of law and human rights.

Human rights, as legal rules, cannot exist without a society based on the rule of law. The rule of law is a logical precondition to human rights.<sup>224</sup> However, though the rule of law is a necessary precondition to human rights, it is not a sufficient condition.<sup>225</sup> It is entirely possible to have a society founded upon the rule of law, i.e. a *formeller Rechtsstaat* which does observe basic principles of just laws (e.g. no crime without law, no retroactive laws), yet which does not acknowledge, or respect, substantive human rights, or even acknowledge the existence of procedural rights.

Consequently, to understand human rights, we must also understand that human rights are a possible, but not a necessary, consequence of the rule of law. How, then, does a society, which guarantees and achieves substantive human rights, emerge from a conception of the rule of law as merely formal procedures?<sup>226</sup> This question is not only interesting be-

220. In fact, Indian discourses on human rights are well-developed and even represented within western legal scholarship. See, e.g., Prakash Shah, *International Human Rights: A Perspective From India*, 21 *FORDHAM INT'L L.J.* 24, 44 (1997).

221. Yash Ghai, *supra* note 195 (citing to Chinese legal authority).

222. Anita Ramasastry, *Corporate Complicity: From Nuremberg To Rangoon An Examination Of Forced Labour Cases And Their Impact On The Liability Of Multinational Corporations*, 20 *BERKELEY J. INT'L L.* 91, 153 (2002).

223. Robin West, *supra* note 131 (equality the foundation of mutual respect).

224. Report of the Joseph R. Crowley Program, *One Country, Two Legal Systems?*, 23 *FORDHAM INT'L L.J.* 1, 6 (1999).

225. Similarly, there is also no necessary connection between democracy and the rule of law. Michel Rosenfeld, *The Rule Of Law And The Legitimacy Of Constitutional Democracy*, 74 *S. CAL. L. REV.* 1307, 1308 (2001).

226. One possible answer is for realist reasons, i.e. *Realpolitik* considerations. The rule of law, like human rights, can be a tool in a state's diplomatic arsenal and serve its foreign policy goals. José Maravall, *The Rule of Law as a Political Weapon*, Working Paper 2001/160 (2001) available at:

<[http://www.march.es/NUEVO/IJM/CEACS/PUBLICACIONES/WORKING%20PAPERS/2001\\_160.pdf](http://www.march.es/NUEVO/IJM/CEACS/PUBLICACIONES/WORKING%20PAPERS/2001_160.pdf)>.

cause the emergence of human right is not inevitable, it is also relevant to the universality debate. If the rule of law is a uniquely western<sup>227</sup> concept, and the rule of law is a necessary precondition to human rights, then human rights would be a uniquely western concept. In fact, that is not the case. Asian societies and aboriginal societies also observed, and continue to observe, the formal requirements of the rule of law, and, in some cases, have also achieved the positive goals of guaranteeing the substantive human rights necessary to obtain the good life.

This is not to say that there are no unique contributions of western thought to theories of the rule of law. Clearly, separation of powers<sup>228</sup> and the right<sup>229</sup> to rebel<sup>230</sup> are western inputs to the stock of human knowledge. However, neither of these is necessary to have a state governed by laws. But, because there are many western contributions to the theory of human rights, that concept will never be able to escape from accusations of cultural imperialism. There are, of course, very good reasons for such an accusation. For example, labor exploitation in the colonial world was justified in the name of the Christian<sup>231</sup> duty to "civilise" "savages." However, the finalities which human rights serve, namely to enable the human, as individual and species, to survive, and not only to survive, but also to lead the good life, explain why those accusations are

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227. One can of course question whether the United States are committed to the rule of law: the United States has deployed military forces in Grenada, Libya, Nicaragua, Panama, and Yugoslavia without authorisation from the United Nations Security Council, as required by the U.N. Charter. The United States quit UNESCO, failed to pay its U.N. dues in a timely manner, withdrew from the jurisdiction of the International Court of Justice, and refused to comply with the International Court's orders on at least three occasions... the United States has repeatedly executed foreign nationals without according them the basic right to consult with their consular representatives... the United States has failed to ratify the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines... the Bush administration rejected the Kyoto Protocol on global warming, the Comprehensive Nuclear Test Ban Treaty, the Biological Weapons Protocol to enforce the 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons, which banned such weapons, and the Rome Statute of the International Criminal Court.

Joel R. Paul, *Holding Multi-National Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 287-288 (2001).

228. Charles Montesquieu, *De L'Esprit des Lois* (1758), Livre XI, available at: <[http://www.uqac.quebec.ca/zone30/Classiques\\_des\\_sciences\\_sociales/livres/montesquieu/montesquieu.html](http://www.uqac.quebec.ca/zone30/Classiques_des_sciences_sociales/livres/montesquieu/montesquieu.html)>.

229. "[T]he American and French Revolutions... established the right of the people to rebel against tyranny." Nancy P. Kelly, *The Political Offense Exemption To Extradition: Protecting The Right Of Rebellion In An Era Of International Political Violence*, 66 OR. L. REV. 405 (1987).

230. Though Hobbes and Rousseau consider the social contract irrevocable, this is not Locke's position. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Ch. XIX §22 (1764) available at <<http://history.hanover.edu/early/locke/j-12-001.htm>>.

231. Makau Mutua, *What is TWAIL?* 94 ASIL PROCEEDINGS 1, 37 (2000).

ultimately only partly correct. Human rights emerge from the miasma of post-modern moral relativism<sup>232</sup> precisely where they assert the truly universal aspects of humanity - namely rationality. All humans, not merely rich white males, have an essential dignity and beauty as humans because of the capacity to think. As a consequence of rationality, humans also have the capacity to acquire and alienate. However, the very rationality which permits us to acquire, and alienate, is also the foundation of our essential dignity, explaining why certain of our rights are inherently inalienable. For an alienation of our rights - for example food, shelter, and respect - destroys the human as human, rendering one at best, dead, and at worst, an unthinking animal.<sup>233</sup>

While it could be argued (imprudently, for the argument risks accusations of cultural arrogance) that the rule of law is originally a western concept - for the institutions of democratic self rule<sup>234</sup> under law were first developed in the west (ignoring for the moment that Athens was a slave economy) - the idea of the rule of law is, in fact, not uniquely, nor inevitably, western. As recently as the Twentieth Century, the west faced several challenges to the rule of law centering on the question of genetic inequality in Germany, the United States and South Africa.<sup>235</sup> Furthermore, several contemporary, non-western societies clearly display all the aspects of the supposedly western concept of the rule of law. However, although the rule of law is a necessary, but not sufficient condition of human rights, it is a necessary and sufficient condition of a market economy.<sup>236</sup> Without guaranties of the finalities of transaction, and without some social mobility, a complex capitalist economy would be impossible. While capitalism did originate in the west, it has since spread globally, proving the rule of law is not a product of either race or the Christian religion - and thus neither uniquely, nor necessarily, west-

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232. For good critiques of the flaws and confusion which inherent in post-modern thought due to an erroneous axiology and epistemology see Dennis W. Arrow, *Pomobabble: Postmodern New-speak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. R. 461 (1997); Dennis Arrow, *Spaceball (Or, Not Everything that's Left is Postmodern)*, 54 VAND. L. REV. 2381 available at: <<http://law.vanderbilt.edu/lawreview/vol546/arrow.pdf>>.

233. Aristotle argues that man outside of political society is rendered beastlike.

The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state.

ARISTOTLE, *POLITICS*, Book I, Part II (ca. 350 b.c.) available at:

<<http://classics.mit.edu/Aristotle/politics.1.one.html>>.

234. The universality debate also exists in democratic theory. Surya P. Subedi, *supra* note 212, at 47.

235. William G. Ross, *Attacks On The Warren Court By State Officials: A Case Study Of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 508 (2002).

236. Richard L. Abel, *Capitalism and the Rule of Law: Precondition or Contradiction?* 28 LAW & SOC'Y REV. 971, 987 (journal renamed: was 15 LAW & SOCIAL INQUIRY 685) (1990).

ern. Human rights, however, are a function of economic development. This, then, is the explanation of how the rule of law ultimately can lead to human rights: the rule of law creates necessary pre-conditions for economic prosperity.<sup>237</sup> As the economy develops, speaking of substantive rights in a meaningful sense becomes possible. Human rights, thus, are neither inevitably nor uniquely “western.” They are economic functions which appear to have first, or most clearly, developed in the western world.

However, while economic development does make it possible to speak of rights in a meaningful sense, theories that international human rights law somehow resembles *lex mercatoria* confuse the possible with the necessary. While possible that economic development can permit the emergence of human rights, it is not necessary. The correlation between economic development and human rights is not causal. How, then, have human rights, in fact, developed with economic progress?

#### IV. THE GENERATIONAL THEORY OF HUMAN RIGHTS

The growth of human rights, which has roughly paralleled economic development, is usually<sup>238</sup> described as having evolved over time in three successive waves,<sup>239</sup> from easily implemented<sup>240</sup> individual<sup>241</sup> negative claims, to freedom from the state, to positive collective<sup>242</sup> claims, to entitlements to state resources. At least one scholar has tried to draw an a-historical, but philosophically interesting, parallel between first-generation rights as expressions of liberty, second-generation rights as expressions of equality, and third-generation rights as expressions of solidarity.<sup>243</sup> Such a description is almost poetic in its symmetry, and

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237. “Human Rights ensure international security and prosperity” speech by the Foreign Secretary, Jack Straw, to the United Nations Commission on Human Rights, Geneva, 17 April 2002, available at: <<http://www.britischebotschaft.de/en/news/items/020418.htm>>.

238. *But see*: Dianne Otto, *supra* note 200, at 5-6. (Describing human rights as having developed in four generations – Otto’s view is distinctly the minority view; Otto also describes the usual typology of first generation and second generation rights but subdivides third generation rights based on whether they arose out of the Soviet Bloc or Non-Aligned Movement.)

239. Claire Moore Dickerson, *supra* note 60, at 1441-1442 (describes and refines the three-generation theory of human rights).

240. John King Gamble, et al., *supra* note 116, at 36 (argues that first-generation rights are able to be easily and immediately implemented).

241. *But see*: Claire Moore Dickerson, *supra* note 60, at 1444. Dickerson’s ignores the individualist propertarian presumptions of first generation rights practice and claims of rights to collective bargaining which were raised only with the second generation of rights.

242. John King Gamble, et al., *supra* note 116, at 36.

243. “The first generation of political and civil rights, embodied in the Universal Declaration and the Covenant on Civil and Political Rights, are freedoms from state intrusion: *liberté*. The second generation furthers realization of the first generation by guaranteeing minimum standards, demandable upon the state, of education and health, a liveable wage, decent working conditions, and social insurance for all persons: *egalite*. Finally, the third generation consists of rights which may be

clearly, the Déclaration des Droits de l'Homme of 1789<sup>244</sup> did inspire the Universal Declaration of Human Rights (UDHR).<sup>245</sup> The analogy is just that, however, an analogy, no more, no less.

The idea of a triumvirate of rights did not spring, like Athena, fully formed from the mind of Zeus.<sup>246</sup> It appears to be of rather recent origin. Louis Sohn traces the concept of three generations of human rights to Karel Vasak of UNESCO, whom Sohn quotes as the source of the term.<sup>247</sup> Sohn, quoting Vasak, believes that each generation of rights complements and completes the other. That, however, ignores the tension between individual property rights and collective-social rights. One can argue that the second-generation rights guarantee the substantive social *minima* precisely to preserve the first-generation property rights, namely by maintaining social stability, obviating the need for revolution. Be that as it may, Sohn points out that Vasak linked the idea of generational rights to the motto of the French revolution – liberté, égalité, fraternité. Nothing in the writings of Montesquieu<sup>248</sup> or Rousseau,<sup>249</sup> or even Locke,<sup>250</sup> Hobbes,<sup>251</sup> or Kant,<sup>252</sup> support the theory that human rights would unfold in successive generations.<sup>253</sup> It seems to be a neologism.<sup>254</sup> In fact, the tripartite typology of human rights is a historical observation *ex post*, not a theoretical framework *ex ante*. A better typology might justify the generational split, not on the basis of history or teleology, but rather on positive international law. First-generation international human rights appear to be a part of *jus cogens*.<sup>255</sup> Second-generation rights are

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invoked against and demanded of the state. These rights require all the organs of society--individual, state, regional, and international--to cooperate in order for the rights to be realised: *fraternité*." Jennifer A. Downs, *supra* note 69, at 364. I have found no evidence for this assertion in the writings of Diderot, Montesquieu or Rousseau.

244. *Déclaration des droits de l'Homme et du citoyen*, 26 août 1789 available at: <<http://www.justice.gouv.fr/textfond/ddhc.htm>>.

245. *Die Allgemeine Erklärung der Menschenrechte*, Resolution 217 A (III) vom 10.12.1948, available at: <<http://www.unhchr.ch/udhr/lang/ger.htm>>.

246. ANONYMOUS, ATHENA (2002) <<http://www.mythologica.de/athena.htm>>.

247. Louis B. Sohn, *supra* note 5, at 61-62.

248. Charles Montesquieu, *L'Esprit des Lois* (1758) available at: <[http://www.uqac.quebec.ca/zone30/Classiques\\_des\\_sciences\\_sociales/livres/montesquieu/de\\_esprit\\_des\\_lois/de\\_esprit\\_des\\_lois\\_tdm.html](http://www.uqac.quebec.ca/zone30/Classiques_des_sciences_sociales/livres/montesquieu/de_esprit_des_lois/de_esprit_des_lois_tdm.html)>.

249. JEAN JACQUES ROUSSEAU, *supra* note 172.

250. JOHN LOCKE, *supra* note 174.

251. HOBBS, *supra* note 20.

252. IMMANUEL KANT, ZUM EWIGEN FRIEDEN (1795) available at: <<http://www.mda.de/homes/matban/de/kant-zef.html>>; IMMANUEL KANT, BEANTWORTUNG DER FRAGE: WAS IST AUFKLÄRUNG? (1784) available at: <<http://www.gutenberg2000.de/kant/aufklae/aufkl001.htm>>.

253. I am, of course, open to contradiction and do not claim to have read the entire canon of every western enlightenment thinker. However, it seems unlikely that the enlightenment thinkers foresaw with such clarity the future development of human rights.

254. Louis B. Sohn, *supra* note 5, at 61-62.

255. *Id.* at 32.

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also customary laws, but may be derogated from. Third-generation rights are aspirational goals. Each generation is binding, but to a different degree and concerns different branches of human rights law.

Contemporary rights discourse describes human rights as divided into three categories. However, that description of rights, and the study of rights, is only approximate.<sup>256</sup> It ignores certain crosscurrents and tensions between those rights, and also ignores other evolutionary developments which are not generally identified in rights discourse. Our historical and theoretical analysis of the theory of rights reveals the apories in the theory in order to resolve them. In conclusion, despite some problems, the idea of three generations of human rights is, with qualifications, a workable, if sometimes only approximate, description of positive law.

## A. FIRST-GENERATION RIGHTS

The first wave of human rights in modernity is usually identified with the period of Scottish enlightenment<sup>257</sup> and the age of reason (the nineteenth century), expressed in the liberal revolutions<sup>258</sup> in America, France, and Latin America.<sup>259</sup> Rights asserted in these revolutions were essentially claims of the individual against state interference and to self-government. That is the first-generation rights (e.g., the freedom to worship, to peaceably assemble) were negative restrictions on state power.<sup>260</sup> First-generation rights also tend to be procedural rights,<sup>261</sup> that is rules which

256. Jennifer A. Downs, *supra* note 69, at 351 (argues that the generational theory is metaphoric not historic).

257. R. Randall Kelso, *A Post-Conference Reflection On Federalism, Toleration, And Human Rights*, 40 S. TEX. L. REV. 811, 826-827 (two historical strands to moral reasoning about universal human rights: the Enlightenment natural law tradition, and the classic and Christian natural law tradition).

258. *Id.*; see also, Louis B. Sohn, *supra* note 5, at 33. Kelso seems to ignore contemporary theorists of *ius naturale* such as Finnis.

259. Because of this bourgeois influence on the idea of human rights some are sceptical as to whether human rights truly "liberates." This scepticism is understandable. Indeed as such critics of human rights note, rights are not merely a protection of the weak and innocent against the strong and powerful, they are also a vector of state power, and a subtle one at that. See, e.g., Wendy Brown, *Rights and Identity in Late Modernity*, in IDENTITIES, POLITICS AND RIGHTS 89 (Sarat and Kearns eds., 1995).

260. U.S. CONST., amend. I (freedom of speech, worship), IV (no unlawful search or seizure), *inter alia* available at: <<http://www.law.cornell.edu/constitution/constitution.billofrights.htm>>.

261. See e.g., U.S. CONST., amend. V, available at: <<http://www.law.cornell.edu/constitution/constitution.billofrights.htm>> and *Déclaration des droits de l'Homme et du Citoyen*, arts. 7-9.

« Article 7 - Nul homme ne peut être accusé, arrêté ou détenu que dans les cas déterminés par la loi et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires doivent être punis ; mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant ; il se rend coupable par la résistance. Article 8 - La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et

determine the creation or application of substantive claims to material goods. Another common characteristic of the first generation of rights is that, historically, the first generation of human rights tends to see property rights as fundamental, individual and even absolute.<sup>262</sup> Later generations see property as relative, and socially conditioned.<sup>263</sup> First-generation rights can be summarised, roughly, as negative civil and political rights – “freedoms from” rather than “rights to.”

However, describing first-generation rights as negative protection from state interference is not entirely accurate. The right to worship as one chooses, to write or speak one’s mind,<sup>264</sup> are not mere restrictions on state power – they are also assertions of the individual’s power. Most restrictions of state power imply an exercise of individual power and *vice versa*.

Rights discourse is inherently problematic because of this dual nature of rights – every single person’s right implies another person’s corresponding duty. Rights discourse is inherently problematic because “rights” are expressed as vague, or ambiguous, platitudes. Rights discourse is also contested because the interest of the individual and the collective are, at times, in conflict, and one, or the other, must prevail and because of the classic duality<sup>265</sup> of “substance” versus “procedure.” However, though the usual account of the historical development of human rights is not perfectly accurate, and though human rights are inherently problematic, that does not mean that there is no common concept of an idea that humans have inherent rights. There is even some agreement as to, at least,

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légalement appliquée. Article 9 - Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi. »

Available at: <<http://www.justice.gouv.fr/textfond/ddhc.htm>>.

262. *Declaration des Droits de l'Homme et du Citoyen*, art. 2, 17, available at: <<http://www.justice.gouv.fr/textfond/ddhc.htm>>; U.S. CONST., amend. V, available at: <<http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmentiii>>.

263. E.g. “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.” *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

264. E.g., *Declaration des Droits de l'Homme et du Citoyen*, art. 10 & 11:

Article 10 - Nul ne doit être inquiété pour ses opinions, mêmes religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi.

Article 11 - La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme ; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

available at: <<http://www.justice.gouv.fr/textfond/ddhc.htm>>. Clearly, these are restrictions of the state’s power – but they are often also affirmations of the individual’s power.

265. Paul W. Kahn, *American Hegemony And International Law Speaking Law To Power: Popular Sovereignty, Human Rights, And The New International Order*, 1 CHI. J. INT’L L. 1, 5 (2000) (points out the collapse of dualism and that sovereignty rather than a solution to the problems of peace and justice is a problem).



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a common core of universally recognized human rights, such as the right not to be deprived arbitrarily of one's own life.

In sum, despite the historical and methodological limitations, it is possible to roughly sketch human rights as having passed through three historical stages. However, the usual description must be nuanced, and qualified, because that sketch is only roughly accurate. A correct understanding of history will, in turn, permit us to develop a correct theory. For theory must itself be a reflection of history, i.e. of material reality, if it is to be accurate according to materialist epistemology.

## B. SECOND-GENERATION RIGHTS

The second generation of rights arose during the industrial revolution and was contemporaneous with the political revolutions<sup>266</sup> of circa 1848-1870.<sup>267</sup> Human rights were then seen, increasingly, as no longer merely negative rights to freedom from state interference, but rather as affirmative, substantive<sup>268</sup> social claims to state resources.<sup>269</sup> Second-generation rights were seen as the consequence of dialectical class struggle<sup>270</sup> and thus, to some extent, as collective rights.<sup>271</sup> Second-generation rights discourse tends, unlike first-generation rights analysis, to see property claims as social and relative.

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266. Louis B. Sohn, *supra* note 5, at 33.

267. Claire Moore Dickerson, *supra* note 60, at 1444-1445 (describes three-generation rights theory).

268. E.g., *Verfassung der DDR*, Artikel 25 „(1) Jeder Bürger der Deutschen Demokratischen Republik hat das gleiche Recht auf Bildung. Die Bildungsstätten stehen jedermann offen. Das einheitliche sozialistische Bildungssystem gewährleistet jedem Bürger eine kontinuierliche sozialistische Erziehung. Bildung und Weiterbildung.“ Available at: <<http://www.ddr-im-www.de/Gesetze/Verfassung.htm>> and at: <<http://www.documentarchiv.de/ddr/verfddr.html>>.

269. E.g. *Landesverfassung der Freien Hansestadt Bremen* Artikel 14: „Jeder Bewohner der Freien Hansestadt Bremen hat Anspruch auf eine angemessene Wohnung. Es ist Aufgabe des Staates und der Gemeinden, die Verwirklichung dieses Anspruches zu fördern.“ Available at: <<http://www.bremen.de/info/skp/lv/Vrfssngl.htm>>.

270. Präambel, *Verfassung der DDR*, 6 April 1968: „In Fortsetzung der revolutionären Traditionen der deutschen Arbeiterklasse und gestützt auf die Befreiung vom Faschismus hat das Volk der Deutschen Demokratischen Republik in Übereinstimmung mit den Prozessen der geschichtlichen Entwicklung unserer Epoche sein Recht auf sozial-ökonomische, staatliche und nationale Selbstbestimmung verwirklicht und gestaltet die entwickelte sozialistische Gesellschaft.“ Available at: <<http://www.ddr-im-www.de/Gesetze/Verfassung.htm#sozgesell>>.

271. *Landesverfassung der Freien Hansestadt Bremen*, vom 21 Oktober 1947 (Brem.GBl. S. 251). „Erschüttert von der Vernichtung, die die autoritäre Regierung der Nationalsozialisten unter Mißachtung der persönlichen Freiheit und der Würde des Menschen in der jahrhundertealten Freien Hansestadt Bremen verursacht hat, sind die Bürger dieses Landes willens, eine Ordnung des gesellschaftlichen Lebens zu schaffen, in der die soziale Gerechtigkeit, die Menschlichkeit und der Friede gepflegt werden, in der der wirtschaftlich Schwache vor Ausbeutung geschützt und allen Arbeitswilligen ein menschenwürdiges Dasein gesichert wird.“ Präambel, *Landesverfassung Bremen*, available at: <<http://www.bremen.de/info/skp/lv/Vrfssngl.htm>>. A comparison of the preamble of the Bremer constitution and the preamble of the East German constitution reveals several interesting equivalences, parallels and divergences.

On this point, there is some tension<sup>272</sup> between the first and second generation of rights. For example, the social welfare and social insurance schemes<sup>273</sup> of industrial states<sup>274</sup> and social democracies<sup>275</sup> are second-generation rights – but those rights infringe on the property rights guaranteed by first-generation rights. However, while that is the case, the second-generation rights also appease the dispossessed and, as such, tend to increase social stability. Thus, second-generation rights function ultimately to maintain property rights.

Not only is there surface tension between the first and second generation of rights on the issue of property rights, the usual evolutionary generational understanding of human rights is incomplete. Are the rights of women a first-generation procedural right, a second-generation substantive right, or a third-generation collective right? Historically, claims to women's rights only began to be made around 1880, which would place them in the second generation. But those claims were to procedural rights, such as the right to vote, or freedoms from state restrictions on employment and property ownership. So theoretically, at least, the early women's rights were first-generation rights – but historically they were only recognized just after the rise of the second generation of human rights circa 1880. Thus, proponents of the generational theory should explicitly declare their description of three generations of rights as either theoretical (the author's position), or historical, in order to avoid misunderstanding and to clarify the points where history and theory diverge.

This is not the only example of historical contradiction within the idea of human rights. What about the rights of non-whites? Emancipation of black persons occurred in the mid-nineteenth century, circa 1860.<sup>276</sup> This was another claim to freedom from state power - the right not to be property, the right to vote, the right to speak. Racial inequality was *de facto*,

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272. Jennifer A. Downs, *supra* note 69, at 360-361 (argues, in my opinion, unconvincingly that first and second generation rights live in symbiosis and are not, in fact, in conflict).

273. E.g., RUSSIAN CONSTITUTION OF 1936, art. 120 (right to pensions for the elderly) *available at*: <<http://www.departments.bucknell.edu/russian/const/36cons04.html#chap10>>.

274. Usually social insurance in the liberal democracies is a part of administrative law. Sometimes however it does enter into constitutional law. E.g., art. 41 Bundesverfassung Schweiz: „1 Bund und Kantone setzen sich in Ergänzung zu persönlicher Verantwortung und privater Initiative dafür ein, dass: a. jede Person an der sozialen Sicherheit teilhat; ...“ *available at*: <<http://www.admin.ch/ch/d/st/101/a41.html>>. Cf., CONSTITUTION FRANCAISE, art. 1, *available at*: <<http://www.assemblee-nat.fr/connaissance/constitution.asp>>.

275. CONSTITUTION FRANCAISE, 4 Octobre 1958, Article premier « La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. »

276. E.g., The Emancipation Proclamation (1863) *available at*: <<http://www.nps.gov/ncro/anti/emancipation.html>>.

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and sometimes *de jure*, well into the twentieth century in the U.S.,<sup>277</sup> and even (with resistance) into the 1980s in South Africa.<sup>278</sup> The historical description of three generations of human rights must thus acknowledge two major incongruencies: the delay in recognizing womens' rights, and the denial, at least until relatively recently, of the human rights of non-whites.

These instances of historical inconsistencies demonstrate the limits of the idea of a "first" wave of procedural negative rights and a "second" generation substantive affirmative claims. With these qualifications, the usual historical account of the evolution of human rights can help us to understand why the revolutions of 1776<sup>279</sup> and 1789 wrought different changes than those of 1917<sup>280</sup> and 1949. These tools of understanding can be used to indicate whether the discussion concerns the three-generations theory as an abstract description, where it is roughly accurate (with qualification), or as a historical description, where it is only loosely accurate.

### C. THIRD GENERATION OF RIGHTS

The third generation of human rights<sup>281</sup> arose in the post-war world. The recognition of third-generation rights is sometimes linked to the recognition of the limited international legal personality.<sup>282</sup> Third-generation rights are seen as essentially collective.<sup>283</sup> They seek to dynamically<sup>284</sup> complement the rights of the first and second generation.<sup>285</sup> That attempt,

277. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (segregated railways not unconstitutional, later overruled) available at: <[http://afroamhistory.about.com/library/blplessy\\_v\\_ferguson.htm](http://afroamhistory.about.com/library/blplessy_v_ferguson.htm)>; *Cumming v. Board of Ed. of Richmond County*, 175 U.S. 528 (1899) (segregated education not unconstitutional, later overruled) available at:

<[http://afroamhistory.about.com/library/blcumming\\_v\\_richmond.htm](http://afroamhistory.about.com/library/blcumming_v_richmond.htm)>.

278. For a listing of the principle apartheid legislation and history see BBC, *The Story of Africa: Southern Africa* (2003) available at:

<<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/12chapter7.shtml>>.

279. For a discussion of the role of revolution in international law (and as expression of the right of national self determination) see Theodor Schweisfurth, *The Role of Political Revolution in the Theory of International Law*, in Macdonald & Johnston, *supra* note 39, at 913.

280. Louis B. Sohn, *supra* note 5, at 33.

281. Jennifer A. Downs, *supra* note 69, at 362 (citing Karel Vasak, Legal Adviser to the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) and former director of the UNESCO Division of Human Rights and Peace, as the first to use the term 'third generation human rights').

282. Comment, *Developments In The Law – International Environmental Law: V. Institutional Arrangements* 104 HARV. L. REV. 1580, 1600 (1991) (notes that individuals have limited rights and duties under international human rights law).

283. Claire Moore Dickerson, *supra* note 60, at 1445-1446 (describes third generation rights as collective solidarity rights).

284. Jennifer A. Downs, *supra* note 69, at 363 (third generation of rights a consequence of a dynamic view of human rights).

285. *Id.* at 358 (describes generational theory of rights).

however, is somewhat doomed from inception, because of the inherent tension between the individual/propertarian basis of first-generation rights and the collective/social basis of second-generation rights. Despite that fact, third-generation rights are said to include the right to peace,<sup>286</sup> the right to security,<sup>287</sup> the right to democracy, and the right to environmentally sustainable,<sup>288</sup> economic development.<sup>289</sup>

Is there anything in the third-generation rights making them inherently collective? If so, does that inherent factor mean that individuals should not have a cause of action? And, if individuals have a claim for third-generation rights, is not that claim substantive? It is this author's opinion that, while these rights are necessarily collective – peace, democracy, and development are not individual phenomena – the enforcement of these rights could be placed in the hands of individuals, and linked to substantive material goods. In fact, however, the positive force of third-generation collective rights is contestable, particularly since the fall of the Soviet system. Third-generation rights are usually seen as hortatory goals which guide and direct the development of the law.

Because there is some tension between first and second generation of rights and a lack of dialogue between third-generation rights and earlier conceptions of rights,<sup>290</sup> and because of historical inexactitude, the usual typology of the three generations of human rights is inaccurate, but not so inaccurate that it must be rejected. Instead, the theory must, like most theories, be qualified and adapted to conform to reality. It is only where reality so fails to conform to a model's descriptions and predictions, that legal science, like any other science, must reject the old model and formulate a new one. That is not the case of the historical account of the

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286. *Declaration on the Right of Peoples to Peace*, G.A. res. 39/11, annex, 39 U.N. GAOR Supp. (No. 51) at 22, U.N. Doc. A/39/51 (1984) available at: <<http://www1.umn.edu/humanrts/instreet/q3drpp.htm>>.

287. J. Oloka-Onyango, *Human Rights And Sustainable Development In Contemporary Africa: A New Dawn, Or Retreating Horizons?* 6 BUFF. HUM. RTS. L. REV. 39, 43 (2000).

288. African Charter on Human and Peoples' Rights June, 26, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, arts. 19-24 (entered into force Oct. 21, 1986), reprinted in 21 I.L.M. 58 (1982).

289. 1986 Declaration on the Right to Development. Adopted by General Assembly resolution 41/128 of 4 December 1986, available at: <<http://193.194.138.190/html/menu3/b/74.htm>>. Also see, e.g., Isabella D. Bunn, *The Right To Development: Implications For International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1426 (2000) (arguing for "the emergence of the right to development.").

290. The U.S. generally opposes the idea of a third generation of human rights in international law. *But see* Barbara Stark, *Economic Rights In The United States And International Human Rights Law: Toward An "Entirely New Strategy"* 44 HASTINGS L.J. 79, 130 (1992) suggesting that third generation rights in the U.S. are protected at the state level rather than the federal level. That view ignores that those claims are generally not defended as inalienable rights but rather are stated to be conditional entitlements accorded to individuals by the state as an act of largesse. A conditional entitlement must be distinguished from an inalienable right.

evolution of human rights through three stages. However, the Westphalian theory of the state as absolute hermetic sovereign no longer corresponds to material reality. Modifying that model is probably impossible due to fundamental changes in technology. Further, even if the theory could be modified, modification may actually be undesirable if the Westphalian model of the state led the world to two global wars.

The traditional analysis above, that sees human rights as evolving in three successive waves, is only partially complete. It is true, very roughly, that conceptions of human rights have evolved from individual rights to collective claims. It is also true, theoretically, that the rights of the individual can be distinguished from freedoms from state interference and rights to state resources. However, the three-generation analysis ignores certain crosscurrents and tensions between those rights and other evolutionary developments not generally identified in rights discourse. As such, it can only be used, with these qualifications, as a tool to describe contemporary reality.

### 1. Individual and Collective Rights

The typical description of human rights is somewhat problematic, and requires a shift of focus for better understanding. The generational perspective focuses on the content of the right, i.e. the character of the right. However, it ignores who holds the right. Instead of asking: "What right is held?" ask: "Who holds the right?" A different view emerges when the question is "who holds the right?" Having this different view is important because future rights discourse will probably be characterized by a struggle between western/universalist market rights (e.g., the WTO) and local, collective, and possibly, fundamentalist conceptions of collective rights.<sup>291</sup>

Just as the contents of rights have evolved with historical development, conceptions of who is entitled to claim a right have also evolved. The conception of who is entitled to claim a right has evolved from an understanding of the holder of legal rights, as the individual, white, male, adult citizen, to the holder of rights as including non-whites,<sup>292</sup> women, and ultimately, non-citizens, children,<sup>293</sup> and finally, collectives. This

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291. See, e.g., Alan Greenspan, *The Embrace of Free Markets*, Remarks at the Woodrow Wilson Award Dinner of the Woodrow Wilson International Center for Scholars, New York, New York, June 10, 1997.

292. See, e.g. U.S. CONST., amend. XIV.

293. Thus, radical critiques of human rights as a vector of power are not without foundation. See, e.g., Martha Minow, *Rights and Cultural Difference*, in Sarat and Kearns, *supra* note 139, at 355.

progress in the ability to hold a right is basically ignored in the traditional generational view, which focuses on what right is held, rather than on who holds the right. This must be pointed out, however, in order to escape from the hierarchical, and patriarchal,<sup>294</sup> origins of human rights seen in Aristotle's thought,<sup>295</sup> leading to unjust inequalities.<sup>296</sup>

The idea of women's rights, and rights against racial discrimination, do not harmonize well with the generational perspective of rights. Neither women's rights, nor the rights of non-white persons, are claims to entitlement, but both women and non-whites were ignored by the individualist first-generation rights theory. Perhaps, this is because these rights, though enjoyed by individuals, are derived from collectives – and first-generation rights are essentially individualistic. In any event, women were emancipated relatively late in history - in many cases only in the last century, and in some cases, women are not emancipated, most obviously in the Islamic world,<sup>297</sup> but elsewhere as well. Islamic scholars<sup>298</sup> would point out that the right of a woman to seek divorce was first recognized by Islam, as was racial equality. Islamic feminists would also argue that human rights include the right to be treated with dignity and respect, and dress codes enforce that respect, and, further, equality of rights does not mean equal roles. This author views the historical argument as more persuasive. Islam clearly assigns specific roles based on gender. However, the "liberation" of women in the west should be questioned, as this "liberation" serves the interests of consumerism and capitalism. In the west women are free to be commoditized. Women in the west may well have traded the kitchen for the office, yet they still are expected to maintain the kitchen.<sup>299</sup>

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294. See, e.g., ARISTOTLE, POLITICS, Book I, pt. XIII, available at: <<http://classics.mit.edu/Aristotle/politics.mb.txt>>.

295. Aristotle even recognizes that his arguments for natural slavery and the natural inequality of men and women are flawed, and tries to meet the objections. *Id.* at Book I, pt. VI.

296. Aristotle clearly believed that some people were inherently destined for slavery. *Id.*, Book I, pt. V., available at: <<http://classics.mit.edu/Aristotle/politics.mb.txt>>.

297. But see, Joelle Entelis, *International Human Rights: Islam's Friend Or Foe?* 20 FORDHAM INT'L L.J. 1251 (1997). Arguing that Algeria is an Example of the Compatibility of International Human Rights law and Islamic law regarding women.

298. E.g., RIFFAT HASSAN, RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 361-86 (John Witte, Jr. and Johan D. van der Vyver eds., Martinus Nijhoff Publishers 1996) available at: <<http://www.law.emory.edu/EILR/volumes/spring96/hassan.html>>.

299. For a discussion of Islamic human rights law and international human rights law see, Bharathi Anandhi Venkatraman, *Islamic States And The United Nations Convention On The Elimination Of All Forms Of Discrimination Against Women: Are The Shari'a And The Convention Compatible?* 44 AM. U. L. REV. 1949, 1951 (1995).

One must also recognize that apartheid was the norm, at least until the 1950s<sup>300</sup> - well after the beginning of the second-generational social rights to substantive goods. It is also worth noting that the rights of sexual dissidents, such as homosexuals,<sup>301</sup> transvestites, and transgendered persons remain essentially ignored throughout the world.<sup>302</sup> Some group's rights remain unprotected.

Because the usual generational perspective focuses on the content of the right, rather than who holds the right, it ignores the fact that rights discourse is either a reflection of, or reflected in, political theory. But if the second and third generations of rights are to be implemented, they require an interventionist government - exactly the type of government that first-generation rights sought to protect against, even avoid. Though this contradiction is implicit in the generational perspective on rights, it is generally not explicitly stated. Negative "freedoms from" are obviously incompatible with unlimited government. However, positive "claims to" are often incompatible with the idea of limited government. So, the tension between different generations of rights also reflects a contradiction between forms of government, which in turn depend on economic development. This author posits the substantive content of rights can only be understood within the economic context in which they are deployed.

## 2. Property Rights

Another tension between first and second generation of rights, often ignored by the usual generational perspective, concerns property rights. While property rights played a central theoretical role in first-generation rights discourse, as both the means and end of the good life,<sup>303</sup> and though, at least since the fall of the Soviet Union, the practical importance of property rights has increased, their theoretical role has decreased. Today, it is nearly universally admitted that reasonable restrictions on property rights are permissible.<sup>304</sup> In terms of economic development there is no reason for it. Perhaps, the field of human rights is dominated by altruists, just as the field of commercial law is dominated by practical businesslike persons? If there is legal interpretative flexibil-

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300. Population Registration Act 30 of 1950; Group Areas Act 41 of 1950; Separate Representation of Voters Act 45 of 1951 (Union of South Africa).

301. *But see*, Lawrence v. Texas, 539 U.S. 558 (2003); Dudgeon v. U.K., 45 Eur. Ct. H.R. (1981).

302. *See, e.g.*, James D. Wilets, *International Human Rights Law And Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994).

303. ARISTOTLE, NICOMACHEAN ETHICS, Book I, § 2 (translated by W.D. Ross) (350 b.c.), available at: <<http://classics.mit.edu/Aristotle/nicomachaen.1.i.html>>.

304. This is true even in the United States. *See, e.g.*, U.S. v. Locke, 471 U.S. 84 (1985).

ity in the future resolution of the dialectic between rights as economic, negative limitations on government *versus* rights as positive expressions of local and indigenous sovereignty, it may be found here.

Theoretically, the first generation of human rights was shaped by liberalism, exemplified in the writings of Rousseau,<sup>305</sup> Locke,<sup>306</sup> and Kant,<sup>307</sup> though rooted much more deeply in the thought of Aristotle.<sup>308</sup> The second and third generations of rights were in contrast influenced by Marx,<sup>309</sup> Engels,<sup>310</sup> Lenin,<sup>311</sup> and Mao.<sup>312</sup> This raises an implicit question: what is the future of rights discourse now that the Soviet Union has collapsed?

Many theorists, particularly American theorists, regard the end of the U.S. S.R. as resulting in a net gain for human rights.<sup>313</sup> This is, however, not exactly the case. First, Marxist human rights theory assigns survival rights, such as food and shelter, a higher value than property rights or the right to worship. So, at least from that perspective, gaining the right to worship freely and losing the right to a job would be seen as a net loss. Furthermore, the economic situation in Russia and the C.I.S. clearly has deteriorated severely in the last 10 years<sup>314</sup> with a resulting increase in

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305. JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* (1752), available at: <<http://www.google.de/search?q=rousseau+contrat+social&ie=ISO-8859-1&hl=de&meta=>>>.

306. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (1690), available at: <<http://libertyonline.hypermall.com/Locke/second/second-frame.html>>.

307. Epistemologically, Kant's *Kritik der reinen Vernunft* (1787) (available at: <<http://www.gutenberg2000.de/kant/krvb/krvb.htm>>) is the more important work, though in international law Kant is better known for *Zum ewigen Frieden* (1795) (available at: <<http://www.mda.de/homes/matban/de/kant-zef.html>>). His metaphysics and idealism led him to be rejected because only material facts are capable of scientific proof not opinions or subjective states of mind.

308. "Liberal" is a much abused term, particularly by "neo" "liberals." To understand the origin and true meaning of the concept of liberality (and by consequence that "neo-liberal" thought is in fact illiberal) see ARISTOTLE, *NICHOMACHEAN ETHICS*, Book IV Ch. 1, *supra* note 303, at: <<http://classics.mit.edu/Aristotle/nicomachaen.4.iv.html>>.

309. Karl Marx, *Kapital I*. MEW 23, 189f.309, 183, 789 (1867), available at: <[http://www.marx-forum.de/das\\_kapital/kapital\\_1/inhalt\\_1.html](http://www.marx-forum.de/das_kapital/kapital_1/inhalt_1.html)>.

310. Friedrich Engels, *Anti-Dühring*, MEW, 20, 95-99 (1887) available at: <[http://www.mlwerke.de/me/me20/me20\\_001.htm](http://www.mlwerke.de/me/me20/me20_001.htm)>.

311. V.I. LENIN, *The State and Revolution*, in 25 COLLECTED WORKS, 381-492 (1918) available at: <<http://www.marxists.org/archive/lenin/works/1917/sep/staterev/>>.

312. MAO TSE-TUNG, *On Policy* (1940), in 2 SELECTED WORKS OF MAO TSE-TUNG, 441-49 (Foreign Languages Press, Peking 1965) available at: <<http://www.marx2mao.org/Mao/OP40.html>>.

313. For an exposé and critique of the conventional wisdom see, Scott D. Syfert, *Capitalism Or Corruption? Corporate Structure, Western Investment And Commercial Crime In The Russian Federation*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 357 (1999).

314. Shannan C. Krasnokutski, *Human Rights In Transition: The Success And Failure Of Polish And Russian Criminal Justice Reform*, 33 CASE W. RES. J. INT'L L. 13 (2001).



crime and decline in human rights.<sup>315</sup> Similar regression has also occurred in South Africa. Formally, human rights are better protected there because of the legal equality, at least in theory, of blacks and whites. However, formal equality is not the same as substantive equality. Formal improvement in post-Apartheid South Africa is belied, just as in Russia,<sup>316</sup> by the rise in crime.<sup>317</sup> The situations in Myanmar, Yugoslavia,<sup>318</sup> and Nigeria,<sup>319</sup> and Chechnya also belie the idea that, with the end of Soviet imperialism, human rights have improved – although perhaps a net human rights improvement can be seen, however, in South America. What conclusions can be drawn from these facts?

## V. CONCLUSIONS

In this author's opinion, rights can only be understood in their economic context because rights are ultimately claims to material goods, or determine procedures by which material goods are assigned. Rights can only be scientifically understood when seen as arising out of material conditions because science requires empirical verification of its propositions. The fact that the conceptualisation of rights has evolved with economic progress corroborative evidence of the theory that rights can only be understood from a materialist perspective.

As to the future, the resurgence of property<sup>320</sup> and market rights such as capital mobility<sup>321</sup> and the free movement of labor and goods in the post-Soviet world<sup>322</sup> may be merely a temporary trend. A trend that will con-

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315. Louise Shelley, *Post-Soviet Organised Crime And The Rule Of Law*, 28 J. MARSHALL L. REV. 827 (1995) (“[o]rganised crime in Russia today is so serious that it threatens human rights, the rule of law, democracy, and free markets”).

316. *Id.*

317. Adrien Katherine Wing, *The South African Transition To Democratic Rule: Lessons For International And Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254, 259 (2000).

318. Christopher C. Joyner, *Enforcing Human Rights Standards In The Former Yugoslavia: The Case For An International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235, 251 (1994).

319. Sakak Mahmud, *The Failed Transition to Civilian Rule in Nigeria: Implications for Democracy and Human Rights*, 40 AFR. TODAY 87 (1993); Okechukwu Oko, *Subverting The Scourge Of Corruption In Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT'L L. & POL. 397 (2002).

320. *See, e.g., Loizidou v. Turkey* (Merits) (ECHR 40/1993/435/514) (1996).

321. Alfred C. Aman, *supra* note 42, at 781 (pointing out global capital mobility). It must be remembered that prior to 1970 international capital mobility was the exception, not the rule.

322. Jost Delbruck argues that major changes have occurred in international relations and international law since 1989 – but that these changes actually affirm sovereignty. *Supra* note 32, at 705. However, Delbruck himself acknowledges both the disintegration of states such as the U.S.S.R. into smaller states and more importantly the rise of transnational institutions of governance. *Id.* at 706. The devolution of the sovereign power to other sovereigns cannot be seen as an affirmation of sovereignty but is evidence of its transformation. Further the transnational institutions of global governance clearly afford the fact that sovereignty has been not only transformed by devolution but also transferred by so many derogations that to speak of a rule of absolute sovereignty is meaningless and to speak of literally dozens of exceptions to a principle of qualified sovereignty is awkward. It

tinue only until the third world objections to capitalism reorganize, possibly centered around local cultural icons, such as religious fundamentalism, e.g. Islamic nationalism,<sup>323</sup> liberation theology,<sup>324</sup> or some other mix of ancient and modern local resistance to a global economic order.<sup>325</sup> On the other hand, it is also possible that the rise of market rights since 1989<sup>326</sup> could be signalling the return to an understanding of rights in the first-generational sense, mere limits on the state's power, or right to constrain the market ("freedoms from"), rather than positive claims to substantive resources ("rights to").

Whether the future of rights will continue to follow market trends, or reject the market as ultimate judge of right, will depend on whether the third world industrializes and escapes the grip of poverty. If it does, then a conception of rights as reflections of, or even springing from, markets and which, in either case, operate to limit government, will permit the west to escape the charge of cultural imperialism or moral relativism, and may dominate the discourse of rights for the next few decades. Alternatively, if the third world spirals further into debt and recessions, as seems to be the case contemporarily in Argentina<sup>327</sup> and Venezuela,<sup>328</sup> then we may consider the possibility either of a rejection *in toto* of human rights discourse or, more likely, the formulation of cultural particularisms and an exceptionalist view of rights such as indicated above. The author considers the second the more likely outcome, but both are in fact, possible.

The usual tri-partite generational perspective on human rights is only partially complete. This is because that classification ignores both the economic foundation<sup>329</sup> of human rights, and their social expansion to cover not only white, male, adult citizens, but also women, persons of

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would be better theoretically to reconceptualize sovereignty rather than to deny empirical reality in order to affirm outdated dogma. *Id.* at 705-706.

323. For an interesting discussion of the convergence of local tribalism and globalisation see BENJAMIN R. BARBER, *Jihad vs. McWorld* (Times Books, 1995).

324. See, e.g., Mark Engler, *Toward the "Rights of the Poor": Human Rights in Liberation Theology*, *JOURNAL OF RIGHTS AND ETHICS*, JRE 28.3: 337-63 (2000).

325. As mentioned elsewhere the world is developing institutions and processes of global governance under law. Ulrich K. Preuss, *supra* note 113, at 305-306. International institutions such as the European Union and the W.T.O. and the U.N. are in fact replacing so many functions of the state that, in concert with devolution and privatization, we can meaningfully speak of a shift of state power from the nation state to regional global and local institutions of governance.

326. Some predict that claims that Western ideals are universal will increase because of the end of the cold war. See Dianne Otto, *supra* note 200.

327. *THE ECONOMIST*, *The Death Of Peronism?* Nov. 14, 2002.

328. *THE ECONOMIST*, *When Push Comes To Shove*, Dec. 5, 2002.

329. T. S. Twibell, *Ethiopian Constitutional Law: The Structure Of The Ethiopian Government And The New Constitution's Ability To Overcome Ethiopia's Problems*, 21 *LOY. L.A. INT'L & COMP. L.J.* 399 (1999).

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color, and even children. The classical typology is incomplete, but does help us understand rights discourse, although only partially. We have tried to expand briefly upon that theory, since it is roughly accurate historically speaking, and since science contents itself with improving existing theories and only rejects a previous theory when a new theory can better explain observed phenomena.