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HUMAN RIGHTS TREATIES: A SUGGESTED TYPOLOGY, AN HISTORICAL PERSPECTIVE¹

by

John King Gamble,
Teresa A. Bailey, Jared S. Hawk, Erin E. McCurdy

I. INTRODUCTION

In many ways, the last half of the 20th century can be characterized as the era of human rights law. It was a time when international law expanded to include many aspects of human rights that, as recently as 1945, could have seemed beyond the pale of international law as usually understood. Our purpose here is not to question the magnificent contribution human rights law has made to the complex fabric of modern international law and certainly not the improvement in the lives of millions of people. Ours is a study on a suggested typology and an historical perspective on this era of expansion.

Systematic analysis of human rights law in the year 2000 may be the victim of that law's own successes. So much more law exists that the boundaries between international human rights law, economic law, and municipal law are increasingly harder to draw.² There has been a proliferation of scholarship on many aspects of human rights law, but conceptualizations of the entire field have been rare. Much scholarship focuses on a narrow aspect of human rights and/or a specific treaty.³ Put metaphorically, there

¹ We wish to thank Dr. Charlotte Ku, Executive Director, American Society of International Law, for helpful comments on an earlier draft.

² For an excellent discussion of linkages and interrelationships, see Chaloka Beyani, *The Legal Premises for the International Protection of Human Rights*, in *THE REALITY OF INTERNATIONAL LAW—ESSAYS IN HONOUR OF IAN BROWNLIE* 21 (Guy Goodwin-Gill & Stefan Talmon eds., 1999).

³ Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986). See John P. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968); Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985). Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532 (1986); David P. Forsythe, *UNRWA, the Palestine Refugees, and World Politics: 1949-1969*, 25 INT'L ORG. 26 (1971); Paul Weiss, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193 (1954). Makau wa Mutua, *Limitations on Religious Rights:*

has been such rapid cultivation of human rights trees in many and varied environments that scant attention has been paid to the forest of international human rights law. Herein, we suggest some ways to organize and to understand better the maze of human rights law principally through treaties that exist today. We do so first by examining the frameworks that have been offered for human rights treaty law. We make some modest suggestions for a more meaningful way to view this important new body of international law. Balance and perspective are essential to understanding modern human rights treaty law. To achieve this, we use an important new research tool, a Comprehensive Database of Multilateral Treaties (CDMT). CDMT is derived from Professor Christian Wiktor's *Multilateral Treaty Calendar, 1648-1995. Répertoire des traités multilatéraux, 1648-1995*.⁴ Wiktor "includes 6048 entries and covers the period from October 24, 1648, to the end of 1995."⁵ Wiktor uses the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986) to develop a clear, explicit standard for deciding which instruments to include.⁶

The definition of "human rights" seems the logical place to begin; even this has been problematic. Professor Rebecca M. M. Wallace writes:

Human Rights are difficult to define. Generally speaking, they are regarded as those fundamental and inalienable rights which are essential for life as a human being. There is, however, no consensus as to what these rights should be. What human rights may be interpreted as being differs according to the particular economic, social and cultural society in which they are being defined. Human Rights have

Problematizing Religious Freedom in the African Context, 5 BUFF. HUM. RTS. L. REV. 75 (1999); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988). Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Myres S. McDougal, Harold D. Lasswell, & Lung-chu Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975).

⁴ CHRISTIAN WIKTOR, *MULTILATERAL TREATY CALENDAR, 1648-1995. RÉPERTOIRE DES TRAITÉS MULTILATÉRAUX, 1648-1995* (1998).

⁵ *Id.* at xxi.

⁶ *Id.* at xxii.

therefore, escaped a universally acceptable definition, presenting a problem to international regulation.⁷

Professor Malcolm Shaw had a slightly different perception of problems:

While there is widespread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law. The question of what is meant by a 'right' is itself controversial and the subject of intense jurisprudential debate. Some 'rights', for example, are intended as immediately enforceable binding commitments, others merely as specifying a possible future pattern of behaviour.⁸

Other scholars seem to be saying international human rights is an important element of international law, deserving a unique niche. Yale Professor W. Michael Reisman noted that human rights "is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law."⁹

ICJ Judge Thomas Buergenthal provides one of the most concise, workable definitions:

. . . the international law of human rights is defined as the law that deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights, and with the promotion of these rights. This branch of law is sometimes also referred to as international protection of human rights or international human rights law.¹⁰

The suggestions of these scholars help to shape our approach emphasizing the need for a broader, more conceptual view of human rights law.

⁷ REBECCA M. M. WALLACE, *INTERNATIONAL LAW* 195 (2d ed. 1992).

⁸ MALCOLM N. SHAW, *INTERNATIONAL LAW* 196 (4th ed. 1997).

⁹ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 872 (1990).

¹⁰ THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 1 (2d ed. 1995).

II. QUALITY¹¹ OF HUMAN RIGHTS

Dr. Rolf Künemann asserted the need for a more comprehensive approach to human rights, an approach that acknowledges the variety and diversity of human rights:

Any modern approach to human rights must be coherent. It must start from the full range of human rights and from the axiom of indivisibility. This has become increasingly clear in recent discussions on the conceptual development of economic, social and cultural rights.¹²

Professor Rebecca M. M. Wallace, in her authoritative text, described ten major sub-divisions:¹³

- | | | |
|------------------------|-----------------------------|--|
| * right to development | * children | * protection of civilians during hostilities |
| * women | * persons with disabilities | * prisoners |
| * minorities | * refugees | |
| * indigenous people | * migrant workers | |

The UN, trying to make sense from the thousands of treaties contained in its own treaty series, uses more than 200 categories many of which have human rights aspects to them. These include: children, deportation, disasters, drugs, family matters, health and sanitation, human rights, ILO conventions, marriage, medicine, migration, minorities, narcotic drugs, obscene publications, prisoners of war, Red Cross conventions, refugees, relief assistance, slavery and slave trade, statelessness, traffic in persons, and women.¹⁴ The UN formulation and, to a lesser extent, that of Professor Wallace, illustrate problems with mutual exclusivity both among human rights subcategories and between human rights and other areas of international law.

Another distinction suggested by many scholars is a demarcation between individual and group or collective rights with the former seen as

¹¹ We hesitate to use the word “quality” because probably no word in the English language is so misused in the year 2000. Many American universities used “quality” as if it were an adjective meaning “good.” By “quality” we mean “1. That which belongs to something and makes or helps to make it what it is” WEBSTER’S DELUXE UNABRIDGED DICTIONARY 1474 (2d ed. 1983).

¹² Rolf Künemann, *A Coherent Approach to Human Rights*, 17 HUM RTS. Q. 323 (1995).

¹³ REBECCA M. M. WALLACE, *INTERNATIONAL HUMAN RIGHTS: TEXT AND MATERIALS* xiii-xvii (1997).

¹⁴ WIKTOR, *supra* note 4, at 36.

those defined by the Universal Declaration of Human Rights (1948).¹⁵ In the last 25 years, there seems to have been a shift in emphasis toward collective rights along with the acknowledgment that the line between the two can be unclear:

Some rights are purely individual, such as the rights to life or freedom of expression, others are individual rights that are necessarily expressed collectively, such as freedom of assembly or the right to manifest one's own religion. Some rights are purely collective, such as the right to self-determination or the physical protection of the group as such through the prohibition of genocide, others constitute collective manifestations of individual rights, such as the rights of persons belonging to minorities to enjoy their own culture and practice their own religion or use their own language.¹⁶

Professor Theodor Meron explains how some scholars ascribe greater status to certain human rights; he would call them "fundamental human rights" borrowing from the Charter.¹⁷ This approach echoes Professor Hans Kelsen's idea of a *Grundnorm*, the highest norm of a legal order.¹⁸ Less well known, but a more readable explanation can be found in Kelsen's *Peace through Law*.¹⁹

One approach that attempts to find order in what can seem a dizzying variety of human rights law suggests the idea of first, second, and third generation rights. Professor Wallace described it this way:

. . . under contemporary international law, human rights are increasingly sub-divided into three classifications, "first, second, and third generation" rights. Civil and political rights constitute "first generation" rights; economic, social

¹⁵ Universal Declaration of Human Rights, Dec. 10, 1948, 43 AM. J. INT'L L. 127.

¹⁶ SHAW, *supra* note 8, at 209.

¹⁷ Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 6 (1986).

¹⁸ John Gamble, *New Information Technologies and the Sources of International Law: Convergence, Divergence, Obsolescence and/or Transformation*, 41 GERMAN Y.B. INT'L L. 170, 195 (1998) (discussing Hans Kelsen, *Theorie du droit international coutumier*, 1 REVUE INTERNATIONALE DE LA THEORIE DU DROIT 253, 259 (1939), and GENNADII M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 27 (1993)).

¹⁹ HANS KELSEN, *PEACE THROUGH LAW* (1944).

and cultural rights, the “second generation”; whilst group rights are characterized as “third generation” rights.²⁰

One of the earliest discussions of the generational approach was a 1979 lecture presented by Professor Karel Vasak in which he hypothesized that the three generations correspond to the ideals of the French Revolution, *liberté, égalité, et fraternité*.²¹ Professor Meron describes first generation classic rights that “lend themselves . . . to immediate implementation.”²² He discussed the divide between Third and First World states including the fact the former must achieve a “level of economic development that enables them to implement social rights, and that those states must therefore give priority to social rights and to economic and social development in order to facilitate the realization of civil and political rights.”²³ One could see where these discussions soon might assume the character of a classic chicken/egg debate. Or, more optimistically, this could give credence to the idea of “a theory of the unity of human rights.”²⁴

Of course, much finer distinctions have been drawn. Paul Sieghart found six varieties of ‘collective rights’²⁵ which Cambridge Professor James Crawford summarized as follows:²⁶

- | | |
|--|---|
| * self-determination and equality rights | * rights relating to international peace and security |
| * permanent sovereignty over natural resources | * rights in relation to development |
| * rights in relation to the environment | * rights of minorities |

While Crawford believed the above to be Third generation rights, he does admit to confusion and overlap and asks for “more orthodox terminology” in analysis.²⁷

²⁰ WALLACE, *supra* note 7, at 195.

²¹ Carl Wellman, *Solidarity, the Individual and Human Rights*, 23 HUM. RTS. Q. 639 (2000).

²² Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT’L L. 754, 757 (1982).

²³ *Id.*

²⁴ Künnemann, *supra* note 12, at 325-26.

²⁵ PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 367-78 (1983).

²⁶ James Crawford, *The Rights of Peoples: ‘Peoples’ or ‘Governments’?*, in *THE RIGHTS OF PEOPLES* 56-57 (James Crawford ed., 1988).

²⁷ *Id.* at 67.

Later we shall use this distinction among First, Second, and Third generation rights in our discussion of macro patterns and trends in human rights treaties. As the foregoing discussion illustrates, it is possible to draw more complicated distinctions, but the generation approach is straightforward and easily applied to actual treaties.

III. THE REGIONAL APPROACH TO HUMAN RIGHTS

Soon after World War II, when human rights first began to emerge as a principal focus of international law, attention tended to focus on global human rights initiatives often under UN auspices. The most notable example here is the Universal Declaration of Human Rights (1948).²⁸ However, many of the most developed human rights regimes seem to be at the regional level. This begs the issue of why a regional approach and the limits of such approaches. Perhaps the most basic issue is why regionalism in a global world. Professor Gerhard Bebr writing forty-five years ago remarked that "various regional organizations may seem a paradox in the light of the present interdependence of the world . . ." ²⁹ Francis Wilcox acknowledged "controversy over the relative merits of regionalism and globalism in international organization will ever be with us."³⁰ As if more complexity were needed, regional regimes often are "nested" within global regions.³¹ Even if we long for the simplicity and regularity of a single global human rights regime, regionalism is a fact of international life.

Judge Thomas Buergenthal is one of many scholars who views human rights through the lens of regionalism. This approach is logical since it corresponds both with the law itself, e.g., the Treaty of Rome, and with the political organization of states on planet earth. Regional approaches often look first at the Organization of American States (OAS), now consisting of 35 states from the Americas.³² The OAS Charter was signed on April 30, 1948, making it the oldest regional human rights organ-

²⁸ Universal Declaration of Human Rights, *supra* note 15.

²⁹ Gerhard Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166 (1955).

³⁰ Francis O. Wilcox, *Regionalism and the United Nations*, 19 INT'L ORG. 789 (1965).

³¹ See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 619-20 (1986).

³² These states include: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and To-

ization. The original Charter, amended four times with different protocols,³³ made limited reference to Human Rights, e.g., Article 3 stated “The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.”³⁴ Hardly surprising for the era, the Charter did not explain what “fundamental rights of the individual” were.

On May 2, 1948 the OAS created the American Declaration of the Rights and Duties of Man.³⁵ This declaration lists 27 human rights including civil rights, political rights, economic rights, social rights, and cultural rights³⁶ and 10 duties.³⁷ Today the Declaration is “deemed to be the normative instrument that embodies the authoritative interpretation of the ‘fundamental rights of the individual,’”³⁸

The Organization of African Unity (OAU) is another regional IGO that has a multilateral treaty serving as its constitution. The Charter of the

bago, United States, Uruguay, and Venezuela. See *Organization of American States* (visited Oct. 23, 2000) <<http://www.oas.org>>.

³³ The four protocols are: Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967, 721 U.N.T.S. 266 (*entered into force* March 12, 1970); Protocol of Amendment to the Charter of the Organization of American States (Protocol of Cartagena de Indias), Dec. 5, 1985, 25 I.L.M. 527 (*entered into force* November 16, 1988); Protocol of Amendment to the Charter of the Organization of American States (Protocol of Managua), June 10, 1993, 33 I.L.M. 981 (*entered into force* January 29, 1996); Protocol of Amendments to the Charter of the Organization of American States (Protocol of Washington), Dec. 14, 1992, 33 I.L.M. 981 (*entered into force* September 25, 1997). University of Minnesota Human Rights Library, *Inter-American Human Rights Instruments* (visited Oct. 21, 2000) <<http://www.umn.edu/humanrts/oasinstr/oaslist.htm>>.

³⁴ Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, 54 (*entered into force* Dec. 13, 1951).

³⁵ American Declaration of the Rights and Duties of Man, May 2, 1948, 43 AM. J. INT’L L. 133 (Supp. 1949).

³⁶ These rights include: “the right to life, liberty and security of person, to equality before the law, to residence and movement to a fair trial, to protections from arbitrary arrest, to due process of law, to nationality and asylum. Freedom of religion, expression, assembly and association are proclaimed. Protected, too is the right to privacy, to property, to health, to education, to the benefits of culture, to work, to leisure time and to social security.” BUERGENTHAL, *supra* note 10, at 179-180.

³⁷ These duties include: “duty to society, toward children and parents, to receive instruction, to vote, to obey the law, to serve the community and the nation, to pay taxes and to work.” *Id.* at 180.

³⁸ *Id.*

Organization of African Unity entered into force on September 13, 1963.³⁹ Currently the OAU has 53 members.⁴⁰ The OAU's charter does not deal extensively with the issue of human rights; however, the OAU adopted the African Charter on Human and Peoples' Rights. This Charter, adopted on June 27, 1981, and entering into force on October 21, 1986,⁴¹ has ratifications or accessions from all 53 OAU members.⁴²

The African Charter's mechanism for the "protection and promotion of human rights . . . is designed to function within the institutional framework of the OAU."⁴³ Article 1 of the African Charter on Human and Peoples' Rights spells out the expectations of state parties:

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall *undertake to adopt legislative or other measures to give effect to them*.⁴⁴ (emphasis added).

This provision highlights a major distinction that should be part of every scheme to organize and understand human rights treaties. There are vast differences in the modes through which human rights norms can be enforced ranging from the OAU's approach that does nothing more than urge members to take appropriate measures to direct judicial action to ensure compliance.

³⁹ Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept. 13, 1963).

⁴⁰ These states include: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote D'Ivoire, Congo, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Seychelles, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe. Organization of African Unity, (visited Oct. 17, 2000) <<http://www.oau-oua.org/>>; University of Minnesota Human Rights Library, *List of Countries Who Have Signed, Ratified/Adhered to the African Charter on Human and Peoples' Rights* (visited Oct. 17, 2000) <<http://www1.umn.edu/humanrts/instree/ratz1afchr.htm>>.

⁴¹ Banjul Charter on Human and Peoples Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

⁴² University of Minnesota Human Rights Library, *supra* note 40.

⁴³ THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 171 (1st ed. 1988).

⁴⁴ Banjul Charter on Human and Peoples' Rights, *supra* note 41, at 60.

There can be no doubt that the fullest development of human rights law has been in Europe. The earliest manifestation was the Council of Europe (COE), established in 1949, and currently having forty-one parties.⁴⁵ The Statute of the COE makes general references to human rights, stating that “[e]very member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter 1.”⁴⁶

On November 4, 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁷ was signed; it entered into force on September 3, 1953.⁴⁸ This Convention has eleven protocols⁴⁹ and

⁴⁵ These states include: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the “former Yugoslav Republic of Macedonia”, Turkey, Ukraine, United Kingdom. Council of Europe, *The Council of Europe’s Member States* (visited Oct. 17, 2000) <[http://www.coe.int/portal.asp?strScreenType=100&L=E&M=\\$+/1-1-1-1//portal.asp?L=E&M=\\$+/001-00-00-2/02/EMB,1,0,0,2,Map.stm](http://www.coe.int/portal.asp?strScreenType=100&L=E&M=$+/1-1-1-1//portal.asp?L=E&M=$+/001-00-00-2/02/EMB,1,0,0,2,Map.stm)>.

⁴⁶ Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103, 106 (*entered into force* Aug. 3, 1949).

⁴⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953).

⁴⁸ States party to the convention as of 1994 include: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom. BUERGENTHAL, *supra* note 10, at 103-04.

⁴⁹ These protocols being: Protocol [No. 1] to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 (*entered into force* May 18, 1954); Protocol No. 2, May 6, 1963, 1496 U.N.T.S. 245 (*entered into force* Sept. 21, 1970); Protocol No. 3, May 6, 1963, 1496 U.N.T.S. 255 (*entered into force* Sept. 21, 1970); Protocol No. 4, Sept. 16, 1963, 1496 U.N.T.S. 263 (*entered into force* May 2, 1968); Protocol No. 5, Jan. 20, 1966, 1496 U.N.T.S. 273 (*entered into force* Dec. 20, 1971); Protocol No. 6, Apr. 28, 1983, 1496 U.N.T.S. 281 (*entered into force* Mar. 1, 1985); Protocol No. 7, Nov. 22, 1984, 24 I.L.M. 435 (*entered into force* Nov. 1, 1988); Protocol No. 8, Mar. 19, 1985, 25 I.L.M. 387 (*entered into force* Jan. 1, 1990); Protocol No. 9, Nov. 6, 1990, 30 I.L.M. 693 (*entered into force* Oct. 1, 1994); Protocol No. 10, Mar. 25, 1992, 6 E.C.A. 169 (*entered into force* Mar. 25, 1992); Protocol No. 11, May 11, 1994, 33 I.L.M. 943 (*entered into force* Nov. 1998). *University of Minne-*

provides a comprehensive list of rights guaranteed to the nationals of all parties:⁵⁰

- | | |
|--|--|
| * right to life | * freedom of expression |
| * prohibition of torture | * freedom of assembly and association |
| * prohibition of slavery and forced labour | * right to marry |
| * right to liberty and security | * right to an effective remedy |
| * right to a fair trial | * prohibition of discrimination |
| * no punishment without law | * derogation in time of emergency |
| * right to respect for private and family life | * restrictions on political activity of aliens |
| * freedom of thought | * prohibition of abuse of rights |
| * conscience and religion | * limitation on use of restrictions on rights |

The European Union (formerly and sequentially, the Common Market, the European Economic Community and the European Communities) began as the European Coal and Steel Community in 1951.⁵¹ Over nearly half a century and four principal treaties,⁵² the organization metamorphosized into the fifteen-member European Union.⁵³ The preamble to the Single European Act is the first major mention of human rights in a European Union treaty:

Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the Convention for

sota Human Rights Library—Council of Europe (visited Oct. 17, 2000) <<http://www1.umn.edu/humanrts/euro/eurocon.html>>.

⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 47, art. 1-17.

⁵¹ Treaty Instituting the European Coal and Steel Community (Treaty of Paris), Apr. 18, 1951, 261 U.N.T.S. 140 (*entered into force* Jul. 23, 1952).

⁵² The four main treaties establishing the EU are: Treaty Establishing the European Economic Community (Treaty of Rome) Mar. 25, 1957, 294 U.N.T.S. 17 (*entered into force* Jan. 1, 1958); Single European Act, Feb. 28, 1986, 25 I.L.M. 503 (*entered into force* Jul. 1, 1987); Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247 (*entered into force* Nov. 1, 1993); Treaty of Amsterdam, Oct. 2, 1997, 32 I.L.M. 56 (*entered into force* May 1, 1999).

⁵³ The fifteen current members are: Belgium, France, Germany, Italy, Luxembourg, Netherlands, United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria, Finland, and Sweden. DESMOND DINAN, *EVER CLOSER UNION* 5 (2d ed. 1999).

the Protections of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.⁵⁴

Human rights figure prominently in the Treaty Establishing the European Union, the next major treaty instrument to deepen the EU:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.⁵⁵

To date, there have been few, if any, IGO-centered human rights treaties in other regions of the world. For example, "The Asian Human Rights Commission (AHRC) was founded in 1986 by a prominent group of jurists and human rights activists in Asia. However, the AHRC is an independent, non-governmental body, which seeks to promote greater awareness and realization of human rights in the Asian region."⁵⁶ As such, it is conceptually and operationally different from IGO-based regional regimes.

IV. TRANSFORMATIVE FUNCTIONS

International law generally has been very concerned with what often is called enforcement. Professor W. Michael Reisman provided what remains one of the most comprehensive statements of the issue:

Enforcement refers to the transformation, by community means, of authoritative pronouncement into controlling reality. Organized communities enforce their authority in two ways: By *direct enforcement* they supervise the physical transfer of what was decreed in authoritative decision. By *indirect enforcement* they impose sanctions on the miscreant in order to persuade him to comply with community norms. Direct enforcement is frequently *substitutive, i.e.*,

⁵⁴ Single European Act, *supra* note 52, preamble.

⁵⁵ Treaty on European Union [as amended by the Treaty of Amsterdam], *supra* note 52, sec. 5.

⁵⁶ Asian Hum. Rts. Comm. (visited Oct. 17, 2000) <<http://www.ahrchk.net/about/about.html>>.

the community arranges for the physical transfer of an equivalent in value to the original objects of decision.⁵⁷

Often enforcement is discussed along with that uncomfortable question: is international law law at least in the sense usually understood. Enforcement of all law, municipal, international, European Union, etc., is complex involving much more than coercive authority available to catch and punish violators and to force compliance. Again, in Reisman's words:

Effective law does not depend exclusively on operating enforcement mechanisms. In the most fundamental sense, it depends upon predispositions among an effective majority of participants towards compliance with authority.⁵⁸

Since the word "enforcement" often connotes this narrow coercive authority mode, we shall use the broader concept of "transformation," i.e., how legal prescriptions are converted into behavior.

There is reason to believe that transformation may be especially difficult in the area of human rights where "institutions . . . are still quite weak."⁵⁹ Transformation occurs at many levels and in myriad ways and can be very much a matter of degree. As Professor Jack Donnelly wrote: "International regimes are not an all or nothing matter, however, the transfer of authority may take a variety of forms, and its significance may be of varying degrees."⁶⁰ Donnelly lists four main ways through which transformation may occur:

- * Authoritative international norms: binding international standards, generally accepted as such by states.
- * International standards with self-selected national exemptions: generally binding rules that nonetheless permit individual states to "opt out," in part.
- * International guidelines: international standards that are not binding but are nonetheless widely commended by states. Guidelines may range from strong, explicit, detailed rules to vague statements of amorphous collective aspirations.

⁵⁷ W. Michael Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 6 (1969) (footnotes omitted).

⁵⁸ *Id.* at 26.

⁵⁹ BUERGENTHAL, *supra* note 10, at 20.

⁶⁰ Donnelly, *supra* note 31, at 603.

* National Standards: The absence of substantive international norms.⁶¹

Most experts would agree that the European Union has the most elaborate and effective system of transformation. “The European Union is a unique international entity that directly affects the daily lives of its 375 million citizens.”⁶² The situation in the EU has been referred to as “the sharing of sovereignty,” an expression that would seem absurd in most regions of the world.⁶³ An example of EU progress can be seen in Article 171 of the Treaty of the European Union which deals with enforcement of the judgments of the European Court of Justice:

If the Court of Justice finds that a Member State has failed to fulfill an obligation under this treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

If the Commission considers that the Member State concerned has not taken such measures it shall, after giving the State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. . . . If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.⁶⁴

This direct enforcement is stunning given the situation in most regions, but it should not obscure the fact that transformation is much more than black letter treaty law even when that law is unequivocal. The broadening and deepening of the EU over more than 40 years can be seen in various treaty instruments, but is due at least as much to attitudinal factors, “. . . national courts and member state governments accept the principles of direct effect and supremacy of Community law”⁶⁵

As promising as the EU may seem, we must not lose sight of the fact it is a massive exception to the rule. Much more common are many attempts to dilute the transformation function. Judge Buergenthal discusses

⁶¹ *Id.* at 603-04.

⁶² DINAN, *supra* note 53, at 1.

⁶³ *Id.* at 2.

⁶⁴ Treaty on European Union, *supra* note 52, at 292.

⁶⁵ DINAN, *supra* note 53, at 309.

the International Covenant on Civil and Political Rights.⁶⁶ Buergenthal notes that the Covenant “contains a ‘derogation clause,’ which permits the States Parties ‘in time of public emergency that threatens the life of the nation’ to suspend all but seven of the most fundamental rights.”⁶⁷

In other cases, transformation might appear to be severely limited by the need to accept—and the right not to accept—an additional obligation that appears to be needed for meaningful transformation. Attitudes on this issue are influenced by the situation with the so-called Optional Clause to the Statute of the International Court of Justice.⁶⁸ There is a growing literature much of which concludes it may be better, given the poor record of accepting the optional clause, to abandon the idea. Professors Gary Scott and Craig Carr wrote that “36(2) . . . was born amid controversy and has lived amid controversy; but for reasons to become clear shortly, we think it should be permitted to die in peace.”⁶⁹

Scott and Carr explained their controversial view in this way:

Acceptance of the clause may permit some political posturing by those states hoping to present an image of civility to the world, but this does not mean that states accepting the clause, at least in principle, will consider themselves bound to live up to their ideals in practice. Nor is it necessarily proper to build an image of an international legal system by analogy with domestic legal systems. Reproducing the machinery and operational style of domestic legal systems is no guarantee that it is possible to reproduce the same commitment to the rule of law that one finds within states boasting successful legal systems.⁷⁰

In the area of human rights, there are many cases where an ICJ Optional Clause-like situation exists, i.e., state parties can avoid transformation. “The Covenant [on Civil and Political Rights] also permits the states to limit and restrict the exercise of the rights it proclaims.”⁷¹ Another ex-

⁶⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

⁶⁷ BUERGENTHAL, *supra* note 10, at 41.

⁶⁸ Statute of the International Court of Justice, June 26, 1945, art. 36(2), 36 AM. J. INT’L L. 215 (*entered into force* Oct. 24, 1945).

⁶⁹ Gary L. Scott and Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT’L L. 57 (1987).

⁷⁰ *Id.* at 59.

⁷¹ BUERGENTHAL, *supra* note 10, at 41.

ample is the European Convention on Human Rights.⁷² However, the results are far different than with the ICJ. "Forty States have bound themselves to honor the provisions of the Convention, and to submit to the jurisdiction of the Court, which now can be invoked unilaterally at the instance of individual complainants."⁷³ Even though states have the right not to renew their acceptance of this forceful version of transformation, most "renew it regularly."⁷⁴

V. A SUGGESTED MODEL AND A THREE HUNDRED FIFTY YEAR TEST

We take a radically different approach in this section. Rather than examining individual treaties to try to discern the obligations created, we suggest a very general construct, a typology, into which human rights multilateral treaties can be placed. This typology is illustrated in Figure 1. We believe this provides a workable compromise to organize and to understand the huge volume of information. By compromise, we mean the typology draws important, generally-accepted distinctions, but cannot accommodate the entire diversity of these treaties. For example, ours is not as fine a cut as Künnemann's where he described 16 groups of human rights from the various Covenants divided into economic, social, cultural, civil, and political categories.⁷⁵ First, human rights multilateral treaties are categorized according to focus, regional or global (left column of Figure 1). Next we use the attribute, "quality of rights," First, Second, Third Generation described earlier. Finally, (rightmost column) we examine transformation. We divide enforcement into three main types ranging from "honor system" where states are urged to take appropriate action to direct effect. Examples are provided for each cell in the figure. We provide eight examples, but it would take 18 just to exhaust discrete possibilities in Figure 1.⁷⁶ Eventually, when the Comprehensive Database of Multilateral Treaties is fully operational, we shall be able to ask very sophisticated questions. For example, we *might* find that regional treaties are twice as likely to have direct effect provisions than are global treaties. Those questions are beyond the scope of the present work, but we can begin to answer some important questions about aggregate patterns and trends in multilateral human rights treaties.

⁷² See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 47.

⁷³ Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT'L L. 515, 521 (2000).

⁷⁴ BUERGENTHAL, *supra* note 10, at 134.

⁷⁵ See Künnemann, *supra* note 12.

⁷⁶ For example, Regional/1st/Honor, Regional/1st/Reports, Regional/1st/Direct.

FIGURE 1
A FUNCTIONAL TYPOLOGY OF HUMAN RIGHTS TREATIES

Focus	Quality of Rights	Transformation
	First Generation The International Covenant of Civil and Political Rights (1966) ⁷⁷	Honor System American Declaration of the Rights and Duties of Man (1948) ⁷⁸
Regional African Charter of Human and Peoples' Rights (1981) ⁷⁹	Second Generation International Covenant of Economic, Social and Cultural Rights (1966) ⁸⁰	Reports, Monitoring International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) ⁸¹
Global Universal Declaration of Human Rights (1948) ⁸²	Third Generation Convention on the Prevention and Punishment of the Crime of Genocide (1948) ⁸³	Direct Effect European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ⁸⁴

Figure 2 provides an overview of 350 years of multilateral treaty making. As mentioned earlier, this relies on the meticulous scholarship of Professor Wiktor.⁸⁵ Treaties are a complex genre of legal information, not always easy to locate, let alone to understand.⁸⁶ For analyses such as those suggested in Figure 2, it is vital to apply a rigorous, consistent definition of

⁷⁷ See International Covenant of Civil and Political Rights, *supra* note 66.

⁷⁸ See American Declaration of the Rights and Duties of Man, *supra* note 35.

⁷⁹ See Banjul Charter of Human and Peoples' Rights, *supra* note 41.

⁸⁰ International Covenant of Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).

⁸¹ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (*entered into force* July 18, 1976).

⁸² See Universal Declaration of Human Rights, *supra* note 15.

⁸³ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

⁸⁴ See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 47.

⁸⁵ Christian L. Wiktor, Professor of Law and Law Librarian, Dalhousie University Faculty of Law, Halifax, Nova Scotia, L.L.M. University of Wroclaw, Ph.D. University of Paris, M.S.L.S. Columbia University.

⁸⁶ John Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT'L L. J. 1, 24 (1980); John Gamble, *Multilateral Treaties: A Critical Examination of the Concept of Laterality*, 3 LOY. INT'L & COMP. L. J. 19, 42 (1980); John Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L. J. 305, 319 (1981); John Gamble and Charlotte Ku, *Choice of Language in*

“multilateral treaty” which Wiktor provides. He has spent decades combing through every conceivable source for treaty information.⁸⁷

Figure 2 confirms what we—and many others—stated earlier, but does so in a much more empirically-based way, i.e., there has been an explosion of human right multilateral treaty law in the 20th century. This is true in absolute terms, but must be qualified when compared with the entirety of multilateral treaties. The following figures summarize Figure 2:

Time Period	Number of Human Rights Multilateral Treaties	Percent of Multilateral Treaties Dealing with Human Rights
1648-1899	24	4.5 %
1900-1949	210	11.7 %
1950-1995	271	7.3 %

Figures 3 and 4 look only at multilateral human rights treaties signed since 1945, the era when these treaties proliferated. Figure 3 charts treaties by generation from 1945-1995. We suspect these results will be surprising. There are very few Third Generation treaties distributed evenly throughout the period. Many of these Third Generation rights deal with

Bilateral Treaties: Fifty Years of Changing State Practice, 3 IND. INT'L & COMP. L. REV. 233, 264 (1993).

⁸⁷ WIKTOR, *supra* note 4, at xv-xvi. The following illustrates the care taken with each of 6,048 treaty entries.

July 27, 1950

Rivers

Agreement concerning the social security of Rhine boatmen, with annex. *Accord concernant la sécurité sociale des bateliers rhénans, avec annexe.*

Concluded between: Belgium, Germany (Fed. Rep.), France, Netherlands, and Switzerland

Done at Paris July 27, 1950

Printed text: 166 UNTS 73; 157 BFSP 560; JORF 1952:10787; 1960:1657; RTAF 1960/13 (561); 2 VBD A14 (F,G)

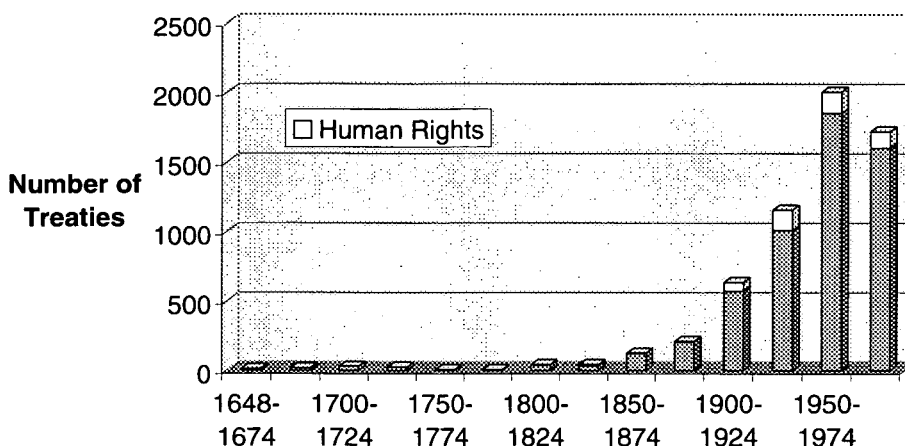
Depository: ILO

Duration: 3 years (initially)

Entered into force: June 1, 1953

Note: Refers to revised convention on Rhine navigation of OCTOBER 17, 1868; establishes an “Administrative Centre for the Social Security of Rhine Boatmen,” with headquarters at the Central Commission for Rhine Navigation; superseded February 1, 1970, by agreement concerning the social security of Rhine boatman (revised) on FEBRUARY 13, 1961; see also administrative arrangement of MAY 23, 1953.

FIGURE 2



statelessness.⁸⁸ Unique among the three generations of treaties, there were more⁸⁹ Third Generation treaties before 1945. This is due principally to a group of treaties following World War I designed to protect minorities in Eastern and Southern Europe.⁹⁰ This paucity of Third Generation treaties is evidence of generally slower movement from aspiration to black letter treaty law.

Throughout the entire 50-year period, more Second than First Generation treaties were signed although the gap began to close about 1980. The simple explanation, absolutely clear when one looks at the data, is that treaties negotiated under the auspices of the International Labour Organisation constitute a huge portion of multilateral treaty law. These fit most comfortably in the Second Generation, economic and social rights. One would surmise that because the ILO has been active for so long,⁹¹ Second Generation treaties were frontloaded in the scheme of human rights treaty-making in the 20th century. The upward trend in the number of First Generation treaties appears to be due both to expanding the substantive scope of

⁸⁸ See, e.g., Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

⁸⁹ The numbers are quite small, 6 since 1945 and 13 from 1945 going back to 1648.

⁹⁰ See, e.g., Treaty Concerning the Protection of Minorities in Romania, Dec. 9, 1919, 5 L.N.T.S. 335 (entered into force July 16, 1920); Treaty Concerning the Protection of Minorities in Greece, Aug. 10, 1920, 28 L.N.T.S. 243 (entered into force Aug. 30 1924).

⁹¹ Constitution of the International Labor Organization, June 28, 1919, 225 Parry 373 (entered into force Jan. 10, 1920).

rights, e.g., to include violence against women,⁹² and to increased activity at the regional level, e.g., the 1994 Inter-American Convention on the Forced Disappearance of Persons.⁹³

FIGURE 3

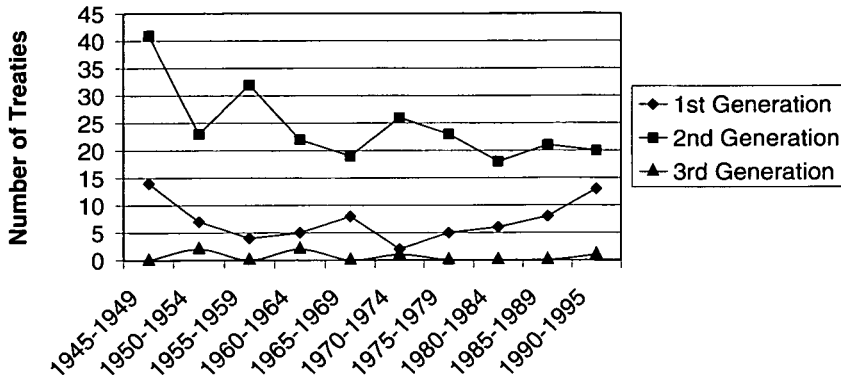


Figure 4 provides a more realistic picture of the effect of these three generations of human rights multilateral treaties. The easiest way to tabulate treaties is simply to calculate the number of new treaties signed or entering into force⁹⁴ for a given time period. This what we have done in Figure 3. The vast majority of treaties create continuing obligations lasting for decades after they enter into force. Figure 4 shows the cumulative effect of all these treaties over 50 years. Far and away there is more human rights treaty law in the Second Generation category, more than 250 treaty instruments.

VI. CONCLUSIONS

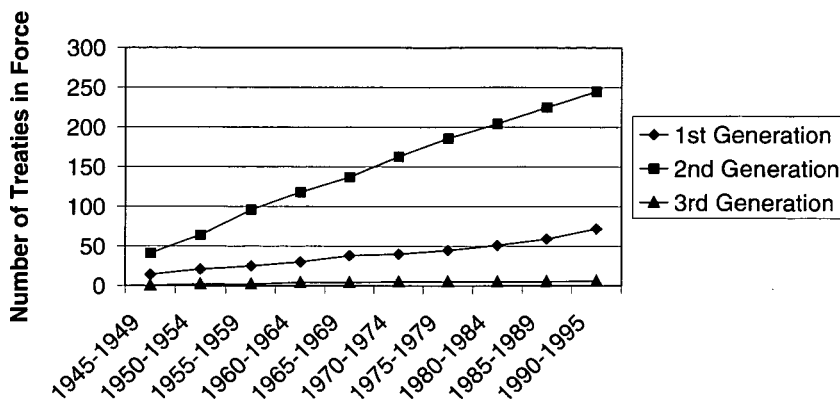
In many ways, our main purpose has been perspective, i.e., there is such a volume of conventional human rights law that structure and context are needed to interpret and to understand that law. This in no way diminishes the importance and impact of thousands of scholars who analyze and

⁹² Declaration on the Elimination of Violence Against Women, Feb. 23, 1994, 33 I.L.M. 1049.

⁹³ Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (*entered into force* March 28, 1996).

⁹⁴ There is not an easy answer to the question of whether to use signature or force dates. Signature dates usually can be determined exactly, but except for so-called instant force treaties, pre-date full legal effect of the treaty. Force dates also present difficulties. Multilateral treaties usually specify a minimum number of state parties for entry into force. But confusion can result because a treaty already in force as a legal instrument can enter into force much later for particular states.

FIGURE 4



usually advocate in favor of adding to the list of human rights and extending existing rights to different groups and/or to other states. The point made by one of us (Gamble) about reservations to treaties is pertinent to human rights. “Legal research that focuses too narrowly on a few specimens tempts the fate as the blind men in the fable who try to describe an elephant.”⁹⁵

Not only is there a lot of human rights law, but that law—as Professor Andrew Moravcsik reminds us—is “not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.”⁹⁶ Professor Ian Brownlie reached the same conclusion writing that human rights law “involved the checking of the performance of national legal systems against external standards, and the consequent erosion of the reserved domain of the domestic jurisdiction of States.”⁹⁷

We hope we have whetted the appetite of the reader for our Comprehensive Database of Multilateral Treaties (CDMT). We realize that some may find broadly-focused, quantitative research such as that contemplated in the CDMT antithetical to good legal scholarship. We disagree, but with the important caveat that we seek to supplement and, if possible, improve traditional legal research, certainly not to replace it. This example illustrates the point. The use of reservations to multilateral treaties is a

⁹⁵ John Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT’L L. 372, 394 (1980).

⁹⁶ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000).

⁹⁷ Ian Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 1, 1-2 (James Crawford ed., Oxford Univ. Press 1988).

major concern for international law. The desirability of a permissive policy on reservations amounts to balancing more parties against inconsistent and less stringent commitments on the part of those parties.⁹⁸ Instead of speculating, it is possible, albeit time-consuming, to examine treaties and to determine the prevalence of debilitating reservations:

Overall, there are no reservations at all to 85% of multilateral treaties, and more than three to only 4% of such treaties. From the perspective of the state itself, the average since World War II is about one reservation per state every five years. Again, these are hardly epidemic proportions.⁹⁹

In this instance, the knowledge that reservations usually play a valuable “diplomatic lubricant” role without gutting legal obligations should help states to negotiate more effective treaties.

Human rights will be one of the most complicated, salient and important aspects of the international legal corpus of the 21st century. It also may be the most fragile because of the frequent need to pierce the veil of sovereignty. As Professor Henkin put it:

The law of human rights contradicts the once deep-and-dear premises of the international system that how a state behaved towards its own citizens in its own territory was a matter of ‘domestic jurisdiction,’ i.e., not any one else’s business and therefore not any business for international law.¹⁰⁰

Our hope is that a better understanding of the totality of human rights treaties will assist in advancing human rights law. Idealistic, perhaps even naïve, but knowing that more than 500 multilateral human rights treaties exist can be of significant value in enhancing the success of those treaties. As information in the CDMT is augmented, e.g., with data about transformation, we hope to be in a position to make useful recommendations for increasing the efficacy of human rights treaty regimes.

⁹⁸ Gamble, *supra* note 95, at 372.

⁹⁹ *Id.* at 392.

¹⁰⁰ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 228 (2nd ed. 1979).