International Human Rights Law: Principled, Double, or Absent Standards?

Dinah Shelton*

Introduction

Every legal system draws lines and makes distinctions in adopting and applying its laws. In the United States, for example, not all speech is protected by the First Amendment;[1] even speech that is within its guarantees may be labeled political, artistic, or commercial, with varying legal consequences attaching to these judicially-created categories.[2] Classifications based on race are proclaimed "suspect" and are subject to "strict scrutiny"[3] while

* Dinah Shelton, Patricia Roberts Harris Research Professor of Law, The George Washington University Law School.

1. U.S. Const. amend. I; *see, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (holding that because public employees speaking in their official capacities are not speaking as citizens for First Amendment purposes, the Constitution does not insulate their communications from employer discipline); Virginia v. Black, 538 U.S. 343, 359-60 (2003) (noting that the First Amendment does not protect "true threats"); R.A.V. v. City of Saint Paul, 505 U.S. 377, 383-86 (1992) (noting that the First Amendment does not protect "fighting words" from state regulation).

2. The United States Supreme Court has held that the First Amendment affords a lesser degree of protection to commercial speech than noncommercial speech. *See, e.g.*, Bd. of Trustees v. Fox, 492 U.S. 469, 477 (1989); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Artistic speech is protected unless it is obscene. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (stating that examples of painting, music, and poetry are "unquestionably shielded" by the First Amendment); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("[M]usic, as a form of expression and communication, is protected under the First Amendment."); Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) ("[E]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); Kaplan v. California, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection."); *see also* Reno v. ACLU, 521 U.S. 844, 865 (1997) (striking down portions of the Communications Decency Act for failure to consider serious artistic value). *But see* Miller v. California, 413 U.S. 15, 23 (1973) (holding that a state can prohibit an allegedly obscene work if "the work, taken as a whole, lacks serious . . . artistic . . . value").

3. Ironically, the standard of strict scrutiny of measures directed at a single racial group originated in the judgment upholding incarceration of Japanese-

other distinctions, such as those based on sex, are judged according to less exacting, more deferential standards.[4] Prosecutors exercise discretion in deciding which criminal cases should go forward, which charges should be dropped, and which sentences should be sought.[5] The government decides which aliens are entitled to remain in the United States and which should be deported. [6] Civil rights attorneys bring test cases and devise litigation strategies to further their long range goal of ensuring respect for constitutional and legislative guarantees.[7]

In each of these instances, those who are targets of enforcement may assert that a double standard or arbitrariness is being employed. Commercial publishers may argue that they should have the same degree of protection as those engaged in political speech. Criminal defendants or aliens facing deportation may challenge action taken against them by claiming selective prosecution. Women seeking equal protection may puzzle over the absence of strict scrutiny for sex discrimination. Defendants in civil rights litigation may protest that the behavior of others is just as bad or worse. Other individuals and groups may note that they have been unable to convince either legislatures or judges to adopt or extend laws to include them at all.[8]

Lawmaking is undoubtedly and deliberately a political process. Various interest groups press their agendas to obtain favorable decisions on laws they propose or support. The process

---

Americans during World War II. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

4. The Court has held on several occasions that classifications based on gender are subject only to intermediate scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976). The Supreme Court reviews economic and social legislation even more deferentially, requiring only that it rest on "some rational basis." United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

5. *See, e.g.*, United States v. Bass, 536 U.S. 862 (2002); United States v. Armstrong, 517 U.S. 456 (1996).

6. *See, e.g.*, Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

7. *See, e.g.*, CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983) (reviewing civil rights litigation challenging segregated transit in the United States).

8. On the limited recognition given same-sex relationships, see, for example, Lawrence v. Texas, 539 U.S. 558 (2003); Vasquez v. Hawthorne, 994 P.2d 240 (Wash. Ct. App. 2000); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

may be distorted by powerful groups that intervene by offering financial incentives or disincentives, threatening to withhold support or block other goals of legislators, but majority decision-making is the legitimate and accepted procedure for enacting laws. Once laws are adopted, however, politics supposedly disappear from enforcement and compliance; the fundamental principle of equality before the law demands fair and principled enforcement, with a hearing before an independent and impartial body.[9] It is an ideal that not even the most advanced legal systems always fulfill.

This Article will examine international human rights standard-setting and enforcement procedures to assess the degree to which they are unprincipled or employ a double standard. In particular, it will test the assertion that the United Nations ("U.N.") has a double standard when it comes to enacting and enforcing internationally recognized human rights. Thomas Franck claimed two decades ago that "no indictment of the U.N. has been made more frequently or with greater vehemence than that it singles out Western and pro-Western states for obloquy, while ignoring far worse excesses committed by socialist and Third World nations."[10] Third World commentators maintain the opposite is true, asserting that the U.N. has focused disproportionately on developing countries.[11] While these contradictory views may indicate that the U.N. is rather more even-handed than is generally accepted, a perception of politicization and lack of standards eroded the credibility and legitimacy of the U.N. Human Rights Commission,[12] leading to its

---

9. The United States Constitution guarantees due process of law. U.S. CONST. amend. V; *id.* amend. XIV, § 1. Additionally, international human rights instruments provide for the right, in full equality, to a fair and public hearing by an independent and impartial tribunal in the determination of rights, obligations, and criminal charges. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III) art. 10, at 71, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 19, 1966) [hereinafter ICCPR].

10. THOMAS FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT 224 (1985).

11. "Longtime U.N. observers" view the U.N. as adopting resolutions condemning violations mostly in developing countries, rather than in the Western world. Thalif Deen, *Human Rights: U.S. Double Standard Prompts UN Tactical Twists*, INTER PRESS SERVICE NEWS AGENCY, Nov. 22, 2006, *available at* http://ipsnews.net.interna.asp?idnews=26387.

12. *See* Joint NGO Statement on U.N. Reform—Presented to the 61st Session of the U.N. Commission on Human Rights (Apr. 12, 2005), *available at* http://hrw.org/english/docs/2005/04/12/global10463_.htm.

replacement in 2006 with the Human Rights Council.[13]

This Article first briefly describes the structure of international institutions concerned with human rights. It then presents an overview of the processes by which human rights standards are adopted. It asserts that the process is closely analogous to domestic lawmaking, with lobbyists, coalitions, and compromises involved, but that a fundamental difference greatly impacts enforcement: the adopted standards are not automatically binding on the target states. Rather, each state must subsequently approve them according to domestic constitutional procedures. In this consensual international legal system, the law cannot be enforced until the state accepts to be bound by the law. Consequently, in the legal texts that states adopt, some rights do not get included and others are limited or compromised.

Turning to enforcement, this Article describes the various procedures to examine and promote compliance with human rights norms, pointing out their weaknesses and limitations. The international legal system lacks not only a legislature but a developed court system, and it has only weak enforcement powers. The primary deficiency of many human rights procedures, especially at the U.N., is that states elect themselves to bodies where they investigate and judge allegations against themselves for violating the norms they have adopted. The result is self-judging political bodies that inevitably reflect the policies of the governments that sit on them. Governments generally respectful of human rights take into account trade, security, ability to influence, and other issues of national interest in deciding what issues to examine and how to vote. Governments violating human rights seek to avoid condemnation, often by lobbying for election to the human rights bodies. Overall, the U.N. attention to human rights matters is "like a dog's walking on his hinder legs. It is not done well. But you are surprised to find it done at all."[14]

---

13. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006). The Council consists of forty-seven states elected by the General Assembly according to the principle of "equitable geographic distribution." *Id.* ¶ 7. Africa and Asia each has thirteen seats. *Id.* There are six seats for Eastern Europe, eight for Latin America and the Caribbean, and seven for Western Europe and Others. *Id.* The Council is authorized to meet three times a year for ten weeks but can also hold special sessions. *Id.* ¶ 10. It reports directly to the General Assembly. *Id.* The Council's mandate is to "be guided by the principles of universality, impartiality, objectivity and non-selectivity, with a view to enhancing the promotion and protection of all." *Id.* ¶ 4. The Council is also to consider and make recommendations on situations of human rights violations, including gross and systematic violations. *Id.* ¶ 3.

14. Samuel Johnson used this phrase in 1763 to describe a woman preaching.

An optimist could see the increased politicization of human rights at the former Human Rights Commission and U.N. General Assembly as a back-handed tribute to the success of the human rights movement in the past fifty years. Human rights violators seek to manipulate the system because it has an impact and constitutes a threat to their abusive exercise of power. As Egon Schwelb noted in looking back over the first twenty-five years of the U.N. practice, "neither the vagueness and generality of the human rights clauses of the Charter nor the domestic jurisdiction clause have prevented the U.N. from considering, investigating, and judging concrete human rights situations, *provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development.*"[15]

Despite the seemingly insurmountable political bias in the structure of U.N. enforcement, this Article finds a principled basis for much of the emphasis on examining certain countries and the priority given to certain issues. It also acknowledges that the U.N. Charter-based system does not afford a neutral examination of alleged human rights violations before an independent body. Global treaty bodies, in contrast to the U.N. Charter bodies, are made up of independent experts, but their investigative and other enforcement powers are generally severely constrained by states during the treaty-drafting process.

This Article further asserts that only the regional human rights systems offer the equivalent of domestic enforcement procedures. They do so by creating independent commissions and courts to which victims of human rights violations can complain. Even these procedures are limited because cases can be filed only against the states, not against individual perpetrators, and remedies are restricted. In addition, all of the courts and commissions depend on the political organs of the region to ensure adequate personnel, financial support, and enforcement of their decisions and judgments. The system works well for individual cases but has grave limitations when it comes to addressing gross and systematic human rights violations. Notably, neither Asia nor the Middle East has any regional system in place. These regions remain dependent on the work of the U.N. to promote and protect

---

JAMES BOSWELL'S LIFE OF JOHNSON, VOL. 1: 1709-1765, at 325 (Marshall Waingrow ed., Yale Univ. Press 1994) (1791). Johnson's attitude is not entirely absent from the modern scene.

15. Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 341 (1972) (emphasis added).

human rights.[16]

This Article concludes that the further development of independent bodies to which victims of violations and their representatives can have open access is the best means to ensure principled enforcement of human rights for the most vulnerable. The U.N. Human Rights Council is unlikely to be an improvement over the former Commission unless it establishes such an independent advisory body, replacing the former Sub-Commission of independent experts. The role of civil society, especially human rights non-governmental organizations ("NGOs"), will remain critical in pressing for stronger human rights enforcement. During the next twenty-five years, standard-setting will not be concluded, but prevention, accountability, and redress will take priority.

I. International Human Rights Law and Institutions

The international protection of human rights is a fundamental aim of modern international law. Its development as a distinct branch of international law is relatively recent, although a limited set of legal norms designed to protect individuals against mistreatment has been in existence since the beginnings of the law of nations.[17] Even a cursory review of human rights law demonstrates the rapid expansion of this field since the end of World War II.[18] During this period, nearly all global organizations have adopted human rights standards and addressed human rights violations by member states.[19] Supplementing global efforts, regional organizations in the Americas, Europe, and Africa have elaborated their own legal texts, institutions, and procedures for the promotion and protection of human rights.[20] As a

16. For a discussion of efforts to create a regional system in the Arab world, see Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward?*, 5 HUM. RTS. L. REV. 361, 361-62 (2005). For developments in Asia, see Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 407 (1998); Li-ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go Before I Sleep"*, 2 YALE HUM. RTS. & DEV. L.J. 1 (1999).

17. For an extensive treatment of the history of human rights, see LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

18. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

19. *Id.* at 19-20.

20. *See generally* THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1950-2000 (R. Blackburn & J. Polakiewicz eds., 2000); RACHEL MURRAY, HUMAN RIGHTS IN

consequence no state today can or does claim that its treatment of those within its jurisdiction is a matter solely of domestic concern.

A. The United Nations

The objectives of the U.N. as stated in Article 1 of its Charter set the stage for the organization's human rights work. The language of the article reveals concern for equality and non-discrimination:

> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security . . .
>
> 2. To develop friendly relations among nations based on respect for the principle of *equal rights and self-determination of peoples* . . .
>
> 3. To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language, or religion* . . . .[21]

Other provisions in the U.N. Charter contributed to placing human rights firmly on the organization's agenda.[22] Articles 55 and 56 create binding, if vague, obligations for all member states.[23] The organs of the U.N.[24] have given content to these obligations

---

AFRICA: FROM THE OAU TO THE AFRICAN UNION (2004); FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA (2003); Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN. ST. L. REV. 679 (2004); Dinah Shelton, *The Inter-American Human Rights System*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 121 (Hurst Hannum ed., 4th ed. 2004). The European Union and the Organization for Security and Cooperation in Europe also address human rights issues, but the topic is not the primary mandate of either organization, and only brief mention of them is made in this Article. *See* Activities of the European Union—Human Rights, http://europa.eu/pol/rights/index_en.htm (last visited Mar. 14, 2007); OSCE: Activities—Human Dimension, http://www.osce.org/activities/18805.html (last visited Mar. 14, 2007).

21. U.N. Charter art. 1 (emphasis added).

22. *See id.* pmbl.; *id.* arts. 1, 13, 55, 56, 62, 68, 76 (mentioning human rights). For a discussion of U.N. activities on human rights, see generally JOHN PETERS HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE (1984); INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE (Irwin Cotler & F. Pearl Eliandis eds., 1992); THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston & Frederic Megret eds., 1992).

23. U.N. Charter art. 55 (establishing that the U.N. "shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); *id.* art. 56 ("[A]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.").

24. "The General Assembly, the plenary body of the United Nations, shall . . .

and sought to ensure compliance with them by adopting a set of detailed human rights treaties and other legal instruments.[25]

The main U.N. organs concerned with human rights, including the General Assembly, the Security Council, and the Human Rights Council, consist of governmental representatives of the member states.[26] Only the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities (renamed in 1999 the Sub-Commission on the Promotion and Protection of Human Rights) was a body of independent experts, nominated by states and elected by the Human Rights Commission.[27] The decision to transform the Commission into the Council was coupled with the demise of the Sub-Commission.[28] The U.N. High Commissioner on Human Rights is an independent official, with a mandate to act on behalf of the organization and to administer the office for human rights.[29] The Charter guarantees independence for the secretariat working under her

---

initiate studies and make recommendations to assist in the realization of human rights and fundamental freedoms." *Id.* art. 13, ¶ 1(b). The Security Council's primary responsibility for peace and security includes a mandate to take action in response to any situation it concludes is a threat to the peace, breach of the peace, or act of aggression, including violations of human rights. *Id.* arts. 39-42. The Economic and Social Council ("ECOSOC"), consisting of seventy-six U.N. member states, is authorized to made recommendations to promote respect for and observance of human rights and to draft conventions on the issue. *Id.* art. 62. Pursuant to the directive in the Charter, ECOSOC established the former U.N. Commission on Human Rights, replaced in 2006 with the Human Rights Council. G.A. Res. 60/251, *supra* note 13. The Commission on the Status of Women, created in 1946, consists of forty-five governmental representatives. ECOSOC Res. 2/11, U.N. Doc. E/RES/2/11 (June 21, 1946).

25. *See, e.g.*, UDHR, *supra* note 9; ICCPR, *supra* note 9.

26. *See* U.N. Charter arts. 9, 23; G.A. Res. 60/251, *supra* note 13, ¶ 7.

27. The Commission on Human Rights created the Sub-Commission at its first session in 1946. U.N. Charter art. 68. The General Assembly abolished the Commission and replaced it with the Council in 2006. G.A. Res. 60/251, *supra* note 13. "In decision 1/102 of 30 June 2006, the Human Rights Council decided to extend exceptionally for one year, subject to the review to be undertaken by the Council in conformity with General Assembly resolution 60/251, the mandates and mandate-holders of the Sub-Commission." Office of the United Nations High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Home Page, http://www.ohchr.org/english/bodies/subcom (last visited Mar. 7, 2007).

28. Office of the United Nations High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Home Page, *supra* note 27.

29. *See* G.A. Res. 48/141, U.N. Doc. A/RES/48/141 (Dec. 20, 1993). The General Assembly created the post of High Commissioner for Human Rights in 1993, with a mandate to promote observance of the Charter of the U.N., the UDHR, and other human rights instruments. *Id.* ¶¶ 1, 3.

administration,[30] but it has been subject to outside political pressure at times.[31] Finally, the fifteen judges of the International Court of Justice ("I.C.J."), the "principal judicial organ of the United Nations,"[32] have jurisdiction to decide inter-state cases and issue advisory opinions.[33] Relatively few cases involving human rights matters have come before the court,[34] but litigating states have insisted on the human rights and duties reflected in the U.N. Charter.[35]

The U.N.'s affiliated specialized agencies have addressed human rights as well.[36] The International Labor Organization ("ILO"), the oldest organization concerned with human rights, focuses on rights related to employment, including "[working] conditions of freedom and dignity,"[37] trade union freedoms,[38] freedom from forced labor,[39] and freedom from child labor.[40] The

30. U.N. Charter art. 100.

31. *See* IAIN GUEST, BEHIND THE DISAPPEARANCES (1990) (describing pressure placed on U.N. human rights machinery during the 1980s).

32. Statute of the International Court of Justice art. 1.

33. *Id.*

34. *See, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C. J. 3 (Oct. 7); Legal Consequences for States of Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16 (June 21); Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

35. *See, e.g.*, Memorial of United States; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 182 (Jan. 12, 1980) (asserting that the existence of fundamental rights for all human beings, with a corresponding duty on the part of every state to respect and observe them, are reflected in Articles 1, 55, and 56 of the U.N. Charter).

36. Specialized agencies are legally independent organizations with separate membership from the U.N. created by their own constitutions or charters. Agencies such as the International Labor Organization ("ILO"), the Educational, Scientific and Cultural Organization ("UNESCO"), the Food and Agriculture Organization, and the World Health Organization ("WHO") are directly involved in human rights standard-setting and compliance monitoring. *See generally* Stephen P. Marks, *The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 20, at 107; Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 20, at 89. The preamble of the Constitution of the WHO states that "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." Constitution of the World Health Organization pmbl., July 22, 1946, 62 Stat. 6279, 14 U.N.T.S. 145.

37. Convention Concerning Discrimination (Employment and Occupation) (No. 111), June 15, 1960, 362 U.N.T.S. 31.

38. Convention on Freedom of Association and Protection of the Right to Organize (No. 98), July 9, 1948, 68 U.N.T.S. 17.

39. Convention Concerning Forced or Compulsory Labor (No. 28), June 28,

ILO has concluded more than 180 conventions and has highly developed monitoring procedures.[41] The U.N. Educational, Scientific and Cultural Organization ("UNESCO") has adopted conventions on educational[42] and cultural rights[43] and adopted the first international instrument to address the impact of biotechnology on human rights.[44]

B. Regional Organizations

Following World War II, the widespread movement for human rights also led newly created or reformed regional organizations to add human rights to their agendas. The stalled efforts of the U.N. on one or more human rights treaties to complete the international bill of rights[45] revealed that global compliance mechanisms would not be strong. The regional systems, therefore, focused on the creation of procedures of redress, establishing control machinery to supervise the implementation and enforcement of the guaranteed rights.[46] All of the regional institutions drew inspiration[47] from the human rights

---

1930, 39 U.N.T.S. 55; Convention Concerning the Abolition of Forced Labor (No. 105), June 25, 1957, S. TREATY DOC. No. 88-11, 320 U.N.T.S. 291.

40. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182), June 17, 1999, 2133 U.N.T.S. 161, 38 I.L.M. 1207.

41. *See* Swepston, *supra* note 36, at 90.

42. UNESCO Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93.

43. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. No. 106-1, 249 U.N.T.S. 215; Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 6, 1999, 38 I.L.M. 769.

44. Universal Declaration on the Human Genome and Human Rights, UNESCO Gen. Conf. Res. 29, at 41 (Nov. 11, 1997), *available at* http://unesdoc.unesco.org/images/0010/001096/109687eb.pdf. The U.N. General Assembly endorsed the Declaration. G.A. Res. 53/152, U.N. Doc. A/RES/53/152 (Dec. 9, 1998).

45. *See* Human Rights Commission, *Celebrating the Universal Declaration of Human Rights* (2001), http://www.hrc.co.nz/index.php?p=451 (noting that the U.N. Covenants were not completed for nearly two decades after adoption of the UDHR).

46. *See* Message to Europeans, adopted by the Congress of Europe, May 8-10, 1948, *quoted in* Council of Europe, *Report of the Control System of the European Convention on Human Rights* 4 (H(92)14) (Dec. 1992) ("We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; We desire a Court of Justice with adequate sanctions for the implementation of this Charter.").

47. *See generally* ARTHUR HENRY ROBERTSON & JOHN GRAHAM MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1996).

provisions of the U.N. Charter and the Universal Declaration of Human Rights ("UDHR"),[48] but different historical and political factors encouraged each region to focus on specific human rights issues.

1. The Americas

The Americas had a tradition of regional approaches to international issues, including human rights, growing out of regional solidarity developed during the movements for independence.[49] This history of concern led the Organization of American States ("OAS") to refer to human rights in its Charter, opened for signature in Bogotá, Colombia, in 1948.[50] In the Charter, "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex" among the principles to which they are committed.[51] Former Article 13, now Article 17, declares that "each State has the right to develop its cultural, political and economic life freely and naturally," but prescribes that "in this free development, the State shall respect the rights of the individual and the principles of universal morality."[52]

The OAS Charter did not define "the fundamental rights of the individual," nor did it create any institution to promote their observance.[53] However, the same diplomatic conference that adopted the OAS Charter also proclaimed the American Declaration of the Rights and Duties of Man,[54] some months before the U.N.

---

48. G.A. Res. 217A (III), *supra* note 9.

49. As early as 1907 some states in the region created the Central American Court of Justice. The court had jurisdiction over cases of "denial of justice" between a government and a national of another state, if the cases were of an international character or concerned alleged violations of a treaty or convention. *See* M. HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 49-50 (1943).

50. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. The Charter has been amended by several Protocols: the Protocol of Buenos Aires, Feb. 27, 1967, O.A.S.T.S. No. 1, T.I.A.S. No. 6847, 721 U.N.T.S. 324; the Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, 119 U.N.T.S. 3, 25 I.L.M. 529; the Protocol of Washington, Dec. 14, 1992, OEA/Ser. A/2 Add. 3, 33 I.L.M. 1005; and the Protocol of Managua, June 10, 1993, OEA/Ser. A/2 Add. 3, 33 I.L.M. 1009).

51. Charter of the Organization of American States, *supra* note 50, art. 3(1).

52. *Id.* art. 17.

53. *Id.* art. 3.

54. American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/VI/1.4, rev. 10, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17 (2004) [hereinafter BASIC DOCUMENTS].

completed the UDHR.[55] Promulgated in the form of a simple conference resolution, this instrument proclaims an extensive catalog of human rights and gives definition to the Charter's general commitment to human rights.[56] In 1969 the OAS adopted the American Convention on Human Rights.[57] Other human rights treaties establishing standards for the region have followed.[58]

The OAS discharges its functions through various organs, including its two primary political bodies, the General Assembly and Permanent Council, both of which have jurisdiction to deal with human rights matters.[59] In 1959, the OAS created the Inter-American Commission on Human Rights,[60] conferring on it responsibility for promoting human rights in the hemisphere. The Commission began accepting communications and issuing reports on human rights violations.[61] It continues these functions with respect to OAS member states but also has responsibility for monitoring compliance with the human rights treaties adopted by

---

55. BASIC DOCUMENTS, *supra* note 54, at 6.

56. American Declaration of the Rights and Duties of Man, *supra* note 54.

57. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 673, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 27.

58. These treaties include the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 91; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 73; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, 29 I.L.M. 1447, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 87; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, June 9, 1994, 27 U.S.T. 3301, 33 I.L.M. 1534, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 111; Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1429, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 101; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, June 7, 1999, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 123.

59. *See* BASIC DOCUMENTS, *supra* note 54, at 17.

60. Org. of Am. States, *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Aug. 12-18, 1959*, 55 AM. J. INT'L. L. 537 (1961). The Statute of the Commission described it as an autonomous entity of the OAS functioning to promote respect for human rights. Statute of the Inter-American Commission on Human Rights art. 1, *reprinted in* BASIC DOCUMENTS, *supra* note 54, at 131. In 1967, the Protocol of Buenos Aires amended the Charter to make the Commission a principal organ of the OAS. BASIC DOCUMENTS, *supra* note 54, at 9.

61. In 1965, the Commission's competence was expanded to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights. *Second Special Inter-American Conference, Rio de Janeiro, Brazil, Nov. 17-30, 1965*, 60 AM. J. INT'L. L. 445, 458 (1965).

the OAS.[62] The Inter-American Court on Human Rights, along with the Commission, monitors compliance with the obligations of state parties to the American Convention on Human Rights.[63]

2. Europe

The European system, the first to be fully operational, began when ten Western European states signed the Statute of the Council of Europe on May 5, 1949.[64] After suffering the atrocities of World War II, Europe felt compelled to press for international human rights guarantees as part of European reconstruction. Faith in Western European traditions of democracy, the rule of law, and individual rights inspired belief that a regional system could avoid future conflict and stem post-war revolutionary impulses supported by the Soviet Union.[65] Article 3 of the Statute provides that "every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . ."[66] The end of the Cold War enabled Central and Eastern European nations to join the Council of Europe after declaring their acceptance of the principles spelled out in Article 3;[67] total membership now stands at forty-six states.[68]

---

62. *Id.* at 459 (stating that the Commission must monitor compliance with human rights treaties).

63. Inter-American Court of Human Rights Home Page, http://oas.org/OASpage/humanrights.htm (last visited Mar. 9, 2007).

64. Statute of the Council of Europe art.3, May 5, 1949, Europ. T.S. No. 1. The original members were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. *Id.*

65. In the preamble to the European Convention on Human Rights, the contracting parties declare that they are:

> [r]eaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. 5 [hereinafter ECHR]. For a discussion of the ECHR's history, see J.G. Merrills, *The Council of Europe (I): The European Convention on Human Rights*, *in* AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 287-89 (Rhija Hanski & Markku Suksi eds., 1999) ("Many statesmen of the immediate post-war epoch had been in resistance movements or in prison during the Second World War and were acutely conscious of the need to prevent any recrudescence of dictatorship in Western Europe."). Merrills also views the emergence of the East-West conflict as a stimulus to closer ties in Europe. *Id.* at 287–88.

66. Statute of the Council of Europe, *supra* note 64, art. 3.

67. Vienna Declaration of the Heads of State and Government of the Council of

As the first human rights system, the European Convention on Human Rights ("ECHR") initially contained a short list of civil and political rights.[69] Over time, ECHR Protocols[70] and independent agreements have added additional guarantees.[71] The Contracting Parties to the European Convention thus have repeatedly lengthened the list of guaranteed rights. The European system was also the first to create an international commission and court[72] for the protection of human rights and to create a

---

Europe, Oct. 9, 1993, *reprinted in* D. HUBER, A DECADE WHICH MADE HISTORY: THE COUNCIL OF EUROPE 1989-1999, at 247 (1999); *see also* Comm. of Ministers, *Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe*, 95th Sess. (Nov. 10, 1994), *reprinted in* Council of Europe, Information Sheet No. 35, at 146 (1995); THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS 24 (4th ed. 1995) (1982).

68. About the Council of Europe, http://www.coe.int/T/e/Com/about_Coe (last visited Apr. 17, 2007).

69. *See* ECHR, *supra* note 65.

70. The Council of Europe has adopted fourteen protocols to the ECHR, expanding the list of guaranteed civil and political rights. Protocol No. 1 to the ECHR, Mar. 20, 1951, Europ. T.S. 9 (adding a right to property and a right to education; requiring the Contracting Parties to hold free and secret elections at reasonable intervals); Protocol No. 4 to the ECHR, Sept. 16, 1963, Europ. T.S. 46 (prohibiting deprivation of liberty for failure to comply with contractual obligations, guaranteeing the right to liberty of movement, and barring forced exile of nationals and the collective expulsion of aliens); Protocol No. 6 to the ECHR, Apr. 28, 1983, Europ. T.S. 114 (abolishing the death penalty except during wartime); Protocol No. 7 to the ECHR, Nov. 22, 1984, Europ. T.S. 117 (according aliens various due process safeguards before they may be expelled from a country where they reside; providing for rights of appeal in criminal proceedings, compensation in cases of miscarriage of justice, protection against double jeopardy, and equality of rights and responsibilities between spouses); Protocol No. 12 to the ECHR, Nov. 4, 2000, Europ. T.S. 177 (augmenting the non-discrimination guarantee in Article 14 of the ECHR by providing that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground" and that "no one shall be discriminated against by any public authority"); Protocol No. 13 to the ECHR, May 3, 2002, Europ. T.S. 187 (abolishing the death penalty under all circumstances); Protocol No. 14 to the ECHR, May 13, 2004, Europ. T.S. 194 (envisaging a revision of judicial procedures).

71. *See, e.g.*, European Social Charter, Oct. 18, 1961, Europ. T.S. 35; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. 126 [hereinafter Torture Convention]; European Charter for Regional or Minority Languages, Nov. 5, 1992, Europ. T.S. 148; Framework Convention for the Protection of National Minorities, Feb. 1, 1995, Europ. T.S. 15; Convention on Human Rights and Biomedicine, Apr. 4, 1997, Europ. T.S. 164.

72. *See* Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 100 (2003).

> The Commission acquired its competence to receive individual petitions in 1955, after six states accepted the right of petition. Many states took decades to accept the right of individual petition. The U.K. filed its first declaration on 14 January 1966. France and Greece did not accept the right of petition until 1981, while Turkey presented its acceptance only in

procedure for individual denunciations of human rights violations.[73] The role of the victim was initially limited and admissibility requirements were stringent.[74] As the system has matured, however, the institutional structures and normative guarantees have been considerably strengthened.[75]

3. Africa

In Africa, as states emerged from colonization, their human rights agenda focused on self-determination and racism.

> The African Charter on Human and Peoples' Rights, which entered into force October 21, 1986, established a system for the protection and promotion of human rights that was designed to function within the institutional framework of the Organization of African Unity (OAU), a regional intergovernmental organization that came into being in 1963 and was replaced in 1999 by the African Union.[76]

The main objectives of the OAU included ridding the continent of the remaining vestiges of colonization and apartheid; promoting unity and solidarity among African States; coordinating and intensifying cooperation for development; safeguarding the sovereignty and territorial integrity of Member States; and promoting international cooperation within the framework of the U.N.[77] The end of colonialism and the ascent of democratic rule in Southern Africa has led to a larger role for human rights issues in the new African Union and to the adoption of a Protocol for the establishment of an African Court of Human Rights.[78]

II. Standard-setting: Universal or Variable Norms?

The U.N. Charter did not define the term "human rights" but left the member states to give it meaning, which they began doing when the General Assembly adopted the UDHR without dissent on December 10, 1948.[79] The same year, the General Assembly also

---

1987.

Id. at 100 n.22.

73. *Id.* at 100.

74. *See id.*

75. *Id.* at 100-02.

76. BUERGENTHAL & SHELTON, *supra* note 67, at 29.

77. *Id.*

78. *Id.* at 29-30.

79. UDHR, *supra* note 9. The Vienna Convention on the Law of Treaties indicates that in interpreting treaties, any subsequent agreement or practice of the parties regarding its interpretation or the application of its provisions shall be taken into account to give meaning to its terms. Vienna Convention on the Law of

adopted the Convention on the Prevention and Punishment of Genocide.[80] Standard-setting continued with a focus on non-discrimination and equality for disadvantaged groups.[81] The 1965 Convention on the Elimination of All Forms of Racial Discrimination ("CERD") was the first of a series of treaties addressing equal rights.[82] The U.N. subsequently adopted instruments concerning women, children, migrant workers, and the disabled.[83] The UDHR became two Covenants, one on Civil and Political Rights ("ICCPR"), the other on Economic, Social and Cultural Rights ("ICESCR").[84] The standard-setting process continues as member states place items on the agenda for action. Standard-setting will not end, because new problems arise, and fears of a "devalued currency" are probably overstated given the need to obtain consensus before a new instrument can be adopted.

From the beginning, the moral leadership of key states has been important,[85] but, as John Humphrey has noted, "[t]he relatively strong human rights provisions in the Charter through which they run, as someone has said, like a golden thread, were largely, and appropriately, the result of determined lobbying by non-governmental organizations at the San Francisco Conference."[86] NGOs and international civil servants working

---

Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

80. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

81. BUERGENTHAL & SHELTON, *supra* note 67, at 20.

82. Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 [hereinafter CERD].

83. BUERGENTHAL & SHELTON, *supra* note 67, at 20-21.

84. *Id.* at 18; *see* ICCPR, *supra* note 9; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

85. The proposal to have the U.N. organization ensure respect for human rights and fundamental freedoms without discrimination was initially submitted by Brazil, the Dominican Republic, and Mexico. Amendments and Comments on Dumbarton Oaks Proposals, *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945—SELECTED DOCUMENTS 87, 93 (1946). Uruguay proposed that the organization endorse the essential rights of mankind, internationally established and guaranteed. *Id.* at 110. *See also* JOHN P. HUMPHREY, THE UNITED NATIONS AND HUMAN RIGHTS: A GREAT ADVENTURE 14-17 (1984) (acknowledging the key role of Panama in efforts to draft an international bill of rights); PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 217 (1998) (discussing the role of key states and specifically the role of Panama in drafting the International Bill on Human Rights).

86. John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, *in* THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75, 83 (Maarten Bos ed., 1973).

exclusively on human rights issues are clearly a major factor in agenda setting. Felice Gaer has called human rights NGOs the engine for virtually every advance made by the U.N. in the field of human rights since its founding.[87] One example is Amnesty International's campaign against the death penalty,[88] which led to the drafting of three treaties: the Second Protocol to the ICCPR,[89] the Sixth Protocol to the ECHR,[90] and the Inter-American Protocol to Abolish the Death Penalty.[91] A multiplicity of actors with divergent interests participate in any negotiations for new human rights norms. Successful negotiations on human rights issues thus typically involve coalition building among states and nonstate actors. Negotiators may make trade-offs between the ideal and the possible; often the form and the content of the negotiated instrument reflect compromise and efforts to achieve consensus.

The media also plays a significant role in identifying human rights issues that need resolution.[92] By documenting abuses, the media often generates public outrage that helps create coalitions of NGOs and others to mobilize action.[93] Compelling media imagery can thus bring an issue forward.[94]

During the standard-setting process one state may take a leadership role, sometimes out of conviction or sometimes because of domestic political pressure after national reforms have been instituted to address particular problems. Usually, however, governments are motivated by strategic and political considerations or historic rivalries. This can be useful; political motivation does not minimize real human rights problems. At the same time, the political motivation may create suspicion about the need for action, thereby undermining any effort to change state

87. Felice D. Gaer, *Reality Check: Human Rights NGOs Confront Governments at the UN*, *in* NGOS, THE UN AND GLOBAL GOVERNANCE 51, 51-53 (Thomas G. Weiss & Leon Gordenker eds., 1996).

88. *See generally* Johanna K. Eyiolfsdottir, *Amnesty International: A Candle of Hope*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 855 (Gudmundur Alfredsson et al. eds., 2001) (discussing generally the role of Amnesty International in influencing the drafting of treaties against the death penalty).

89. Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Jan. 30, 1990).

90. Protocol No. 6 to the ECHR, *supra* note 70.

91. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 58.

92. *See* Dinah Shelton, *Human Rights*, *in* MANAGING GLOBAL ISSUES 424, 439-40 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001).

93. *Id.*

94. *Id.*

behavior. It also may make the target state more intransigent when hostile states or traditional enemies raise issues. For this and other reasons, states often are reluctant to raise human rights matters, which constitute only one of many matters of international concern for them.

NGOs have nonetheless successfully aligned with medium and small powers to achieve considerable success. Groups representing torture survivors and other victims of abuse succeeded in obtaining provisions on victim compensation in the Statute of the International Criminal Court through alliance with key states, such as France and Canada.[95] In subsequent human rights negotiations, leadership of "repeat players," those with expertise and an impartial commitment to human rights, has enhanced the strategy of coalition building.[96]

It may be questioned whether the role of NGOs introduces a Western bias into standard-setting. Civil society and NGOs are both more common and better funded in Western countries than they are in other parts of the world.[97] This may have an impact on the U.N.'s work, especially when NGOs can fund investigations by U.N. experts who are denied support by the U.N. itself. If the system is open and transparent, however, this does not necessarily lead to bias in the results, especially when the majority of states in the organization, which ultimately decide whether to adopt proposals, come from other regions of the world. In addition, it is less and less the case that Western NGOs predominate; the creation of human rights institutions has empowered local and regional NGOs throughout the world. In the twenty years of the African Charter, the number of NGOs accredited to the African Commission has grown to 370.[98] During its Fortieth Session, the Commission accredited sixteen additional NGOs, all but two of which are African organizations.[99] Indeed, it is far more common today to hear Western countries complaining of bias in favor of developing countries' human rights agenda than it is for developing countries to complain about the U.N. human rights

95. *See* Gaer, *supra* note 87, at 55-57.

96. *See* Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, *in* NGOS, THE UN, AND GLOBAL GOVERNANCE, *supra* note 87, at 17, 31.

97. *Id.*

98. *Twenty-First Activity Report of the African Commission on Human and Peoples' Rights*, ¶¶ 14-15, African Union Doc EX.CL/322 (X) (Jan. 25-26, 2007).

99. *Id.* ¶ 14.

agenda. Controversies over the right to development,[100] the right to a safe and healthy environment,[101] and norms for transnational companies[102] reflect a North-South split in priorities and concepts of rights.

Like the U.N. system, regional organizations have evolved over time, increasing the protections afforded and the rights guaranteed. The European, Inter-American, and African systems have all expanded their guarantees through the adoption ofprotocols and other human rights instruments, each one building on the normative advances at the U.N. and in other regions.[103] The Inter-American system, for example, has concluded the Inter-American Convention for the Prevention and Punishment of Torture;[104] the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;[105] the Second Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty;[106] the

100. *See, e.g.*, Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 438 (1981) (arguing the right to property and development is a fundamental right); World Conference on Human Rights, June 14-15, 1993, *Vienna Declaration and Programme of Action*, at 5, U.N. Doc. A/CONF.157/23 (referring to the right to development as "a universal and inalienable right and an integral part of fundamental human rights").

101. *See, e.g.*, Commission on Human Rights: Final Report of the U.N. Special Rapporteur on Human Rights and the Environment, at 258, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (asserting that there is a right to a safe and healthy environment).

102. *See* ECOSOC Sub-Comm. on Promotion and Protection of Human Rights, Econ., Soc. & Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12Rev.2 (Aug. 26, 2003) (recognizing the duty of transnational corporations to promote and respect human rights). The Commission responded by noting that it had not requested the norms and that "as a draft proposal" the Sub-Commission's report had no legal standing. Responsibilities of Transnational Corporations & Related Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN4/Dec/2004/116 (Apr. 20, 2004). Therefore, the Sub-Commission "should not perform any monitoring function in this regard." *Id.* In 2005, the Commission, by resolution, requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises. ECOSOC Res. 2005/69, at 68, U.N. Doc. E/CN.4/2005/L.11/Add.7 (Apr. 20, 2005). No reference was made to the Sub-Commissions Norms. *See id.*

103. *See* BUERGENTHAL & SHELTON, *supra* note 67, at 24-31(summarizing the development of regional human rights organizations throughout the world).

104. Inter-American Convention to Prevent and Punish Torture, *supra* note 58.

105. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 58.

106. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 58.

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women;[107] the Inter-American Convention on Forced Disappearance of Persons;[108] and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.[109] It has drafted a Declaration of the Rights of Indigenous Peoples, but the text has not yet been adopted.[110]

It is notable that virtually all the legal instruments in the various regional systems refer to the UDHR and the U.N. Charter,[111] providing a measure of uniformity in the fundamental

---

107. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 58.

108. Inter-American Convention on Forced Disappearance of Persons, *supra* note 58.

109. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, *supra* note 58.

110. Press Release V, Inter-Am. Comm'n on Human Rights, Press Communique of 3/97, O.A.S. Doc OEA/Ser.L/V/II.98, Doc.7 rev. (Mar. 7, 1997), *reprinted* in O.A.S., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, at 1081.

111. Only the American Declaration of the Rights and Duties of Man does not mention the UDHR, because it was adopted prior to the completion of the UDHR. *See* American Declaration on the Rights and Duties of Man, *supra* note 54. The American Declaration indicates its origin in the "repeated occasions" on which the American States had "recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his personality." *Id.* pmbl. The European system, "considering the Universal Declaration of Human Rights," provides that the "like-minded" governments of Europe have resolved "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." ECHR, *supra* note 65, pmbl. The Preamble to the American Convention also cites the UDHR, as well as referring to the OAS Charter, the American Declaration of the Rights and Duties of Man, and other international and regional instruments not referred to by name. American Convention on Human Rights, *supra* note 57, pmbl. The drafting history of the American Convention shows that the states involved utilized the ECHR, the UDHR, and the Covenants in deciding upon the American Convention guarantees and institutional structure. *See* BUERGENTHAL & SHELTON, *supra* note 67, at 41-43. The African Charter mentions the Charter of the U.N. and the UDHR in connection with the pledge made by the African States to promote international cooperation. African Charter on Human and Peoples' Rights pmbl., *reprinted in* OUGUERGOUZ, *supra* note 20, at 803. In the Charter's Preamble, the African States also reaffirm in sweeping fashion "their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations." *Id.* The Revised Arab Charter on Human Rights was adopted with a preamble "reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights." League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, *available at* http://www.umn.edu/humanrts/instree/loas2005.html.

guarantees and a reinforcement of the universal character of the American Declaration of the Rights and Duties of Man.[112] The rights contained in the treaties also reflect the human rights norms set forth in other global human rights declarations and conventions, in particular the U.N. ICCPR[113] and ICESCR.[114] The most recently adopted regional instrument, the 2004 Revised Arab Charter,[115] was drafted and approved in part to bring the regional norms more into conformity with global standards.[116]

In addition, as each successive system has been created it has looked to the normative instruments and jurisprudence of those systems founded earlier. Provisions regarding choice of law and canons of interpretation contained in the regional instruments have led to considerable convergence in fundamental human rights norms and their application. All of the systems have a growing case law detailing the rights and duties enunciated in the basic instruments. The jurisprudence of the regional human rights bodies has thus become a major source of human rights law. In many instances this case law reflects a confluence of the different substantive protections in favor of broad human rights protections. In other instances, differences in treaty terms or approach have resulted in a rejection of precedent from other systems.[117] In general, the judges and the commissioners have been willing to substantiate or give greater authority to their interpretations of rights by referencing not only their own prior case law but also the decisions of other global and regional bodies.

Some decisions cross-reference specific articles of other instruments. The European Court of Human Rights has utilized Article 19(2) of the ICCPR to extend the application of Article 10 of the EHCR to cover artistic expression.[118] It has referred to the

112. *See* American Declaration of the Rights and Duties of Man pmbl., *supra* note 54 ("[T]he international protection of the rights of man should be the principal guide of an evolving American law.").

113. ICCPR, *supra* note 9.

114. ICESCR, *supra* note 84.

115. The Revised Arab Charter on Human Rights, *supra* note 111.

116. *See* Rishmawi, *supra* note 16.

117. For example, the European and Inter-American courts take very different approaches to their remedial powers based on the different language of their respective treaties. In case law, the Inter-American court has also rejected the more stringent European restrictions on rights. *See* Compulsory Membership in an Ass'n Prescribed by Law for the Practice of Journalism, 5 Inter-Am. Ct. H.R. (ser. A) No. 5, at 15 (Nov. 13, 1985), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

118. *See* Muller, 133 Eur. Ct. H.R. (ser. A) at 19 (1988).

U.N. Convention on the Rights of the Child in regard to education.[119] It has also referred to both the ICCPR and the American Convention in regard to the right to a name as part of Article 8 of the ECHR.[120] Most well known is *Soering v. United Kingdom*, where the court found that the obligation not to extradite someone who might face torture[121] is implicit in Article 3 of the ECHR.[122]

The Inter-American Court of Human Rights also frequently uses other international court decisions and international human rights instruments to interpret and apply Inter-American norms. It has referred to the EHCR,[123] the ICCPR, other U.N. treaties,[124] and decisions of the European Human Rights Commission and the European Court.[125] It has stated that it will use cases decided by the European Court of Human Rights and the Human Rights

---

119. *See* Costello-Roberts v. U.K., 247C Eur. Ct. H.R. (ser. A) 50, 58 (1993).

120. *See* Burghartz v. Switz., 280B Eur. Ct. H.R. (ser. A) 19, 28 (1994).

121. Torture Convention, *supra* note 71, art. 3.

122. *See* Soering v. U.K., 161 Eur. Ct. H.R. (ser. A) at 35 (1989) ("The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention."). The former Commission had stated that it found it useful in interpreting the EHCR to refer to provisions in other international legal instruments for the protection of human rights, especially those that contain broader guarantees. *See* Gestra v. Italy, App. No. 21072/92, 80B Eur. Comm'n H.R. Dec.& Rep. 89, 93 (1995).

123. *See, e.g.*, *Compulsory Membership*, Inter-Am. Ct. H.R. (ser. A) No. 5, at 11-13; Enforceability of the Right to Reply or Corr., Inter-Am. Ct. H.R. No. 7, at 6 (ser. A) (Aug. 29, 1986), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_07_ing.pdf.

124. *See Compulsory Membership*, Inter-Am. Ct. H.R. (ser. A) No. 5, at 11-14; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (ser. A) No. 4, at 13-14 (Jan. 19, 1984), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf.

125. *See* Caballero Delgado & Santana Case (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) No. 17, at 14 (Jan. 21, 1994), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_17_ing%5B1%5D.pdf; Gangaram Panday Case, Inter-Am. Ct. H.R. (ser. C) No. 16, at 9 (Jan. 21, 1994), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_16_ing%5B1%5D; The Word "Laws" in Article 30 of the Am. Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 6, at 5 (May 9, 1986), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf; *Compulsory Membership*, Inter-Am. Ct. H.R. (ser. A) No. 5, at 11-13, 19-20; *Proposed Amendments*, Inter-Am. Ct. H.R. (ser. A) No. 4, at 15; Viviana Gallardo v. Gov't of Costa Rica, Inter-Am. Ct. H.R. (ser. A) No. 101, at 3, 7-8 (Nov. 13, 1982), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_101_81_ing.pdf; The Effect of Reservations on the Entry into Force of the Am. Convention, Inter-Am. Ct. H.R. (ser.A) No. 2, at 8 (Sept. 24, 1982) *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf.

Committee when they augment rights protection[126] and has indicated a commitment not to incorporate restrictions from other systems.[127]

Inter-American Commission and court decisions in turn provide extensive jurisprudence on due process,[128] conditions of detention and treatment of detainees,[129] legality of amnesty laws,[130] rape as torture,[131] disappearances,[132] obligations to ensure respect for rights,[133] direct applicability of norms,[134] exhaustion of local remedies,[135] burden and standard of proof,[136] admissibility of evidence,[137] and the general doctrine of interpretation of human rights treaties.[138] The African Commission has drawn upon these and other standards in deciding cases before it.[139] The Commission has adopted several doctrines from European and Inter-American case law: presumption of the truth of the allegations from the silence of government,[140] the notion of

126. *See Compulsory Membership*, Inter-Am. Ct. H.R. (ser. A) No. 5, at 15 ("[I]f in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail.").

127. *See id.* at 14 (stating that the comparison of the "American Convention with the provisions of other international instruments" should never be used to read into the "Convention restrictions that are not grounded in its text.").

128. *See* Judicial Guarantees in States of Emergency, Inter.-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).

129. *See Gangaram Panday Case*, Inter-Am. Ct. H.R. (ser. C) No. 16; *Viviana Gallardo*, Inter-Am. Ct. H.R. (ser. A) No. 101.

130. *See* Enactment of the Amnesty Law and El Sal.'s Int'l Commitments, Inter-Am. C.H.R., OEA/Ser.L/V/II.85, doc. 28 rev. (1994).

131. *See* Report on the Situation of Human Rights in El Sal., Inter-Am. C.H.R., OAS/Ser.L/V/II.46, doc. 23, rev. 1 (1978).

132. *See* Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

133. *See Gangaram Panday Case*, Inter-Am. Ct. H.R. (ser. C) No. 16.

134. *See* BUERGENTHAL & SHELTON, *supra* note 67, at 365-430.

135. *See Caballero Delgado & Santana Case*, Inter-Am. Ct. H.R. (ser. C), No. 17, at 15.

136. *See Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C.) No. 4.

137. *See id.*

138. *See Caballero Delgado & Santana Case*, Inter-Am. Ct. H.R. (ser. C), No. 17, at 5-8.

139. *See* COMPILATION OF DECISIONS ON COMMUNICATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (Inst. for Human Rights & Dev. ed, 1999) [hereinafter COMPILATION OF DECISIONS].

140. *See, e.g.*, Communications Nos. 59/91, 60/91, 87/93, 101/93, 74/92. For example:

> The African Commission . . . has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given.

continuing violations,[141] continuity of obligations in spite of a change of government,[142] state responsibility for failure to act,[143] and the presumption that the state is responsible for custodial injuries.[144] In sum, standard-setting is a dynamic process of cross-referencing and progression in the development of human rights norms; the standard appears to be a single one, although there is diversity outside the core of protections.

III. Enforcement: Taking Up Human Rights Violations

Human rights governance started with a revolutionary

> This principle conforms with the practice of other human rights adjudicatory bodies and the Commission's duty to protect human rights.

Communications Nos. 25/89, 47/90, 56/91, 100/93, Free Legal Assistance Group, Lawyers' Comm. for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah/Zaire, *in* COMPILATION OF DECISIONS, *supra* note 139, at 52-58. Article 42 of the Regulations of the Inter-American Commission allows it to presume the facts in the petition are true if the government fails to respond to the complaint. *See* BUERGENTHAL & SHELTON, *supra* note 67, at 660.

141. *See, e.g.*, Communication No. 142/94, Njoka v. Kenya, at 13; Case No. 39/90, Pagnoulle v. Cameroon.

142. In a communication against Malawi the Commission held:

> Principles of international law stipulate . . . that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.

Communications Nos. 64/92, 68/92, 78/92, Amnesty Int'l v. Malawi, *reprinted in* COMPILATION OF DECISIONS, *supra* note 139, at 33 ; *see* Communications Nos. 83/92, 88/9, 91/93, Degli, Union Interafricaine des Droits de l'Homme, Comm. Int'l de Juristes v. Togo (determining based on the findings of a Commission delegation to Togo that the acts of the prior regime were being remedied by the present government); *see also Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4.

143. In regard to Communication No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, the Commission expounded on the state duty specified in Article 1 to give effect to the rights and freedoms guaranteed by the African Charter. According to the Commission, "if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation." *Id.* ¶ 20. The Commission found that "Chad ha[d] failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights." *Id.* ¶ 22. In language reminiscent of the *Velasquez Rodriguez Case*, the Commission said that "[e]ven where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter." *Id.*

144. *See* Communications Nos. 64/92, 68/92, 78/92, Amnesty Int'l v. Malawi, *reprinted in* COMPILATION OF DECISIONS, *supra* note 139, at 33, 33-35; Communication No. 74/92, *supra* note 143; *see also* Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) 3, 15-16 (1992).

concept—that a government's treatment of those within its power is a matter of international concern. It began, however, with a modest objective—declaring and defining a set of fundamental rights, leaving to states the choice of means and policies to implement the norms.[145] Like standard-setting, human rights compliance mechanisms and enforcement procedures have evolved over time and become gradually stronger, at least at the regional level.

The mechanisms for supervising the U.N. Charter obligations of member states were initially very limited, because the U.N. legal office insisted that the U.N. human rights bodies could not take action with respect to petitions alleging human rights violations.[146] This left few options for enforcement. This section looks first at supervision of the U.N. Charter obligations, then at the U.N. treaty bodies, and finally at the regional mechanisms.

A. United Nations Charter-Based Procedures

Procedures to advance compliance with the U.N. Charter's human rights obligations range from debates in the General Assembly, to investigations of particular countries or issues, to decisions of the Security Council.[147] Most of these techniques have to be initiated by a member state or group of states and require the cooperation of other members.[148] In quite a few instances, the debates have led to investigations or denunciations of human rights violations in member states, but the political pressure placed on states sitting on the Commission to vote for or against such actions has considerably increased in recent years and led to concerns about the entire process.[149]

The enforcement procedures must be considered in the

---

145. Shelton, *supra* note 92, at 438-39.

146. ECOSOC, *Report of the Sub-Committee on the Handling of Communications*, U.N. Doc. E/CN.4/14.Rev. 2 (Feb. 6, 1947).

147. *See* Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989*, *in* THE UNITED NATIONS AND HUMAN RIGHTS 25 (Philip Alston ed., 1992); Sydney D. Bailey, *The Security Council*, *in* THE UNITED NATIONS AND HUMAN RIGHTS, *supra*, at 304.

148. *See* Cassese, *supra* note 147; Bailey, *supra* note 147.

149. *See* Anne Bayefsky, Editorial, *Ending Bias in the Human Rights System*, N.Y. TIMES, May 22, 2002, at A27 ("A United Nations high commissioner for human rights will always need to withstand political pressure from member states to engage in a highly selective application of human rights norms."); Jonathan Fanton, *Taking Human Rights Seriously*, CHI. TRIB., Jan. 10, 2006, at C17 ("Politics, which should not be a consideration, have come too often to dominate the [U.N. Human Rights] Commission's work.").

context of the U.N. Charter as a multilateral treaty. The Charter contains numerous references to human rights but only expressly mentions two: the right to self-determination[150] and the right to non-discrimination.[151] One of the U.N. Charter's objectives is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[152] Furthermore, all but one time that the phrase "human rights and fundamental freedoms" appears in the Charter, appended to it are the words "without discrimination on the basis of race, sex, language or religion."[153] The combined focus on equality and self-determination has directed much of the work of the U.N. political bodies on human rights issues.[154] While it is an intensely political topic, the U.N.'s focus on equality and self-determination has its roots firmly in the language of the treaty.

The human rights provisions in the U.N. Charter had an immediate effect on colonial peoples, who seized on the language concerning human rights, self-determination, and non-discrimination to demand decolonization.[155] The birth of the U.N. in fact coincided with the stirrings of colonial peoples restive under foreign domination.[156] By 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples directly called for the end of colonialism based on the right of peoples to self-determination.[157] A decade later, the U.N. General Assembly affirmed that any subjection of peoples to alien domination and exploitation constitutes not only a violation of the principle of self-determination, but of fundamental human rights and of the Charter.[158] It is no accident that through much of its history the U.N.'s predominant human rights focus has been on the right to self-determination.

The U.N. Charter references to equal rights allowed NGOs

150. U.N. Charter art. 1, ¶ 2; *id.* art. 55.

151. U.N. Charter art. 1, ¶ 2 ("without distinction as to race, sex, language, or religion").

152. *Id.*

153. *See* U.N. Charter.

154. *See* Cassese, *supra* note 147, at 36-37.

155. *See* LAUREN, *supra* note 85, at 206-07.

156. *See id.* at 205-07.

157. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 66, U.N. Doc. A/4684 (Dec. 14, 1960).

158. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. Doc. A/8028 (Oct. 24, 1970); *see also* ICESCR, *supra* note 84, art. 1; ICCPR, *supra* note 9, art. 1.

and governments to speak out against systematic discrimination from the outset.[159] India, for example, criticized segregation in the United States, which responded by pointing to the caste system in India.[160] During the first session of the U.N. General Assembly, Egypt, supported by Latin American states, introduced a resolution, which passed unanimously, to condemn racial and religious persecution.[161] India then sought a resolution to condemn South Africa for its policies of racial discrimination, accusing the government of gross and systematic human rights violations in breach of the principles and purposes of the Charter.[162] The resolution passed with the required two-thirds majority, despite opposition from Australia, Great Britain, Canada, and the United States, each of which had its own racial policies that contravened the Charter guarantees.[163] The first session of the General Assembly also declared genocide a crime under international law.[164]

In subsequent sessions, specific allegations of human rights violations were brought against Bulgaria, Romania, Hungary,[165] and the Soviet Union.[166] Other member states pressed for action on sex discrimination: the Economic and Social Council ("ECOSOC") voted to create the Commission on the Status of Women,[167] and the General Assembly urged states to grant political rights to women.[168] In 1949, the General Assembly declared that measures taken by the Soviet Union to prevent the wives of citizens of other nationalities from leaving in order to join

159. *See* LAUREN, *supra* note 85, at 207.

160. *See id.*

161. G.A. Res. 103 (I), at 200, U.N. Doc. A/RES/1031 (Nov. 19, 1946).

162. Letter from the Indian Delegation to the Sec'y Gen. of the United Nations, U.N. Doc. A/149 (June 22, 1946).

163. *See* G.A. Res. 44(I), at 69, U.N. Doc. A/64/Add.1 (Dec. 8, 1946). The issue of South Africa's racial policies remained on the agenda of the U.N. in every session until the end of apartheid.

164. G.A. Res. 96 (I), at 188-89, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

165. Australia and Bolivia requested that the General Assembly consider the question of the observance of human rights and fundamental freedoms, including religious and civil liberties, in Bulgaria and Hungary. *See* U.N. GAOR, 3d Sess., Annex, at 31, U.N. Doc. A/820 (Mar. 16, 1949); U.N. GAOR 3d Sess., Annex, at 31-32, U.N. Doc. A/821 (Mar. 19, 1949); U.N. GAOR, 3d Sess., Annex, at 35-36, U.N. Doc. A/829 (Apr. 9, 1949). The General Assembly took up Romania during the fourth session. *See* U.N. GAOR, 4th Sess., Annex, at 1 (Sept. 21, 1949).

166. G.A. Res. 285 (III), at 34, U.N. Doc. A/900 (Apr. 25, 1949).

167. ECOSOC, Resolution Establishing the Commission on the Status of Women, U.N. Doc. E/RES/2/11 (June 21, 1946).

168. G.A. Res. 56 (I), at 90, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

their husbands was not in conformity with the U.N. Charter.[169] In 1959, 1961, and 1965, the General Assembly condemned violations of human rights in Tibet.[170] By the 1980s, the General Assembly was taking up human rights violations in Kampuchea,[171] Guatemala,[172] Chile,[173] El Salvador,[174] and Afghanistan.[175] Indeed, human rights issues have always been on the agenda of the General Assembly, its committees, or ECOSOC.

Does empirical evidence support the claim of bias in enforcement? Jack Donnelly's review of thirty years of human rights discussion in the General Assembly and ECOSOC assessed the amount of time devoted to debating human rights practices in South Africa, Israel, and Chile compared to other countries.[176] He concluded that there was considerable bias, although it was declining in the 1980s.[177]

Donnelly's conclusion assumes that there is no principled basis for singling out these countries. His study adopts the UDHR and the Covenants, rather than the U.N. Charter, as the central normative instruments representing "an authoritative international expression of the human rights obligations of contemporary states."[178] However, the Covenants have their own supervisory bodies and procedure, and therefore it is not the role of the General Assembly or ECOSOC to enforce them. Few commentators or states would take the Covenants in their entirety to represent customary international law. The U.N. organs concerned with human rights are monitoring compliance with the obligations of member states under the U.N. Charter.

As noted earlier, the U.N. Charter contains only two specific rights: the equal rights and self-determination of peoples and the right of individuals to be free from discrimination.[179] If these

169. *See* G.A. Res. 285 (III), *supra* note 166.

170. G.A. Res. 1353 (XIV), at 61, U.N. Doc. A/4354 (Oct. 21, 1959); G.A. Res. 4723 (XVI), at 66, U.N. Doc. A/5100 (Dec. 20, 1961); G.A. Res. 2079 (XX), at 3, U.N. Doc. A/6014 (Dec. 18, 1965).

171. G.A. Res. 38/3, at 14, U.N. Doc. A/RES/38/3 (Oct. 27, 1983).

172. G.A. Res. 38/100, at 203, U.N. Doc. A/RES/38/100 (Dec. 16, 1983).

173. G.A. Res. 38/102, at 205, U.N. Doc. A/RES/38/102 (Dec. 16, 1983).

174. G.A. Res. 38/101, at 204, U.N. Doc. A/RES/38/101 (Dec. 16, 1983).

175. G.A. Res. 37/37, at 25, U.N. Doc. A/RES/37/37 (Nov. 29, 1982).

176. Jack Donnelly, *Human Rights at the United Nations, 1955-1985: The Question of Bias*, 32 INT'L STUD. Q. 275, 277-96 (1988).

177. *Id.* at 275.

178. *Id.* at 276.

179. *See supra* notes 150-154 and accompanying text. Donnelly notes the focus on racial discrimination and self-determination in the U.N., but he attributes it to

Charter-based rights are indeed the proper focus of U.N. efforts, then there may be a rational basis for at least two of the three countries mentioned. In fact, Donnelly himself points to the fact that racial discrimination was the most discussed topic, taking up almost as much time as all other civil and political rights combined.[180] He also notes that the right to self-determination received more attention than other topics, "despite the nearly complete decolonization of the Third World" by 1980.[181] Arguably, though, the fact of South African (and Namibian), Angolan, Mozambiquean, and Southern Rhodesian intransigence could very well explain why the U.N. concentrated on them. The overwhelming acceptance of decolonization made those few remaining racist colonial regimes appear particularly odious.

Certainly, South Africa was long a pariah state at the U.N. The question of discrimination in South Africa was the first human rights issue taken up by the U.N. General Assembly, beginning in 1946.[182] The General Assembly was originally concerned with the treatment of the Indian minority, but it expanded its examination after South Africa elected the nationalist government that officially instituted apartheid.[183] In 1953 the General Assembly found that the racial policies of the Government of South Africa and their consequences were contrary to the U.N. Charter, a finding that was repeated with increasing emphasis over the years.[184] Nearly a decade after the first condemnation, in 1962, the General Assembly established a permanent organ, the Special Committee on the policies of apartheid of the Government of South Africa, with the mandate to keep the racial policies of South Africa under review when the

---

the growing presence of the Afro-Asian bloc of countries. Donnelly, *supra* note 176, at 277.

180. Donnelly, *supra* note 176, at 277.

181. *Id.*

182. A list of all resolutions from the General Assembly's first session in 1946 is available at http://www.un.org/documents (last visited Mar. 19, 2007).

183. *See* G.A. Res. 44 (I), *supra* note 163; G.A. Res. 616, at 8, U.N. Doc. A/2361 (Dec. 5, 1952).

184. See G.A. Res. 721 (VIII), at 6, U.N. Doc. A/2630 (Dec. 8, 1953); G.A. Res. 820 (IX), at 9, U.N. Doc. A/2890 (Dec. 14, 1954); G.A. Res. 917 (X), at 8, U.N. Doc. A/3116 (Dec. 6, 1955); G.A. Res. 1016 (XI), at 5, U.N. Doc. A/3572 (Jan. 30, 1957); G.A. Res. 1178 (XII), at 7, U.N. Doc. A/3805 (Nov. 26, 1957); G.A. Res. 1248 (XII), at 7, U.N. Doc. A/4090 (Oct. 30, 1958); G.A. Res. 1375 (XIII), at 7, U.N. Doc. A/4354 (Nov. 17, 1959); G.A. Res. 1598 (XIV), at 5, U.N. Doc. A/4684/Add.1 (Apr. 15, 1961); G.A. Res. 1663 (XV), at 10, U.N. Doc. A/5100 (Nov. 28, 1961); G.A. Res. 1761 (XVII), at 9, U.N. Doc. A/5217 (Nov. 6, 1962).

Assembly was not in session.[185]

South Africa not only deliberately violated the clear U.N. Charter language of equality by denying human rights to the majority of its own population, but it challenged the authority of the U.N. by moving to introduce its racist policies into South West Africa, a League of Nations Mandate that had been under South African supervision.[186] In Resolution 2145 (XXI) of October 27, 1966, the General Assembly, "[c]*onvinced* that the administration of the Mandated Territory [of South West Africa] by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights," declared "that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory [of South West Africa] and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate."[187] The General Assembly further decided that the Mandate conferred upon South Africa "is therefore terminated" and "that South Africa has no other right to administer the Territory . . . ."[188] In a 1971 advisory opinion, the I.C.J. agreed that South Africa had committed a material breach of its obligations, that the supervisory powers of the Council of the League of Nations had passed to the General Assembly, and that the General Assembly in terminating the Mandate had acted within the framework of its competence.[189] The court said that South Africa had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race.[190] To deny those rights on the basis of race constituted "a flagrant violation of the purposes and principles of the Charter."[191]

The topic of Israel also arose in reference to a failed Mandate and continued as repeated conflicts broke out in the region.[192] The

185. G.A. Res. 1761 (XVII), *supra* note 184.

186. G.A. Res. 2145 (XXI), at 2, U.N. Docs. A/L.483 & Add.1-3, A/L.488 (Oct. 27, 1966).

187. *Id.*

188. *Id.*

189. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 46-47 (June 21).

190. *Id.*

191. *Id.* at 57.

192. G.A. Res. 181 (II), at 131, U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

Israel situation, therefore, has an international dimension that provides important context for some of the attention given to it. Like South Africa in Namibia, Israel's occupation of the West Bank and Gaza Strip after the 1967 War has been seen as a form of colonial domination, however valid the security justifications Israel has invoked.[193] While there are undoubtedly other, baser motives to which some of the attention can be attributed,[194] the ability to place the occupied territories under the Charter's rubric of self-determination clearly influenced states to vote for some of the resolutions and keep Israel on the U.N.'s agenda.

Donnelly correctly points to a disproportionate consideration of civil and political rights compared to economic, social, and cultural rights during the period he examined.[195] This actually seems to contradict the perception of critics that the U.N. reflected a pro-Third World, Soviet agenda, because the Soviet Union placed clear emphasis on economic and social rights. Donnelly found that economic, social, and cultural rights were not discussed at all in the second decade of the U.N. (1955-1965) and claims that their absence reflected a Western bias.[196] This may very well be the case, or it may be that most of the economic rights that took high priority at that time (for example, trade union freedoms and education) were relegated to the specialized agencies (for example, ILO and UNESCO) with greater expertise in handling them.

Donnelly found that personal security issues (for example, right to life, freedom from torture, and protection against slavery) also dominated the agenda.[197] He calls this a "disturbing pattern,"[198] but these are non-derogable, fundamental rights that cannot be suspended even during times of emergency.[199] They constitute customary international law and are referred to by many as "jus cogens" or "peremptory rights."[200] It should not be

193. *See, e.g.*, G.A. Res. 47/82, at 3, U.N. Doc. A/RES/47/82 (Dec. 16, 1992) (noting that Palestinian people are under "colonial domination").

194. *See* Donnelly, *supra* note 176, at 290-91.

195. *Id.* at 279.

196. *Id.* at 281.

197. *Id.* at 282.

198. *Id.*

199. ICCPR, *supra* note 9.

200. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 302-05 (2006). For a judicial declaration that the prohibition of torture constitutes jus cogens, see Prosecutor v. Furundzija, No. IT-95-17/1-T, ¶¶ 153-54 (Dec. 19, 1998), *available at* http://www.un.org/icty/furundzija/trialc2/judgement/index.htm.

surprising that they are discussed more often than other rights. In fact, Donnelly's study may reflect a more legal approach to monitoring compliance with the U.N. Charter's human rights obligations than is usually perceived.

Another study, limited to resolutions of the Human Rights Commission condemning states for systematic violations between 1982 and 1997, found that the Commission singled out twenty-two countries over this time period.[201] The most frequently condemned countries were Iraq, Iran, Equatorial Guinea, Cuba, and Haiti.[202] These states hardly count as beacons of liberty, so the criticism seems to be not who was included, but who was excluded. For example, there have been eleven attempts to condemn China, widely considered to be a serious human rights violator, but each attempt has been defeated.[203]

In sum, the focus of condemnation has been on gross violations of core civil and political rights, particularly in the colonial context or when racial discrimination has been at issue.[204] No state has been condemned for economic deprivations. It must be kept in mind, however, that these are not the policies of the U.N., but of its members. They choose to raise or not to raise the issue of human rights violations in other countries for a variety of reasons, including domestic politics, ideological differences, strategic interests, and, on occasion, altruism. States that are targets of censure often cry "double standard" where in earlier years they would have invoked "exclusive domestic jurisdiction." States lobby to find supporters in order to avoid censure.[205] States learn to use the system.[206]

If states are reluctant to complain of human rights violations by others in the club, victims and their representatives have no such reticence. Still, the treatment of victims' complaints may also indicate bias. Until 1959, the U.N. received and considered

---

201. Ron Wheeler, *The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions*, 32 CAN. J. POL. SCI. 75, 81 (1999).

202. *Id.* at 101.

203. Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 72 (2005).

204. *See* U.N. ESCOR, 7th Sess., 2d mtg. at 2, U.N. Doc. E/C.12/1992/SR.2 (Apr. 13, 1993) (criticizing the emphasis on civil and political rights).

205. *See supra* note 203 and accompanying text.

206. *See, e.g.*, ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 49-83 (1999) (arguing that China used its political and economic power to defeat efforts to condemn its human rights record at the U.N.).

only petitions from non-self-governing territories;[207] other claims of violations were met with silence.[208] ECOSOC began to open the door more widely with a resolution that permitted the U.N. Human Rights Commission to review summaries of communications received by the U.N. Secretary-General about human rights violations.[209] The resolution, however, denied the Commission the power to take any action.[210] After a controversial 1966 I.C.J. judgment concerning South Africa,[211] ECOSOC changed its mind. In 1967, with Resolution 1235, it approved the Commission adding a new agenda item, "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories."[212] There was no doubt about the focus of attention, because the resolution expressly mentioned

---

207. Article 87(b) of the U.N. Charter provides that the Trusteeship Council has authority to accept and examine petitions concerning trust territories. U.N. Charter art. 87(b). The last trusteeship terminated in 1994, and the Council no longer meets regularly. Letter from the President of the Trusteeship Council to the President of the Sec. Council, U.N. Doc. S/1994/1234 (Nov. 3, 1994). In 1961, the General Assembly created the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 1654 (XVI), U.N. Doc. A/RES/1654(XVI) (Nov. 27, 1961). The Special Committee may receive petitions from individuals and groups and, with the permission of the administering state, conduct on-site visits to territories. *See* DEP'T OF PUB. INFO., UNITED NATIONS AND DECOLONIZATION 6 (2005), *available at* http://www.un.org/Depts/dpi/decolonization/Decolonization_brochure.pdf. Sixteen non-self-governing territories remain within its mandate. Press Release, Gen. Assembly, Decolonization United Nations Success Story, Albeit Unfinished One, Deputy Secretary-General Tells Special Committee (Feb. 22, 2007), *available at* http://www.un.org/News/Press/docs/2007/gaco13151.doc.htm.

208. It is estimated that in the 1940s and 1950s, some 20,000 human rights complaints a year were received at the U.N. Philip Alston, *The Commission on Human Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 22, at 126, 146. In 1948, the "paradox" of individuals in trusteeships having the right to petition, while those in the administering territories lacked the right, was noted during discussions in the General Assembly's Third Committee. *See* John Carey, *The United Nations' Double Standard on Human Rights Complaints*, 60 AM. J. INT'L L. 792, 792 (1966) (citing U.N. GAOR, 3d Sess., 3d Comm. at 699, U.N. Doc. A/C.3/SR.158 (1948)).

209. ECOSOC Res. 728F, ¶¶ 1-2, U.N. Doc. E/3290 (July 30, 1959).

210. *Id.*

211. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 4 (July 18). The court was evenly divided, and its president cast a deciding vote to reject the claims against South Africa because Ethiopia and Liberia lacked standing. *Id.* at 49. This decision effectively terminated the litigation and allowed South Africa to escape condemnation on the merits.

212. ECOSOC Res. 1235, U.N. Doc. E/4393 (June 6, 1967).

South Africa and Southern Rhodesia.[213] The resolution also authorized the Commission and Sub-Commission to examine information relevant to gross violations of human rights.[214] The Commission could then "in appropriate cases, and after careful consideration . . . make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by . . . apartheid . . . and racial discrimination," and report and make recommendations to ECOSOC.[215]

Pursuant to Resolution 1235, the Commission began to examine Southern Africa and the territories occupied by Israel during and after the 1967 War.[216] Chile, after the September 11, 1973, military coup, became the first situation on the agenda that was not part of what the majority of the Commission considered to be colonialism.[217] Each case was taken up on the understanding that it would not create a precedent for broader human rights investigations.[218] By the end of the decade, however, pressure from NGOs and the human rights initiatives of the Carter administration caused the procedure to be opened up.[219] As of the creation of the Human Rights Council in 2006, the Commission had under study fourteen countries: Belarus, Burundi, Cambodia, Cuba, Democratic Republic of Korea, Democratic Republic of Congo, Haiti, Liberia, Myanmar, the Israeli-occupied territories, Somalia, Sudan, and Uzbekistan.[220] Three of these states, Belarus, Korea, and Iran, were condemned by the General Assembly for human rights violations in December 2006.[221] Few would argue that these states did not deserve to be censured. Many other countries are addressed by the thematic rapporteurs and working groups that the Commission authorized and the Council has maintained.[222]

---

213. *Id.* ¶ 2.

214. *Id.*

215. *Id.* ¶ 3.

216. Alston, *supra* note 208, at 157.

217. *Id.* at 158.

218. *Id.*

219. *Id.* at 159.

220. U.N. Comm'n on Hum. Rts., *Report on the Sixty-Second Session*, at 1-2, U.N. Doc. E/CN.4/2006/122 (Mar. 13-27, 2006).

221. Press Release, General Assembly, General Assembly Adopts 46 Third Committee Texts on Human Rights Issues, Refugees, Self-Determination, Racism, Social Development, U.N. Doc. GA/10562 (Dec. 19, 2006) (summarizing General Assembly Resolutions 61/174, 61/175, and 61/176).

222. *See generally* A United Nations Priority—United Nations Human Rights Monitoring Mechanisms, at http://www.un.org/rights/HRToday/hrmm.htm (last

In 1970, ECOSOC further expanded the process when it adopted Resolution 1503 (XLVIII),[223] which finally authorized the Commission and Sub-Commission to examine communications submitted to the U.N.[224] Numerous restrictions were placed on this limited petition procedure: the examination had to be taken in closed session;[225] the consideration was limited to situations that appeared to reveal a consistent pattern of gross and reliably attested violations of human rights;[226] no hearings or redress were afforded the petitioner; and the outcome was limited to a thorough study or an investigation "with the express consent of the state concerned."[227]

Although the origins of the approval stemmed from efforts to combat colonialism and racism in Southern Africa,[228] other victims of widespread violations began filing complaints. It is important to remember that the Sub-Commission had no independent authority to identify violators, but depended on the communications brought to it.[229] Despite the secrecy enjoined by ECOSOC, the names of the targeted countries quickly became public.[230] In 1972, Greece, Iran, and Portugal were referred to the Sub-Commission, which very cautiously referred them back to the working group because their respective governments had not replied.[231] In addition, the Sub-Commission members probably noted that although Portugal was a colonial power, as the original sponsors of the resolution intended, the other two cases concerned widespread violations by a type of dictatorial government common throughout the world.[232] This made the procedure potentially dangerous to many states. Nonetheless, the following year, the Sub-Commission found the courage to refer eight countries to the

---

visited Mar. 19, 2007). The rapporteurs and members of the working groups serve in their individual capacities. *Id.*

223. ECOSOC Res. 1503, U.N. Doc. E/4832/Add.1 (May 27, 1970).

224. *Id.*

225. *Id.*

226. *Id.* ¶ 1.

227. *Id.* ¶ 7(a). The procedure was revised in 2000 to reduce the role of the independent Sub-Commission and enhance the role of the political Commission. ECOSOC Res. 2000/3, U.N. Doc. E/2000/99 (June 16, 2000).

228. *See* Alston, *supra* note 208, at 143-44 (describing how international efforts to eliminate South Africa's colonialism and racism in the 1960s led ECOSOC to adopt Resolution 1503).

229. ECOSOC Res. 1503, *supra* note 223, ¶ 1.

230. *See* Alston, *supra* note 208, at 148.

231. *Id.* at 148-49.

232. *Id.* at 148.

Commission: Brazil, Britain, Burundi, Guyana, Indonesia, Iran, Portugal, and Tanzania.[233] The confidentiality of the procedure precludes public knowledge about the existence of communications alleging widespread violations against other countries; they may have been absent from the list because no communications had been filed. Despite the evidence reported by the Sub-Commission, the Commission took no action on any of the countries.

The Resolution 1503 procedure thus began slowly, but by 2005, it had resulted in the examination of eighty-four countries in all regions of the world.[234] Nonetheless, political considerations kept several major cases off the Commission's agenda, despite referrals from the Sub-Commission.[235] The procedure is hampered by the fact that it ends up before a political body, by the length of time it takes to obtain results, and by the limited options for responding when systematic violations are found. This does not mean that the procedure lacks standards or that it has a double standard. Both Resolution 1235 and Resolution 1503 are clear on the threshold for action: gross and systematic violations of internationally-guaranteed human rights.[236] This threshold reflects a decision by the U.N. member states to set the standard for what constitutes a material breach of the U.N. Charter. It is the application of the standard in a political context that is the root of the problem.

B. Global and Regional Treaty Bodies

U.N. human rights treaties create specific monitoring bodies, which are usually committees of independent experts that meet in two to three sessions a year.[237] The ICCPR, for example, establishes a Human Rights Committee of eighteen independent experts that may review the periodic reports states submit

233. HOWARD TOLLEY, THE U.N. COMMISSION ON HUMAN RIGHTS 77, 128 (1987).

234. Commission on Human Rights, States Examined Under the 1503 Procedure, http://www.ohchr.org/english/bodies/chr/stat1.htm (last visited Feb. 28, 2007).

235. The most notorious case is probably that of Uganda under President Idi Amin. Between 1974 and 1978, the Sub-Commission placed the case on the Commission's agenda, but no action was taken. *See* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 22, at 149. By the time the Commission decided to act and send a confidential envoy, Amin had been overthrown. *Id.*

236. *See supra* notes 215 & 226 and accompanying text.

237. *See generally* Alston, *supra* note 208, at 337-508.

assessing their own performance.[238] Article 41 gives the Committee jurisdiction to accept inter-state complaints if the states concerned have made a declaration allowing the Committee to receive such complaints.[239] States accepting the Optional Protocol to the ICCPR further grant the Committee the power to receive individual communications, but it cannot issue binding decisions, much less enforce them.[240]

In all the regional bodies, as in the global system, inter-state cases are exceptionally rare. The European system has had fewer than two dozen cases filed by state parties.[241] The African system has received only one inter-state case in its history,[242] and the Inter-American system recently declared inadmissible its first inter-state case.[243] States also show no inclination to denounce others before U.N. treaty bodies or the I.C.J. Instead, human rights issues are generally raised for political reasons before political bodies.

It should not be surprising that governments in power rarely take up the cases of those without power in other states, since the governments often fail victims even within their own borders. Taking a home-grown example, in the infamous *Dred Scott v. Sandford* judgment upholding slavery in 1857, the United States Supreme Court determined that the "unfortunate race" of Africans "had no rights which the white man was bound to respect."[244] Nearly a century after the Civil War and the adoption of constitutional amendments eradicating slavery, segregation remained the law of the land in most states, and the federal government took no action to enforce the constitutional guarantees.[245] Only the courageous efforts of the victims of racist

238. ICCPR, *supra* note 9, at 56.

239. *Id.* at 57.

240. Optional Protocol to the ICCPR, *supra* note 9, at 59.

241. *See* European Court of Human Rights Home Page—List of Judgments, http://www.echr.coe.int/ECHR/ (follow "Case-Law" hyperlink; then follow "Lists of Judgments" hyperlink) (last visited Mar. 20, 2007).

242. Communication No. 227/99, Democratic Republic of Congo v. Burundi, Rwanda & Uganda.

243. Nicaragua v. Costa Rica, Inter-state Case 01/06, Inter-Am. C.H.R., Report No. 11/07 (Mar. 8, 2007), *available at* http://www.cidh.org/INTERSTATE%20CASE%201-06.pdf.

244. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

245. *See, e.g.*, CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 1-19 (1983) (describing segregation by law of public transit, which was upheld by the United States Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

laws, through litigation and eventually civil disobedience, ultimately led the reluctant and sometimes recalcitrant government to enforce the standards set decades earlier.[246] If the standards had not been set or if African-Americans had lacked recourse to federal courts, progress undoubtedly would have been vastly slower. Like federal courts during the civil rights movement, international human rights bodies provide recourse when the laws and institutions of the states fail to respect internationally-guaranteed human rights, but unfortunately, only when the states have accepted the relevant treaties.

The procedures for reviewing state compliance are set forth in the treaties and almost always include state self-reporting. Among the major U.N. treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,[247] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[248] the International Convention on the CERD,[249] and the ICCPR[250] also provide for inter-state complaints, but only CERD requires that its committee address the complaint.[251] All of the other treaties require a separate acceptance of the possibility of inter-state complaints.[252] No inter-state complaint has ever been filed under any of the treaties.[253]

The first U.N. human rights treaty containing a petition process, CERD, required a separate declaration by states parties to accept the procedure set forth in Article 14.[254] The ICCPR,

246. For a description of civil rights actions by the NAACP from its founding in February 1910, see HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA (1998). The organization initially sought to end lynchings in the South. *Id.* at 23. It is notable that a 1930 grant from the American Fund for Public Service gave the NAACP the resources for a broader legal campaign to secure the constitutional rights of African-Americans. *Id.* at 35. Foundations today also play an important role in financing the enforcement efforts of human rights and humanitarian NGOs.

247. Torture Convention, *supra* note 71, art. 21.

248. International Convention on the Protection of the Rights of All Migrant Workers and their Families art. 76, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

249. CERD, *supra* note 82, art. 11.

250. ICCPR, *supra* note 9, art. 41(1)(a).

251. CERD, *supra* note 82, art. 11.

252. *E.g.*, ICCPR, *supra* note 9, art. 41(1)(a).

253. The reluctance of states to file formal complaints is also attested to by the fact that the Constitution of the ILO established an inter-state complaint mechanism that has been used only six times since 1919. I.L.O. CONST. arts. 26-34.

254. CERD, *supra* note 82, art. 14.

adopted one year later, was even less accepting of petitions in that it included the possibility of individual "communications" in an Optional Protocol requiring separate ratification.[255] The independent Human Rights Committee has jurisdiction to receive communications from victims against a state that has accepted both the treaty and the protocol, but its action is limited to reviewing the written record and issuing "views."[256] Many U.N. treaties were initially adopted without even this limited petition procedure, but some of them have been supplemented by later instruments allowing complaints.[257]

At the regional level, the European system reflects the evolution toward stronger international supervision of treaty obligations. The "default setting" for the original 1950 ECHR's supervisory machinery was an inter-state complaint brought to the European Commission on Human Rights.[258] The Commission could investigate the situation, attempt a friendly settlement, and ultimately report the matter to the Committee of Ministers, a political body.[259] The Committee of Ministers would then decide if a violation had taken place.[260] The ECHR allowed submission of an individual petition only if the state in question had filed optional declarations accepting both the right of individual petition and the jurisdiction of the court.[261] In such case, an individual petition could be brought before the former Commission, which would judge its admissibility and then report on its evaluation of admissible cases.[262] If the contracting party had accepted the court's jurisdiction, the state or the Commission could thereafter choose to bring the matter back before the court.[263] The individual had no standing to refer the case.

Over time, this procedure was supplanted by increasing acceptance of individual complaints and recourse to the court.[264] Today, with the revisions of Protocol 11, the Commission no longer

255. Optional Protocol to the ICCPR art. 2, G.A. Res. 2200 (XXI), at 59, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

256. *Id.* art. 5.

257. *E.g.*, *id.*

258. *Id.* art. 48.

259. *Id.* art. 28.

260. *Id.* art. 32.

261. ECHR, *supra* note 65, art. 34.

262. *Id.* arts. 29-30.

263. *Id.* art. 44.

264. *See* Protocol No. 11 to the ECHR, May 11, 1994, Europ. T.S. 155 (restructuring the control machinery established therein).

exists,[265] the right of petition to the court is automatic,[266] and all members of the Council of Europe can be bound by judicial decisions enforced by the Committee of Ministers.[267] Similarly, the Inter-American and the African systems establish the right of individual petition against member states with no separate declaration required.[268] Both also have regional human rights courts.[269]

Despite the independent judicial and quasi-judicial bodies at the regional level, concerns about a double standard of enforcement have also arisen, at least in Europe. On the one hand, critics of the court have suggested that the judges are employing less exacting standards when addressing violations by the new member states, a charge the judges vigorously deny.[270] On the other hand, the new members themselves object to new monitoring procedures that are not part of the judicial process.[271] New countries in the Council of Europe[272] are subject to political monitoring to ensure respect for human rights and fulfillment of other obligations of membership.[273] All applicant states must commit to ratification of the ECHR, but the process of gaining membership also typically results in the applicant state committing to internal reforms in law and practice.[274] Fulfillment of these commitments is monitored through special procedures,

265. *Id.* pmbl.

266. *Id.* art. 34.

267. *Id.* art. 48.

268. American Convention on Human Rights, *supra* note 57, art. 25; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human Rights and Peoples' Rights art. 5, O.A.U. Doc. CAB/LEG/63/3rev. 5 (June 10, 1998).

269. *See generally* American Convention on Human Rights, *supra* note 57; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human Rights and Peoples' Rights, *supra* note 268.

270. LUZIUS WILDHABER, THE EUROPEAN COURT OF HUMAN RIGHTS 1998-2006: HISTORY, ACHIEVEMENTS, REFORM 64 (2006).

271. *See* Vessela V. Stoyanova, *The Council of Europe's Monitoring Mechanisms and Their Relation to Eastern European Member States' Noncompliance*, 45 SANTA CLARA L. REV. 739, 748-53, 765-68 (2005).

272. The Council of Europe has forty-six member states, almost half of which are in Central and Eastern Europe and joined after 1991. The Council of Europe's Member States, http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last visited Mar. 19, 2007).

273. Membership is conditioned on commitment to representative democracy, human rights, and the rule of law. Statute of the Council of Europe, *supra* note 64, art. 5.

274. Stoyanova, *supra* note 271, at 744-45.

primarily under the authority of the Parliamentary Assembly.[275] A state that failed to meet membership commitments or other obligations under the Council's Statute, including through serious violations of human rights, could face suspension or revocation of its membership.[276] Some commentators have argued that the procedures unfairly single out new members for review, while the original members escape extensive monitoring, and that such a double standard at least partly contributes to noncompliance by new member states.[277]

While it is true that older member states are not subject to the same review,[278] it is also true that many of the new member states entered the system with little experience with democracy or human rights.[279] The monitoring procedure is at least in part designed to provide technical assistance to governments emerging from a period of repression.[280] It is probably also the case that without a monitoring system, at least some of the new member states would not have been admitted to the Council.[281]

The European and other regional systems are in danger of becoming victims of their own success. The financial resources and personnel are inadequate to address the continually rising

---

275. In 1997, the Parliamentary Assembly created a Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. EUR. PARL. ASS. RES. 1115 (Jan. 29, 1997). The Committee's mandate focuses on monitoring compliance with obligations and commitments of new member states. *Id.* In the field of human rights, the Committee examines the internal legal order of the state, its judicial system, policing, prison conditions, privacy and family life, civil and political freedoms, property rights, equality between men and women, treatment of minorities, and measures against racism, anti-Semitism, and xenophobia. *See* Jan Kleijssen, *The Monitoring Procedure of the Council of Europe's Parliamentary Assembly*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS, *supra* note 88, at 623.

276. Statute of the Council of Europe, *supra* note 64, art. 8.

277. *See, e.g.*, Stoyanova, *supra* note 271, at 739-40 (positing that the structure and practices of the Council of Europe are partially responsible for noncompliance). Stoyanova also argues that the inability of Eastern European countries to participate in the drafting the ECHR contributes to a sense of Western European imposition. *Id.* at 758. However, all the rights in the ECHR come from the UDHR; the new member states contributed to and voted for the adoption of the UDHR. They also contributed to elaboration of and ratified the U.N. Covenants on Human Rights.

278. *Id.* at 746.

279. *Id.* at 756-57.

280. *Id.* at 746.

281. *Id.*; *see* Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998) (expressing concern about the impact of enlargement on human rights).

numbers of cases. The sheer volume of potential complaints from some of the new member states in Europe calls for a procedure to address systemic problems and prevent widespread violations from overwhelming the court. Part of the problem results from gross and systematic violations that cannot be remedied through the individual case system. It remains primarily the task of the U.N. to take action in response to the worst violations.

C. New Institutions and Procedures

The Human Rights Council, like the U.N. Human Rights Commission, is an elected body of state representatives chosen according to the principle of equitable geographic representation.[282] The Secretary-General's High Level Panel on Threats, Challenges, and Change, which in part led to replacing the Commission with the Council, noted that states had sought membership on the Commission not to strengthen human rights, but to protect themselves against criticism or to criticize others.[283] It asserted that the Commission could not be credible if it was seen as maintaining double standards in addressing human rights concerns.[284] Despite this critique, the new Council is not made up of independent experts, nor are there criteria governing membership.[285]

The political character and membership of the former Commission did affect its work when it came to targeting governments for violations. The United States typically sought resolutions against communist governments like China and Cuba, while ignoring widespread violations in countries with which it had economic or security ties, including Iraq in 1989.[286] The presence of violators was not always negative, however. The Commission was the principal forum to confront governments with

282. G.A. Res 60/251, *supra* note 13, ¶ 7.

283. Chairman, *Report of the High-Level Panel on Threats, Challenges, and Change*, ¶¶ 282-83, *delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004). The U.S. was particularly critical of the Commission after 2001, when it lost its bid for continued membership on the body and Austria, France, and Sweden were elected from the Western European and Other group instead. While these countries cannot be accused of having poor human rights records, the African group nominated Sudan and it was elected.

284. Chairman, *supra* note 283, ¶¶ 282-83.

285. G.A. Res. 60/251, *supra* note 13.

286. Lawrence Moss, *Will the Human Rights Council Have Better Membership than the Commission on Human Rights?*, Human Rights Watch—Backgrounders, http:///hrw.org/backgrounder/un/un0406/ (last visited Mar. 19, 2007).

allegations of violations that demanded response.[287] Nonetheless the election of states with egregious human rights records sometimes allowed them to escape condemnation and contributed to the perception of a double standard, damaging the Commission.[288]

A credible human rights system legally binds states to respect internationally-guaranteed rights and holds governments accountable when they fail to fulfill their obligations. In this respect, the new Human Rights Council may not be a major improvement over the prior Commission. Governments with poor human rights records are eligible for election, as they were before.

The mandate of the Council may be an improvement over the prior system, however. In addition to addressing gross and systematic violations, the Council is to scrutinize the human rights record of every member of the U.N.[289] This peer review process is akin to expanding the treaty-based reporting system and "constructive dialogue" to all states. The Council is charged with assessing compliance with human rights obligations based on "objective and reliable information," ensuring "universality of coverage and equal treatment" of all states.[290] It is intended to be fair, transparent, and effective, but its workings will largely depend on the composition of the Council. Moreover, it is unlikely that the Council will have sufficient meeting time to fulfill its mandate.

Conclusion

International organizations have no policy. Human rights enforcement is instead the combination of the foreign policies of the member states played out in multilateral fora. These policies are rarely neutral and altruistic; indeed, it has been argued that any human rights policy that does not enhance national security is unjustifiable.[291] United States policy, for example, has fluctuated among a number of different approaches. The Reagan administration overtly applied a double standard that took a much harder line on "totalitarian" regimes of the left than

287. *Id.*
288. *Id.*
289. G.A. Res. 60/251, *supra* note 13, art. 5(e).
290. *Id.*
291. Alan Tonelson, *Human Rights: The Bias We Need*, 49 FOREIGN POL'Y 52, 52 (1982-83).

"authoritarian" regimes of the right.[292] Critics argued that a policy reversal would be more successful, because it would focus on those countries with which the United States has greater leverage due to economic and other incentives.[293] President Carter, by contrast, was criticized for not being selective.[294]

What is wrong with a double standard? It is bad for human rights, because it often causes a backlash that threatens human rights or denies the legitimacy of any investigation of alleged violations. It may create tensions and bad relations that undermine constructive efforts to promote human rights. The public may withdraw support for NGOs, international institutions, and governments that give preferential treatment to one set of violators over another. Ideally, then, human rights violations should be treated evenhandedly—but when political, economic, and other resources are limited, choices must be made.

Random enforcement is unlikely to be effective. Extensive trade, aid, or political ties may allow greater pressure to be placed on violators, but applying such pressure risks political fallout from domestic interests that gain from ongoing economic relations. Allies are willing to hear criticism that adversaries would reject. It is also important for a government to disassociate itself from violators, and the government may lose little by voting for U.N. condemnation of violators. Human rights performance will perform little, however, without the imposition of effective targeted sanctions, which expends political capital.

Criteria or a single standard for a government to act on human rights violations could include factors such as past responsibility for the regime in power; economic or other leverage; issue linkage; severity of violations; the existence of a better alternative; and multilateral support. Successfully raising human rights cases or issues in multilateral political bodies generally requires a coalition of NGOs, media coverage, and key state support. It also could be useful if the U.N. viewed itself as having a stake in the country, for example, because it monitored elections or sent peacekeepers. What remain debated and probably without resolution are questions about priorities of rights and countries. In general, though, it is increasingly acknowledged that there are

292. *Id.* at 53.

293. *Id.*

294. Jeane Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34, 44.

different priorities and interpretations of substantive rights, as well as different definitions and appreciations of claimed violations.[295]

In the end, it is probably inevitable that each country accused of human rights violations will claim it is being unfairly singled out for political purposes. China, when it has been accused of violations, has responded that it:

> has always held that to effect international protection of human rights, the international community should interfere with and stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation, as well as apartheid, racial discrimination, genocide, slave trade and serious violation of human rights by terrorist organizations.[296]

At the same time, "China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country" and that non-interference in internal affairs and respect for state sovereignty are applicable to the field of human rights.[297] Similarly, United States government officials have claimed that U.N. investigations into United States practices constitute harassment.[298]

The goal of human rights law is to end current violations of rights and prevent them in the future. Each critique should lead to a more effective legal system. The international human rights law system is clearly not responding to some of the most serious violations today, as in Darfur. Human rights machinery must be improved to ensure that attention and resources are devoted to those situations most requiring a response. The problem is, and likely will remain, political. In *The Responsibility to Protect*, a Canadian government initiative concluded that there are criteria for when intervention by the international community is not just

---

295. For example, determining that there is systematic religious persecution depends on deciding that certain groups constitute religions entitled to exercise religious liberty and not cults or criminal enterprises claiming the mantle of religion for other purposes. *See* MARIA HSIA CHANG, FALUN GONG, THE END OF DAYS (2004) (discussing the Falun Gong and the response of the Chinese government to its activities); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001).

296. INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., Active Participation in International Human Rights Activities, HUMAN RIGHTS IN CHINA ART. X (1991), *available at* http://english.people.com.cn/whitepaper/4.html.

297. *Id.*

298. Betsy Pisik, *Human Rights Probes Irk U.S. U.N. Is Harassing, Lawmakers Charge*, WASH. TIMES, June 29, 1998, at A1.

authorized but required.[299] First, "there must be serious and irreparable harm occurring to human beings or imminently likely to occur."[300] The intervention should be for the purpose of preventing or halting such harm, it should be the last resort, it should use proportional means, and it should have reasonable prospects of success.[301] The consequences of action should not be worse than the consequences of inaction.[302] The U.N. High Level Panel on Threats, Challenges, and Change agreed that there is a norm emerging that imposes a collective international responsibility to protect people in the event of genocide, ethnic cleansing, other large-scale killing, or other serious violations of international humanitarian law.[303] Its criteria for intervention[304] mimicked those of the Canadian report.[305]

As for further multilateral reform, those concerned with human rights need to urge the re-establishment of an independent body similar to the former U.N. Sub-Commission. An institution that is not made up of state representatives must assess the need for new standards and identify deficiencies in compliance with existing ones. In an ideal world, this independent body would have jurisdiction to investigate allegations of gross and systematic violations of human rights.

Finally, in the next twenty-five years, this author believes the following objectives warrant priority consideration.

1. *Determine what justice for victims entails and ensure that it occurs.* The recent emphasis on criminal prosecutions on the one hand and truth commissions on the other sometimes seems to overlook the needs of survivors. Attention to the needs of the victims of human rights is beginning to receive greater attention, but it remains inadequate. A very difficult part of this discussion must concern how far back to go in redressing past abuses. This is critical because historical injustices have a way of returning and becoming present day conflicts.

2. *Focus on prevention.* Widespread violations of human

299. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf.

300. *Id.* at XII.

301. *Id.*

302. *Id.*

303. Chairman, *supra* note 283, ¶ 201.

304. *Id.* ¶ 207.

305. Int'l Comm'n on Intervention and State Sovereignty, *supra* note 299, at xii-xiii.

rights, like environmental disasters, involve catastrophic and often irreversible harm. Prevention rather than redress should therefore be the goal, and devising programs to strengthen respect for human rights must be a priority.

3. *Reconsider the paradigm of human rights guarantees as it has existed for more than half a century.* Violations of human rights today are not always committed by strong dictatorial governments in a police state. They are as likely to be committed by non-state actors in failed states, by powerful private interests taking over governmental functions through outsourcing and privatization, or by criminal enterprises. The U.N. and other inter-governmental organizations also may be implicated in human rights violations during peace-keeping missions or other exercises of power.

4. *Recognize the intersection of human rights with other international legal matters.* Examples of such matters include trade and human rights, environment and human rights, and investment and human rights. It is important to reduce the compartmentalization of lawmaking and law enforcement.

5. *Create regional systems where they currently do not exist.* Regional systems have demonstrated that independent human rights bodies effectively ensure respect for global human rights norms. No one should be left without the international safety net provided by such a system.