

# The Human Rights Problem

## Introduction

When Pakistani politician Benazir Bhutto was killed in a suicide attack on December 27, 2007, she had been seeking a third term as prime minister after eight years in exile. Her election promise was that her Pakistan People's Party would implement the international standards of judicial independence that the president, Gen. Pervez Musharraf, was persistently flouting. Even before Bhutto's assassination, public anger against President Musharraf had been running high, fueled by his crackdown on the judiciary after his reelection in October 2007. He had suspended the Constitution and dismissed dissenting members of the Supreme Court, including Chief Justice Iftikhar Chaudhry, just three days before the court was expected to overturn his reelection. The legal profession's indignation with Musharraf's flagrant violation of the independence of the judiciary erupted time and again into angry demonstrations, and when a second general election was held in February 2008, some six weeks after Bhutto's assassination, Musharraf's political allies were trounced. Pakistan's new leaders—Bhutto's party and that of another former prime minister, Nawaz Sharif—vowed to restore the independence of the Supreme Court, called for the immediate restoration of the judges, and urged Musharraf to convene Parliament quickly so that the parties could begin the "gigantic task" of restoring the country's much-amended constitution. In the subsequent political turmoil, which included the resignation of President Sharif and the appointment of Asif Ali Zardari, Bhutto's widower, as the new president, the sacked judges were still not restored to their posts.

Pakistan's most serious political crisis since Musharraf had seized power in a coup in 1999 had in fact been brewing for quite a while. In March 2007, in a confrontation between modern Western-derived legal principles of judicial objectivity and unfettered military power, Musharraf had removed Chief Justice Chaudhry from his judicial post over allegations of misconduct.<sup>1</sup> Yet instead of meekly resigning, the flamboyant judge had embarked on a nationwide campaign, traveling from city to city accompanied by a large and noisy group of thousands of supporters, including many black-suited lawyers, all shouting in unison for human rights and judicial independence. They claimed that the chief justice's sacking was motivated by Musharraf's wish to avoid legal scrutiny of his bid for a new presidential term. The independent-minded chief justice had also been raising awkward questions about "disappearances"—Pakistanis who were presumed to have been detained indefinitely by the intelligence service without access to either their families or lawyers.

There was violence: video footage showed round after round of gas shells being lobbed at the Supreme Court's white façade while lawyers scurry to avoid harm. At yet another demonstration government forces opened fire and killed more than forty people. A senior Supreme Court official who refused to bring evidence against the chief justice was shot dead at his home. Then, when Bhutto arrived in Pakistan in October 2007, her triumphant return was overshadowed by nearly two hundred deaths caused by a suicide bomber as her cavalcade traveled through the streets of Karachi. Bhutto was unharmed in this first round of deadly violence, only to die herself two months later.

A key plank in Bhutto's reelection campaign had been hard-hitting criticism of Musharraf's treatment of judges. Yet despite Musharraf's iron military rule over Pakistan, the Supreme Court had allowed Chief Justice Chaudhry to represent himself in his dismissal proceedings before the court in 2007. Shockingly for Musharraf, the Supreme Court reinstated Chaudhry and he was given a platform to speak out about human rights: "If there is one lesson we could draw from our past history of sixty years, it is to adhere to the norms and principles of the constitution. It is to enforce the Constitution in its true spirit and letter [that] guarantees fundamental rights and freedoms to citizens. . . . These fundamental rights and freedoms are sacrosanct. They are sublime. Their violation or abridgment is a serious matter. These rights . . . are fundamental issues and civilized societies take a stand on fundamental issues." According to Chief Justice Chaudhry, the job of the Pakistan courts is "to create and sustain an environment in which there is

supremacy of the Constitution and rule of law. . . . The poor and the down-trodden sections of society must be given a stake and treated as equal citizens of the nation. This is how nations are formed and this is how societies move on to develop and progress.”

A speech that might sound familiar in the democratic West was, in the eyes of Pakistan’s military ruler, seen as something akin to treason. For much of its postindependence history, Pakistan’s judiciary had been an apologist for military coups, interventions, and military interference. How is it then that in 2007 it was the Pakistani lawyers who galvanized the people into mass protests using the language of human rights and freedom and at the same time polarized the judiciary and radicalized large parts of political society?

Some of the answers to this question lie in Pakistan’s colonial past and its confrontation with globalization and human rights. During all of Pakistan’s turbulent sixty-year postindependence history, remnants of the British Raj have continuously reappeared in its political and legal systems. Since partition and independence in the 1940s, Victorian colonialism has continued as a ghostly default reference point for Pakistan’s law, order, and probity. In the 1950s, almost without exception, lawyer-politicians making decisions perpetuated the courts and legal institutions they had inherited from the British, at least as far as the formal structure of the institutions is concerned. Even when the Islamist movement forced Pakistan’s politicians to face the issue of Islamic identity—a question that had produced the 1962 Constitution that established sharia as Pakistan’s basic law—the fundamental anglophone structure of the courts continued.

With each successive constitutional amendment, Pakistan’s colonial past has cast a shadow, though increasingly refashioned over each decade as the international principle of the “rule of law.” Each successive military government, including the present one, has then countered these principles, devising legalistic loopholes, keeping the judiciary weak, and eliminating potential judicial challenges to military rule. In 2007 and 2008, however, a previously docile judiciary felt so alienated that it sparked a lawyers’ movement calling for true judicial independence in the name of the rule of law. These ideas are rallying Pakistan’s judges, lawyers, and thousands of ordinary people marching in demonstrations. The Supreme Court’s appeal to notions of international human rights as a check on domestic sovereignty has been both catalyst and fuel to this brushfire. As the example of Pakistan demonstrates, international human rights as part of the rule of law are today claimed around the world

by people of many cultures and traditions. Ideas of human equality and fair, transparent government have been a force driving the creation of legal and political institutions to serve those principles. Even as human rights are invoked in a call for better treatment from oppressive government and harmful social practices, however, the expansion of international human rights has been criticized by both scholars and grassroots organizations. It has been argued that even as international law codifies civil, political, social, cultural, and economic rights that can be invoked on behalf of marginal groups and the poor, governments often thumb their noses at their international obligations. Other critics claim that international human rights have perverse effects, such as legitimizing the appropriation of indigenous property rights for the benefit of multinational corporations or through rationalizing interventions by powerful states in weaker ones. Others even suggest that what masquerades as human rights “progress” is really a subtle form of global subjugation that becomes even more pernicious when harnessed to new global patterns of capital and labor.

Some analysts point out that the human rights offered in international treaties that are grounded upon European philosophical and political writings reflect the individualism of Western legal and political thought and make little sense in cultures that do not share these intellectual roots. Still others criticize the concepts of international law as so inextricably entwined with Europe’s harmful history of colonialism that the rights anchored in modern constitutions may simply repeat the sins of the past. U.S.-based African scholar Makau Mutua makes this argument sharply when he analogizes the human rights movement to earlier religious crusades, suggesting “the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world.”<sup>2</sup>

International human rights, its critics allege, keep bad company: first, with Europe’s colonial appropriation of the New World, then with twentieth-century aggressive nationalism that led to two world wars and countless smaller conflicts, and finally with the aggressive economic expansionism that overwhelms local systems. In an eerie reprise of international law’s earliest days, during the Spanish and Portuguese evangelization of South American “Indians,” today’s international culture wars are fought in the name of secularism versus religion, East versus West, and universalism versus particularism.

A question has been put squarely on the table for those who promote international human rights: can Europe’s Enlightenment philosophy of individual

rights survive present-day culture wars and contrive to provide legitimacy for international human rights institutions and courts? Or has the justification for a universal system of rights been extinguished because Enlightenment ideals of respect for culture, religion, and political organization simply cannot engage with systems that are not built upon the same foundations?

This book is a response to these critiques of international human rights. While each has some force, I argue that these critiques are incomplete. More important, they divert attention from the need to craft institutional responses to these tensions—responses that can make the international human rights system a workable means to promote human rights across cultures and systems.

## Human Rights Aspirations and Reality Today

### *Human Rights Aspirations*

The number of international human rights treaties, declarations, and statements has never been higher. Since 1946, when the Nuremberg trials exposed the horrifying dimensions of the Holocaust and punished individuals for their role in it, international law has held out the tantalizing possibility that there may be collective-action solutions to the world's problems. The architects of the United Nations system believed that human rights, already expressed piecemeal in a handful of state constitutions around the world and slowly expanded over two centuries, could be internationalized and universalized through their expression in a collective document. These post-World War II visionaries identified core human rights and gave the various governments the obligation to provide those rights for their citizens. Since the United Nations Declaration of Human Rights was adopted, international human rights treaties created under the UN system have grown at an exponential rate, which has resulted in the propagation of international standards of human rights across an ever-expanding spectrum: from prisoners' rights to women's rights, from religious rights to children's rights, from voting rights to disability rights.

On December 10, 1948, at the Palais de Chaillot in Paris, all fifty-eight member states of the United Nations General Assembly adopted the Universal Declaration of Human Rights. The declaration recognizes that freedom, justice, and peace in the world are linked to the recognition of fundamental human rights. Eighteen years later, in 1966, the United Nations (then comprising 122 states) adopted the Covenant on Civil and Political Rights, which elaborated the rights to life, liberty, and security of person as well as the rights

to freedom of opinion and expression, thought, conscience, and religion. In 1976 the Covenant on Economic, Social, and Cultural Rights declared that human rights also included an adequate standard of living, health, education, and housing as well as the right to give expression to one's own cultural identity. Many of these social, economic, and cultural rights are described as "non-absolute," unlike many of the "absolute" civil and political rights, such as the human right to freedom from torture.

In an astonishingly short period the international system has generated a human rights thrust. Today the United Nations has 192 states at its table. There are fourteen core international human rights treaties covering everything from racial discrimination to violence against women to children's human rights as well as hundreds of related international agreements. Under these treaties and agreements governments of signatory states undertake to see to it that human rights are included in their national legislation, enforced in national courts, and enacted into government domestic policy. As international phenomena go, the coupling of human rights values to legal forms is an extraordinary historical development.

### *Human Rights Reality*

Despite the impressive structure of human rights agencies and notwithstanding the energy and action driving the creation of the international human rights system, the world remains full of human rights atrocities. While the language and the law of human rights create higher and higher expectations of good behavior, governments fail in their human rights responsibilities every day. International human rights reality still routinely lags behind human rights aspirations.

For example, even though all 192 member states of the UN have committed themselves to the peaceful resolution of internal conflicts, in the last half-century 127 civil wars occurred in 73 states, killing more than 16 million people. Right now in The Sudan, government-supported forces are massacring civilians, raping women, destroying villages and food stocks, and driving tens of thousands of people into camps and settlements where they live on the very edge of survival, hostage to abuses of the Janjaweed militia groups. Other contradictory examples abound. For instance the United States is a signatory to the UN Convention Against Torture, yet since it seeks to finesse its international obligations towards prisoners by placing them in the jurisdictional no-man's-land of Guantánamo Bay, Cuba.<sup>3</sup> Mexico is likewise a signatory to

the UN Convention Against Torture, yet torture is reported to be widespread in the military, and corruption can be found at all levels of Mexico's federal, state, and municipal systems of administration. Virtually every postcolonial government of Australia, a signatory to the International Covenant on Civil and Political Rights, has a bad human rights record in regard to its indigenous population.

Governments also fail in their human rights obligations through simple neglect or even complete lack of interest in the human rights of certain groups in their society. These are the everyday human rights problems that lack the shock value of wartime atrocities. For instance Jordan, one of the few Arab countries where women vote and hold seats in parliament, signed the Convention on the Elimination of Discrimination Against Women (CEDAW) in the early 1990s but has not managed to pass national legislation to prevent hundreds, possibly thousands, of "honor killings." Even women who are the victims of rape are considered to have compromised their families' honor; fathers, brothers, and sons then see it as their duty to avenge their honor, not by pursuing the perpetrators but by murdering their daughters, sisters, and mothers.

Thirty years after CEDAW was adopted by the UN General Assembly, mothers in some African countries still hold their young daughters down for the ritual of female genital cutting even though national criminal legislation in some African countries prohibits the practice. China is one of 138 countries that have signed the UN Convention on the Rights of the Child (CRC), but in Yunnan province alone 7,000 children have been trafficked as prostitutes, beggars, domestics, and workers in garment factories. It seems astounding that these human rights violations occur in countries that have reasonably functional governments, administrative structures, fiscal policies, and trade relations with other countries. When the atrocities of war are added into this picture of everyday human rights neglect, the international human rights problem looks overwhelming.

What do these failures of human rights implementation and enforcement tell us about the world-scale phenomenon of human rights? If there is a disconnect between global human rights values and local human rights implementation, what is the cause? What might be its solution? Have international human rights advocates stalled in their march to civilize governments and liberalize cultures? Why can't international society have more influence on individual governments, and why can't international human rights have more influence on the actions of individuals?

### Three Critiques of the International Human Rights System

The great universalist aspirations of the United Nations are today criticized from across the political spectrum. Critiques of international human rights fall into three categories. First, the “sovereignty critique” argues that the problems of international human rights lie in the international system itself. “Sovereignists” view any attempt to supplant the role of governments as doomed to failure. They would simply leave law in the hands of the state to be decided along lines of national interest. The second main critique of international human rights arises out of the role of civil society under globalization. “Civil societists” argue that the real human rights action in these days of globalization does not spring from formal international and governmental institutions but rather from newer informal sources such as nongovernmental advocacy groups. Third, “multiculturalists” argue that *any* attempt to institutionalize international standards in a multicultural world is philosophically flawed and culturally divisive.

#### *Sovereignty*

In the American legal academy there has been spirited, even acrimonious, debate about the relevance of international law. Some scholars point to the evidence of ongoing human rights abuses in countries that have signed international human rights treaties as evidence against a worldwide human rights trend. They argue that international human rights are nothing more than political rhetoric and that words and ideas lack the power to prevent mass atrocity, influence the behavior of authoritarian governments, or alter sexist or racist beliefs. For all their moral appeal, these skeptics say, international human rights are nothing more than an empty promise that is ignored by national governments at will: human rights are merely notes in the margins of legal and political debate, supported with zeal by few and ignored by many.<sup>4</sup>

Such criticism of human rights has a long history. Nineteenth-century French political theorist Pierre Proudhon described international law as “a scaffolding of fictions.”<sup>5</sup> Likewise, in nineteenth-century Great Britain, when the legal reforms of legislative positivism sought to replace ideas of “natural law” with the transparency of written laws, international law as an explanation of shared human values was ridiculed. Instead, law was portrayed as a product of people’s habitual obedience to their sovereign’s command. There was no room for a normative order in Jeremy Bentham’s well-known scoff in the 1860s that “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.”<sup>6</sup> Rights, he said, are the



product of laws created by sovereigns and legislatures: “Right . . . is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters.”<sup>7</sup>

Like Bentham critiquing natural rights, today’s sovereigntists argue that there is no *intrinsic* moral valence to international human rights standards.<sup>8</sup> This critique points to the voluntary nature of international human rights treaties and the lack of international enforcement powers when human rights are violated. This analysis points out that states enter into treaties and other international legal commitments only when it serves their particular national interests. When a government does translate international human rights standards into its own domestic legislation, it simply demonstrates the state’s internal political agreements and not a deeply shared belief in the principles of international human brotherhood. Any cooperation among states on human rights problems is the serendipitous byproduct of rational acts of national self-preservation.

Weaker states, under this analysis, simply express international human rights commitment because it looks good to the rest of the world. Such states may have little else with which to negotiate with more powerful states: poor countries “trade” state sovereignty in obeisant necessity for economic advantages from richer ones. Sovereigntists say that the very idea of an international system of government is normatively flawed and empirically wrong.<sup>9</sup> International human rights law is merely feel-good rhetoric, an instrumental exercise in international public relations.

This is an especially strong argument for the United States, which has often declared its independence from the international legal system—especially since the terrorist attacks in 2001. The U.S. sometimes chooses to remain aloof from the international human rights system rather than “surrender” state sovereignty to international agencies. It has signed neither CEDAW nor CRC. In 2002 the U.S. was a prominent human rights outlier when it refused to join the treaty establishing the International Criminal Court (ICC). At other times, however, Washington supports international human rights institutions, as when the U.S., in its role in the UN Security Council, agreed in 2005 to refer human rights atrocities in the Darfur region of The Sudan to the ICC. For sovereigntists, however, there is no *moral* necessity for states to participate in the international human rights system. Rather, a government’s obligation is to its own people, which may or may not dictate cooperating with broader international standards.

At issue here is the meaning of state sovereignty: the assertion that governments are the supreme legal authority within their own borders, not subject to international rules or institutions beyond them. Of course, the more a country can use economic and military means to achieve its objectives directly, the less it needs to participate in international human rights institutions. The more powerful a state, the more it can play the sovereignty trump card.

### *"Civil Society"*

While the sovereignty critique challenges human rights optimists' belief in the force of international standards, a second critique questions whether law is the best tool for advancing human rights improvements. Traditionally, enthusiasts of the international system had assumed that the gradual expansion of the international human rights treaty system would inexorably spread better human rights through the agency of legal institutions. Evidence that international legal standards and human rights declarations cause governments to change their behavior is hotly disputed, however.<sup>10</sup> Indeed, there is empirical support for the *lack* of practical efficacy of international law generally and international human rights law in particular.<sup>11</sup> Moreover it seems that countries with the worst human rights records ratify human rights treaties as often as those with the best human rights practices.

The "law" question is especially relevant in conditions of globalization: just how important can law be in a world where corporations seem more powerful than governments, where nongovernmental organizations seem to be more effective agents of change than parliament or congress, and where mass media seem to have supplanted the role of formal institutions? On some accounts civil society in a globalized world has dislodged law—both international and national—as an ordering device. Scholars who emphasize the role of civil society when markets are globalized talk instead about global networks—governmental, nongovernmental, and corporate—that perform the regulatory functions that used to be the role of formal politics and law.<sup>12</sup>

Some argue that globalization has reduced, or possibly even removed, the salience of sovereignty, instead placing social change in the hands of civil society. Global networks have displaced the state, it is claimed, overlaying it with multiple decentralized networks that transcend national borders.<sup>13</sup> These scholars point to the multiple layers of relationships between states through multilateral and bilateral obligations and regional and international institutions, arguing that international human rights norms are spread through

persuasion and acculturation rather than through top-down legal coercion.<sup>14</sup> Civil society, not law, is seen as the engine of change and the implementer of social preferences, so much so that it is sometimes simply assumed that human rights are natural components of a reasonable society rather than distinctive norms.<sup>15</sup> As with the evidence about the efficacy of human rights treaties, however, empirical support for the replacement of law by global civil society networks is deeply controversial. While civil society and mass media have added new layers of complexity to political and economic structures, it has yet to be established that these new dynamics have overtaken or replaced formal legal mechanisms.

### *"Multiculturalism"*

If the "sovereignty critique" from the political right questions the force of international law unless it serendipitously coincides with national self-interest, one might expect that the political left would automatically be *for* international law. On the left, however, social theorists of pluralism and cultural identity can be equally suspicious of the universal principles of international human rights. Postmodernists criticize international human rights as naively papering over deep cleavages in cultural identity and making false assertions of universal norms. Multiculturalists would have the state protect rather than erase conflicting visions of human rights norms. Indeed, the "nationalist" left would elevate group rights as defenses against universal norms built on individual rights. From this perspective international human rights must be treated with suspicion—there can be no one-size-fits-all approach to the content of human rights. In the eyes of some, the absence of non-Europeans in the history of human rights philosophy has discredited the very idea of human rights as a universal norm that could underwrite legal rights. Human rights are seen as irretrievably part of Western triumphalism that reached its apogee in colonial ideology.

The historical account of modern human rights is also a story of human inequality, shadowed by the colonialist mission of civilizing "benighted" peoples. From the sixteenth to the twentieth-century international law legitimized the acquisition of huge swathes of the Americas, Africa, and the Asia-Pacific region in a style of imperial fundamentalism that was supported by the science of the day. Anthropologists made clear distinctions between "savage," "barbarian," and "civilized" peoples. In 1877 lawyer-anthropologist Lewis Henry Morgan wrote in the opening pages of his book *Ancient Society*, "It can

now be asserted upon convincing evidence that savagery preceded barbarism in all tribes of mankind, as barbarism is known to have preceded civilization . . . [and these] three distinct conditions are connected with each other in a natural as well as necessary sequence of progress. . . . Democracy in government, brotherhood in society, equality in rights and privileges, and universal education, foreshadow the next higher plane of society to which experience, intelligence and knowledge are steadily tending.”<sup>16</sup>

While the colonizing West brought the constitutive aspects of the human rights tradition—sovereignty, constitutionalism, and ideas of freedom and equality—their beliefs about anthropology effectively excluded non-European peoples from human rights benefits.<sup>17</sup> Instead, the West’s anthropological assumptions justified the legalization of unequal treaties between European and non-European peoples, with the consequence that it was completely “legal” to acquire sovereignty over non-European societies by conquest.<sup>18</sup>

The more recent rejection of international human rights by some post-colonial countries has led to suggestions that non-Western systems with different cultural underpinnings have an entirely different set of human rights priorities. The skeptics of international human rights argue that much of the human rights scholarship and activism seems driven by moral absolutism, that aspirations for greater human dignity can only end in clashes between competing visions of the truth like the religious disputes of past ages. International human rights are criticized for being a politics of identity that “allows inclusion only by assimilation or conversion.”<sup>19</sup> As Canadian philosopher Charles Taylor has pointed out, “we can’t assume straight off, without further examination, that a future unforced world consensus could be formulated to the satisfaction of everyone in the language of rights.”<sup>20</sup>

There could be no better example of this than the “Asian values” debate. The first prime minister of Singapore, Lee Kwan Yew, attacked the underlying philosophy of human rights in the West for according primacy to the individual. Yew argued for a different interpretation of human rights, understood through Confucianism. Asian values, he asserted, put the social and economic rights of the community before the rights of the individual.<sup>21</sup> The Association of Southeast Asian Nations (ASEAN) countries of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam conspicuously overlook each other’s human rights abuses, refusing for example to sanction the rulers of Myanmar for their brutal crackdown on the Buddhist monks who took to the streets in September 2007 to dem-

onstrate for political freedom or for their prolonged detention of opposition leader Aung San Suu Kyi.

### **Answering the Critiques: A More Complex Human Rights History**

These are long-standing problems in the Western tradition of law, rights, and international society. Each of these critiques points out valid and serious flaws in the current operation of international human rights. The very international institutions that were created to pursue human rights appear undermined by some of the core values and features that were part of their creation. Each of these critiques, when seen more precisely in its historical context, however, reveals that it is missing crucial elements of the genealogy of human rights. Key pieces of the human rights system as it has evolved remain relevant today. The development of international law over the past 500 years is unquestionably a blemished history, but the human rights ideals within that history are not fatally flawed. Human rights as a shared project across dissimilar cultures remains a viable vision.

Each of the three critiques overlooks a crucial piece of the international human rights jigsaw. Although the sovereignty critique is a legitimate account of the effects of national power on international matters, other long-standing features of the development of the international legal system also show a sensibility that can only be described as a moral obligation towards people of other states. The civil society critique properly notes the influence of non-legal pressures on governments, but it is also clear that the proliferation of nongovernmental forms of activity has gone hand in hand with the creation of legal frameworks. The cultural critique of human rights is a devastatingly accurate account of misused Western power in the colonies, but the history of the Western rights tradition is also one of the desire to accommodate cultural difference within overarching principles and institutions.

The drawback of each of these critiques is that none of them on its own offers a full account that encompasses law, society, and politics in philosophical history. I argue that once these developments are disentangled from their history and their ideology, key elements of the international human rights system are more visible. A more careful analysis of the development of human rights philosophy demonstrates that important values can be disaggregated from a flawed history.

Despite many failures in their implementation, these ideas have been offered in the Western philosophical tradition as far better alternatives to

singular national interests, inflexible legal institutions, and fixed ideas of human identity. Ideas about self-determination, humanitarian intervention, cultural and ethnic difference, and religious diversity were all part of the interactions between the Old World and the New World that began in the fifteenth century.<sup>22</sup> They have been part of the philosophical scaffolding of empire from its earliest days and need to be reemphasized in the contemporary human rights story.

### *Recovering a Lost Philosophical Tradition*

The conventional legal story about human rights starts with the end of World War II, the Nuremberg trials, and the Universal Declaration of Human Rights. Traditional accounts of the philosophy of human rights have focused on the political history of Europe and the United States. This perspective emphasizes international law as a development contiguous with the Enlightenment, the rise of sovereignty in the Peace of Westphalia of 1648, and the rise of individual rights in modern government. The history of individual rights is therefore seen to stretch from the contributions of Thomas Hobbes and John Locke to the English tradition of individual freedom as the “birthright of the English people,” to Jean-Jacques Rousseau’s articulation of individual French liberty and the writings of Charles de Montesquieu and James Madison that framed the tradition of individual freedoms in the U.S. Constitution.<sup>23</sup>

The law and the philosophy of human rights have a far longer and more complex lineage, however, one that goes back to ancient Greece and Rome but that in Enlightenment times was deeply connected to Europe’s discovery of the New World and to Europe’s own religious wars. Its early principles were constructed in the shadow of the Roman Catholic Church’s designs upon the souls of the heathens in distant lands, then came a steady drumbeat of laws and policies that pursued two often conflicting goals: reducing the influence of Rome on Europe’s commercial activities in the New World and increasing the claims of European individuals for religious freedom at home. Europe’s rapid commercial expansion required new rules to regulate the “rights” of trade and navigation, establishing the earliest principles of the “open seas,” unfettered by claims of sovereignty of other countries plying the oceans. It also needed principles by which Europe’s land grabs in the Americas, Africa, and Asia could maximize profits and minimize demarcation conflicts with other European neighbors in the colonies. When it became clear that colonization was bringing disease and depredation, as well as enslavement and

outright massacre, to the far-flung satellites, rules were needed to constrain colonialism's worst excesses. International human rights began as two parts greed and one part compassion.

**Cultural Differences** While European evangelism, voracious trade, and predatory slave activities still reverberate in contemporary postcolonial societies, these activities were criticized by some in Europe as early as the sixteenth century.<sup>24</sup> Of course it had always been known that other lands had different cultures, and traders had been dealing with this fact for as long as goods had moved along the Silk Road. After the discovery of the Americas, however, Portuguese and Spanish explorers and conquerors wanted to stake their claims to the new hemisphere's resources in ways that their competitors in Europe would acknowledge and respect. The Roman Catholic Church saw non-Christians as having no souls, which meant they could not be said to own their lands and so could be enslaved with impunity. When news reached Europe of hideous violence in what is now Latin America, however, it became clear that the subjugation of distant lands and peoples was producing serious political, social, and legal problems. Spanish Catholic cleric Francisco de Vitoria mounted an eloquent defense of Indian rights in his 1532 *De Indis* lecture, arguing against enslavement of the natives whom most Europeans believed were "slaves, sinners, heathens, barbarians, minors, lunatics and animals."<sup>25</sup> Going against the status quo, Vitoria discerned humanity in the indigenous population: "they are not of unsound mind, but have, according to their kind, the use of reason. . . . They have polities which are orderly arranged and they have definite marriages and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion."<sup>26</sup>

In the end, however, Vitoria's protests did nothing to slow Spain's—or Portugal's and other countries'—colonization of Latin America. In a sad twist to the only compassionate aspect of what was otherwise a rationalization for conquest, the ascribing of European-like rationality to the natives was instrumental in destroying their culture. While Vitoria argued for the right of the Indians to retain their own religion and to own their land, his attribution of reason to the indigenes was a double-edged sword. As soon as they either converted to Christianity or used force to keep Spanish traders from exercising Spain's "natural" right to roam freely over the land for the purposes of trade, the local populations incurred either the "protection" or the wrath of the Spanish crown. The argument for universal humanity brought the indigenous

peoples up from their subhuman status but also justified the Spanish empire through legal arguments that delivered the “natives” into the jurisdiction of their colonizers.<sup>27</sup>

**Religious Tolerance** Religion in Europe also played a central role in the development of human rights. When Alberico Gentili, a sixteenth-century writer fled Italy because of his Protestantism, he went to England where Protestantism was taking hold. Ultimately, he became a professor of law at the University of Oxford and advised Queen Elizabeth I on the principles that ought to apply to military engagement with the Spanish Armada. The brilliance of Gentili’s works, which became classics of international law, is that he wrote of the world as a community comprised of a single human race—not Christians and “others,” who held alternative religious beliefs. He argued for more compassion in times of war. In a time when war was only fought to secure territory or spread religion, he was one of the first to argue for war in the name of humanitarian intervention, or, as he put it, “to right human wrongs.”<sup>28</sup> Gentili’s thinking prefigured military interventions in the name of human rights in the latter half of the twentieth century by insisting that a sovereign should neither rule by fear nor have absolute discretion over citizens.<sup>29</sup>

Gentili’s flight to Protestant England from Catholic Italy in 1580 was the impetus for the trenchant critiques of religious intolerance that he delivered as a professor of civil law at Oxford. This sentiment took root in England over the next century as freedom of conscience. The struggle between Catholics and Protestants in England led ultimately to the establishment of parliamentary supremacy over monarchical rule after the Glorious Revolution in 1688, which removed the part of the English monarchy’s power that had been based on its “divine right” to rule.

Death and destruction through warfare and conquest was the problem of their time, and Vitoria and Gentili were among the first European philosophers to lambaste the human rights violators who acted in the name of religion and territorial expansion. The slow separation of church and state had begun but with the paradox that a more secular universal law of rights sharply differentiated between European “civilized” peoples and non-European peoples.

As civil war in Europe and violent conquest overseas continued, scholars crafted rules that would tie the hands of kings and princes and limit the extent of civilian suffering. First Gentili then Dutch separatist Hugo Grotius developed ideas about the legal conduct of war. Grotius lived at the time of the Eighty Years’ War between Spain and The Netherlands and the Thirty



Years' War between Catholic and Protestant European countries. He witnessed slaughter, disease, and destruction that wiped out 15–20 percent of the total population of what is now Germany. The work of Grotius signaled a fundamental shift from earlier writings on international law that has shaped its contours ever since. Although both Gentili and Vitoria had claimed that their writings for the most part merely systematized the growing number of customs, usages, and state practices that had developed over the previous centuries, Grotius made the distinction between the natural law, *jus naturale* (the justification for his rules) and *jus gentium* (the customary law of nations). *Jus naturale* rests upon basic metaphysical principles of religion and divine authority, but customary law is quite different. It simply justifies international law through describing the practice of states and the conduct of international relations, as evidenced either by informal customs or forced treaties. While assuming universal humankind, Grotius also prefigured positivism, the new political theory that would explain the steady rise of the nation-state and its increasingly absolute claims to legal and political supremacy from the latter part of the eighteenth century to the early part of the twentieth.

**Selective Compassion** All three of these early scholars of international law—Vitoria, Gentili, and Grotius—seem to have been genuinely motivated by humanitarian concerns. They were grasping for a wider view of human values beyond either blind obedience to the church or fearful self-defense of territory, towards a view that included protecting the weak from those more powerful according to higher principles.<sup>30</sup> This became the theme over the next century, and law was increasingly seen as the leavening influence between chaos and order. Against Thomas Hobbes's idea of the all-important sovereign—his "Leviathan"—German philosopher Samuel von Pufendorf also argued that "Any man must, inasmuch as he can cultivate and maintain toward others a peaceable sociality that is consistent with the native character and end of humankind in general."<sup>31</sup> Law was the key to maintaining sociability: "What would men's life have been like without a law to compose them?" "[A] pack of wolves, lions, or dogs fighting to the finish," he concluded.<sup>32</sup> It was a view that spread through Europe and then to the American founders Hamilton, Madison, and Jefferson as their formulation of the role of rights in the new republic.<sup>33</sup>

Nonetheless, these compassionate arguments applied to just a tiny percentage of any population. Privilege rather than any fundamental moral

equality recognized by law was the doorway to political life. Although social conditions and the human rights agenda improved during the Enlightenment, in fact many people did not qualify to receive the freedoms guaranteed by the European and American declarations of rights. Property ownership and private wealth were both formal and informal prerequisites to political participation. Despite the advances made in fundamental rights such as the right to life and freedom of opinion, civil inequality remained prevalent.<sup>34</sup> “Freedom” and “liberty” were written about in neutral terms, but these principles only applied to those eligible to vote—initially, propertied white men.<sup>35</sup> The position of women in society still remained unequal to that of men, even in England, where women had more human rights than in any other part of Europe. Granting minority rights and freeing all repressed nationalities throughout Europe was theoretically part of the French revolutionary agenda, but although Napoleon did much to spread these ideals during his conquests, real conditions lagged far behind.<sup>36</sup>

Human rights in the Western tradition were crafted to suit a particular set of historical conditions: Europe’s new emergence at the center of global military and economic power abroad and religious schisms at home. The European particularity can seem shocking to those familiar with the rich history of earlier systems of belief outside Europe, yet little or nothing of non-European moral philosophy was deemed relevant by the men of the Enlightenment.<sup>37</sup>

**Abolition of Slavery** There was one development in this early period that demonstrated the potential of human rights to be a truly global movement. When the French civil code was translated into English by an anonymous barrister in the Inns of Court in London in 1804, its advancement of the legal status of homosexuals, slaves, and Jews struck a chord with the British Quakers, who had for years been advocating for an end to the slave trade. European expansionism had massively stoked the trade because the colonial powers relied upon slave labor both at home and in the colonies, and also trafficked in slaves as part of their commercial enterprise with one another. By the middle of the eighteenth century, British ships were carrying about 50,000 slaves a year and the trade was bringing in huge profits.

Philosophical opposition to slavery had been rising since Vitoria’s day. From France, Montesquieu’s *L’esprit des lois* (The Spirit of the Laws) had a powerful influence over the early U.S. slave abolitionist movement.<sup>38</sup> In Great Britain philosophers such as Adam Smith opposed slavery on both economic and moral grounds. In the *Wealth of Nations* Smith wrote: “From the

experience of all ages and nations, I believe, that the work done by free men comes cheaper in the end than the work performed by slaves. Whatever work he does, beyond what is sufficient to purchase his own maintenance, can be squeezed out of him by violence only, and not by any interest of his own."<sup>39</sup> In his *Theory of Moral Sentiments*, he wrote: "[It is cruel] . . . to reduce them [captured indigenous people] into the vilest of all states, that of domestic slavery, and to sell them, man, woman, and child, like so many herds of cattle, to the highest bidder in the market."<sup>40</sup>

Yet the slave trade continued until years of wars made inroads on the economic underpinnings of slavery, especially on the business interests of particular British members of Parliament. Finally, twenty-five years of advocacy by the Quakers and the English Evangelicals was recognized in 1807 when Parliament outlawed the slave trade within the British Empire, authorizing the navy to collect fines for any slaves found on British ships. With ships active in every ocean, the British Navy became a de facto international police agency charged with monitoring and enforcing the first international human rights campaign.

As a global campaign it had extraordinary success. In 1833 Parliament passed the Abolition of Slavery Act and provided £20 million in compensation to the slaveholders. France abolished slavery in its colonies after the 1848 revolution, and Tsar Alexander II emancipated Russia's fifty million serfs in 1861. Despite these international successes, it took a bloody civil war finally to abolish slavery in the U.S. Until the U.S. Civil War the majority of bills concerning slavery were more concerned with the economy than the rights of the slaves. A proposal in 1839 by Congressman John Quincy Adams to end slavery failed. It was not until 1863, two years into the Civil War, that Pres. Abraham Lincoln issued the Emancipation Proclamation. Like the abolition of slavery in the U.K., the U.S. abolition of slavery resulted from a combination of economic factors and moral sentiment. The Thirteenth Amendment to the United States Constitution was finally passed in 1865 to guarantee the permanent abolition of slavery and the rights of newly freed slaves. It was followed by the Fourteenth Amendment to protect the civil rights of former slaves and the Fifteenth Amendment, which banned racial restrictions on voting.<sup>41</sup>

Of course these momentous events did not eradicate "state-sanctioned" slavery. Indeed, the trade had created new economies: some African nations had prospered so much through the slave trade that they sent tribal leaders from the Gambia, Congo, and Dahomey in delegations to London and Paris to

protest its abolition in its very earliest days.<sup>42</sup> The Dutch system of coerced labor in its East Indian (Indonesian) colonies continued until the 1880s, and slavery similarly persisted in parts of France's African colonies until the 1940s.

**Children's Rights** Concern about children's human rights began in the same way as the movement for the abolition of slavery. Indignation over the plight of child labor in factories and coal mines was a rallying point for progressive forces throughout Europe, leading ultimately in the mid-1800s to British, French, and American legislation for the protection of children.<sup>43</sup> As the industrial revolution progressed, many European countries passed legislation to make elementary education universal and compulsory.<sup>44</sup>

In the global context these were modest successes,<sup>45</sup> yet they demonstrated two things. First, an international publicity campaign telling the public about human rights harms could result in legal change. Most people in Europe had known nothing of slaves' conditions on the ships and the plantations or the plight of seven-year-old children in the mines. Once they knew, political movements for reform developed momentum that blossomed into new national legal standards. Second, a growing consensus in Europe about core human values of individual freedom and agency was paying off in increased international legal cooperation. Transnational activism about slavery sparked international organizations such as the Eight Power Declaration of the Congress of Vienna, the French Société des Amis des Noirs, and the British and Foreign Anti-Slavery Society.<sup>46</sup> Human rights ideas within states were influencing ideas across their borders.

**Early Principles of Humanitarian Intervention** Notions of humanitarian intervention began with ideas of "mutual aid" in the eighteenth century, the same time the first suggestions of regional and international confederations of states were advanced.<sup>47</sup> German philosopher Christian Wolff wrote in *The Law of Nations* in 1749 that all the countries of the world together make up a "supreme state" that ought to have its own right to promulgate laws for the universal good. Wolff's idea was that just as people are free and equal before the law, so individual countries ought to be free and equal parts of the supreme state of the world.<sup>48</sup> Writing in the mid-eighteenth century, Swiss jurist Emerich de Vattel popularized Wolff in his own work, also called *The Law of Nations*.<sup>49</sup> It became especially influential in the United States because of its parallels with the Declaration of Independence. Like Wolff, Vattel asserted the equality and sovereign independence of states. Just as individuals

aim to perfect themselves, Vattel wrote, states are obligated to mutual assistance in perfecting themselves.

Although rejecting Wolff's conception of a regulatory world state, Vattel argued that sovereigns ought to increase human happiness through mitigating wars and promoting "mutual aid" among countries. Vattel prefigured the UN structure by writing about confederations of sovereign states that could maintain a balance of power and together preserve the liberties of each nation. He even went so far as to say that states could join together to put down a violator of international law. States' obligations to each other included assisting a weaker state against a powerful enemy that threatens to oppress it, giving aid during a famine, and ensuring that it did not monopolize trade. Within national borders, the sovereign had a duty to render justice regardless of nationality, to citizens and noncitizens alike. This was an important step in recognizing the absolutely central role of governments in caring for the well-being of the citizens as well as the role of international alliances in promoting peaceful relations among states.

### *An International Institutional Theory to Match International Principles*

**The Law of Nations** For all their powerful morality and logic, these international human rights were ideals without an international home. The principles only took life when each sovereign ruler or parliament passed laws for its own people—there was no corresponding theory of international institutions to apply the same laws across all states. Previously there had been some writing about states comprising a collective value system rather than a hierarchy of "civilized" versus colonized societies, but such work had failed to capture the imaginations of enough reformers to make much impact.

**A League of Nations** A comprehensive theory of international philosophy finally emerged from Western Europe in the late 1700s, centuries after the Islamic world's intricate and advanced international legal philosophy had flourished during the Ottoman empire. Much modern thinking in international law and human rights depends upon Immanuel Kant's ideas of individual rights within international society because he was able to put together both values of individual rights and global community.<sup>50</sup> A German philosophy professor who lived his entire life in the Prussian city of Königsberg, Kant proposed a global organization of nation-states, a voluntary "league of nations" that would ensure worldwide peace and "does not tend to any domin-

ion over the power of the state but only to the maintenance and security of the freedom of the state itself and of other states in league with it.”<sup>51</sup>

Kant’s vision of international organization was premised upon his idea of “cosmopolitanism”<sup>52</sup>—a world of rational individuals who are members of a universal moral community and who share freedom, equality, and independence.<sup>53</sup> Such people choose to give themselves the law. “Practical” law, made by sovereign governments and ostensibly agreed upon by citizens, ought to be grounded in people’s equal capacity to reason, to subject themselves and their world to rational analysis—“[man should have] the courage to use his own intelligence.”<sup>54</sup> Kant’s individual citizens, their sovereign state, and the international community each are constitutive parts of a common morality. He argued for a universal morality, arrived at through the use of reason—the attribute of all the human species. Kant’s global vision was a world where morality was rooted in human freedom and each individual acted autonomously within a constitutional republic.<sup>55</sup>

Unlike those writing before him, Kant saw war as both morally and legally baseless. He was scathing about earlier justifications for war and aggression: “Up to the present, Hugo Grotius, Pufendorf, Vattel, and many other irritating comforters have been cited in justification of war, though their code, philosophically or diplomatically formulated, has not and cannot have the least legal force, because states as such do not stand under a common external power.”<sup>56</sup> Instead, Kant proposed that states be founded on representative government, and this would preclude external aggression towards other states. Similarly he was critical of Europe’s expansions into the New World, labeling them as

inhospitable actions of the civilized and especially of the commercial states of our part of the world. The injustice which they show to lands and peoples they visit (which is equivalent to conquering them) is carried by them to terrifying lengths. America, the lands inhabited by the Negro, the Spice Islands, the Cape, etc., were at the time of their discovery considered by these civilized intruders as lands without owners, for they counted the inhabitants as nothing. In East India (Hindustan), under the pretense of establishing economic undertakings, they brought in foreign soldiers and used them to oppress the natives, excited widespread wars among the various states, spread famine, rebellion, perfidy, and the whole litany of evils which afflict mankind.<sup>57</sup>

Kant understood that law is central to guaranteeing human rights. He wrote that “our social and political relations should be governed and our public con-

flicts settled in a universal manner. This requires the existence of law.”<sup>58</sup> Kant’s insight, which influences moral philosophy to this day, was that true freedom could only exist when the rule of law prevails within nation-states and also in international relations.

**Early International Institutions Fail** Kant was ahead of his time. His ideas lay fallow for nearly a century and were only revived when a new critique of Europe’s appetite for colonial imperialism emerged at the end of the nineteenth century. The impetus came from a group of European lawyers opposed to the type of European nationalism that was being used to justify colonial brutalities across Asia, Africa, and the Pacific.<sup>59</sup> As Finnish legal historian Marti Koskenniemi recounts, the *Institut de Droit International* (Institute of International Law) was founded in Ghent in 1873 by two Belgians, Gustave Moynier and Gustave Rolin-Jaequemyns, and nine other lawyers from continental Europe, England, Scotland, the U.S., and Argentina. Koskenniemi writes, “They strove to become the legal conscience . . . of the civilized world . . . linked with liberal-humanitarian ideals and theories of the natural evolution of European societies.”<sup>60</sup>

Alas, the institute was a failure, highlighted just a decade later when newly imperial Germany convened the Berlin Conference to apportion Africa among the great powers: arrangements that were agreed in Europe between the European powers that were then enacted with arrogance and terrible violence in Africa. It was clear that any early impact of the Ghent institute on European governments was negligible, and it certainly did not prevent the “scramble for Africa.”<sup>61</sup> The institute also lacked a progressive agenda: “If they welcomed the increasing interdependence of civilized nations, this was not only to make a point about the basis of the law’s binding force but also to see international law as part of the progress of modernity that was leading societies into increasingly rational and humanitarian avenues.”<sup>62</sup>

The idea of institutionalizing human rights in international treaties and organizations was stalled everywhere until 1945. Even the League of Nations that was established by the Treaty of Versailles following World War I did not make a decisive break with the past. It had established the Permanent Court of International Justice, but the court proved virtually impotent. The U.S. never signed or ratified its charter, and other League of Nations members paid little attention to its decisions. The single shining international human rights achievement during this period was the series of conventions that came out of the First and Second Peace Conferences at The Hague in 1899 and 1907.

The Hague Conventions addressed the humane treatment of people and prohibited the use of certain types of weapons in warfare. Yet even this partial realization of Kant's vision of a "government of governments" was unable to prevent the onset of World War II and the terrible human rights atrocities during this period. Kant's writings anticipated the evolution of international law as a discipline separate from philosophy and diplomatic relations that took place in the late nineteenth century, but his vision was too abstract for the world of nationalist *realpolitik*.

### *Flawed Ideas or Flawed Institutions?*

Prefiguring today's debates about national security, Kant's message of institutionalized cosmopolitanism was overwhelmed by the urgent nationalism of the nineteenth and early twentieth century. Europe was industrializing rapidly in these years, and states jealously fought over their colonial boundaries in the New World, eager to ensure a steady supply of raw materials for their factories in the Old World. Kant's international architecture was ignored in favor of statism.<sup>63</sup> International society as Kant had sketched it could not compete with the nationalist visions of Germany, Japan, and the U.S. as the newly rich great powers. The Spanish and Ottoman empires began to crumble, the Holy Roman and Mughal empires simply ceased to exist, and Russia and China began to fall back as world powers, leaving the British Empire as the world's superpower.<sup>64</sup>

Where did these developments leave the philosophical and legal project of human rights? Human rights as an international movement stalled after the abolition of slavery. At the same time, human rights, especially political and civil rights, deepened as national movements within countries. Curiously enough, although the new rights emerging in national constitutions and legislation throughout Europe and North America were couched as universal rights, these rights were mostly not extended to the colonies, at least in any meaningful or practical way. Vitoria's early attempts to persuade European states to credit indigenous Americans with a political economy of their own could not compete with the claims that Westerners were making against their own governments for human rights at home. "Uncivilized" nations had to wait for their human rights because they needed first to be taught how to take proper advantage of such rights.

The empire-builders of Europe and the U.S. increased the stakes of seeing some nations as "free" and "civilized," and others as "backward" and "uncivilized." Montesquieu, the architect of the separation of government powers



and also a key influence upon Madison's work on the U.S. Constitution, wrote in the late eighteenth century that: "The difference between savage peoples and barbarian peoples is that the former are small scattered nations which, for certain particular reasons, cannot unite, whereas barbarians are ordinarily small nations that can unite together."<sup>65</sup> European empires viewed their colonized peoples as childlike and incapable of rational thought. Indigenes were viewed by the West as barbaric, putting them beyond the realm of moral and legal argument. This test of civilization dictated whether an indigenous population was entitled to full recognition as a legal personality that could undertake binding commitments under international law. In some places, such as Australia, the indigenes were even considered to be *pre*-legal. Although the first governors of the settlement in New South Wales were told to "treat the natives well," the international law applied to Australia's settlement was that of *terra nullius* or "empty land."<sup>66</sup> Unlike the situation in New Zealand, Canada, or the United States, no treaties of land ownership or transfer were struck with Australian Aboriginals. Lacking obvious townships or cultivation agriculture, they were considered too nomadic to be property owners, with the consequence that the British Crown deemed the land empty and simply took possession of Australia by default.

From the moment international law became a distinctive disciplinary practice in the West—that is, as it became part of the legal rules applied by governments in their activities beyond their own borders—Europe positioned itself as the apotheosis of civilization. International law was simply European law. Koskenniemi points out that "As a constructive theory, it was hopelessly *manqué*: an eclectic, fragile façade over what must often have seemed as the banal prejudices of a cultured but declining bourgeoisie."<sup>67</sup>

Wittingly or unwittingly this approach rationalized colonial paternalism with Darwinian arguments that portrayed the colonizers as intellectually superior precisely because they dominated the indigenous populations. The sentiments of political equality and individual human rights that were energizing Europe were not transmitted to the colonial satellites. In an uncanny reproduction of Vattel's humanitarianism that in the sixteenth century had delivered the Indians into Spanish hands through arguments about human equality, the end result of nineteenth-century paternalism simply increased colonial control over people and land in the colonies. Whereas Kantian universal humanity might have granted full equality to indigenous peoples, instead it justified the replacement of indigenous institutions with

European-style institutions because they were regarded as the universal best standard. Because colonial societies were seen as immature nations, full individual human rights were withheld from their inhabitants because they too were seen as insufficiently advanced. This was a Western habit of mind that continued until the decolonization movement of the 1970s.

Sadly the results of colonial interventions to prevent so-called native barbarism and backwardness are still felt today. In Australia and Canada, for example, authorities removed indigenous children from their families, institutionalizing them until the 1980s so that they could receive religion, social graces, and a Protestant work ethic.<sup>68</sup>

Australia's Aboriginal population suffers today from high rates of domestic abuse, child abuse, and deaths in custody as the consequence of prior colonial policies of familial disruption and dispossession of tribal lands.<sup>69</sup> It is a familiar story. Although formal decolonization ended in the 1970s when Portugal withdrew from Africa and East Timor and the French from Indochina, the consequences of colonial policies continue. In former empires the world over, including the old Russian and Chinese territories, the outrages inflicted on the colonies and satellites still reverberate today.<sup>70</sup> Many of today's poorest countries blame their weak institutions and poor economies on their experience of colonization and understandably cling to their postcolonial national sovereignty like a talisman.

### *The Language of Request*

The paradox of this history of imperial expansion, disregard for indigenous cultures, and failed institutions is that the human rights *ideas*, which comprise a constitutive part of that history, have continued to spread as a global movement. Equal human rights are now a ubiquitous feature of international political language, the moral music of governments invoked in many key international relations developments in the post-World War II period. When European states handed back their empires to the indigenous peoples of Africa and the Asia-Pacific region in the decolonization movement of the 1950s and '60s, new postcolonial constitutions were laced with international human rights language, as were many of the constitutions of Latin America's post-military regime states from the 1980s. When the United States, Canada, the Soviet Union, and most of the countries of Europe acceded to the Helsinki Accords in 1975, international human rights were buried beneath issues of security, sovereignty, and war in Europe. Few people expected the Soviet Bloc countries to honor the

provisions of the Helsinki Accords. No one, not even the most confident, could have predicted that the vaguely worded section about respect for human rights and fundamental freedoms that were buried midway in the voluminous Accord documents would help frame the political pronouncements that accompanied the unraveling of communism in the late 1980s.<sup>71</sup>

Internationally, human rights are held up as bargaining chips in the global economy. Human rights form part of the international regulation of trade under conditions set by the World Trade Organization and the International Labour Organization. International human rights are the signifier of new or transitioning governments that seek international legitimacy and want greater participation in international decision making. Countries receiving economic aid promise their financial benefactors better human rights as a *quid pro quo*, as when states seeking acceptance into the European Union promise they will improve their treatment of national minorities in return for money to redesign their legal and political institutions or when struggling African states promise to improve conditions in their jails as a condition for receiving unilateral assistance packages from richer countries. Virtually every formal relationship or negotiation between states in the developed and developing world now makes reference to human rights. Thousands of organizations mobilize each day—on the Internet, via direct mail, at conferences, and in meetings—and invoke international human rights to push, cajole, and persuade governments, corporations, religious authorities, schools, and families toward better human rights behavior.

In the name of international human rights the United Nations convenes international courts to force Rwandan and Yugoslavian perpetrators of genocide to appear before judges and face accusations of their atrocities. In the name of international human rights, national legal systems become hybrid combinations of domestic law and domestic judges augmented by international law and international judges, as in the instances of the Special Court for Sierra Leone and the courts trying human rights violators in East Timor and Kosovo. International human rights standards are cited in truth commissions, where government officials are called upon to confess their violations and apologize to their victims, as was the case in South Africa's Truth and Reconciliation Commission and the scores of other truth and reconciliation bodies that have been established in other post-conflict countries.

International human rights are also invoked for much more than *ex post* standards of judgment after civil conflict. The slew of new constitutions from

the 1990s—from Eastern Europe to South Africa—carry long lists of human rights that draw upon the language of international human rights treaties. Human rights as constitutional guarantees establish prospective standards for government behavior and frame the expectations of civil society. Beyond the political cloakrooms and corridors of courthouses, the language of human rights is invoked as a language of protest and a language of claim. Governments and nongovernmental organizations around the world go into communities, both rich and poor, and talk about human rights. Schoolbooks teach about the rights of children, and labor unions talk about rights of employees. Doctors talk about the human rights of mothers, and community leaders talk about the human rights of detainees. The topic may be different but the framing exercise is the same: people claim as their due something they do not have, but possibly something that citizens of other countries do have. Human rights put this claim at the feet of governments. International human rights have become the lingua franca of global visions of equality and human dignity.

The idea behind the international human rights movement is that the international community has an interest in ensuring that governments deliver on their moral and legal promises to their citizens. For believers in the international system of law, human rights are the ultimate litmus test of a government's performance; they are the language that voices international judgment and expectation. Internationalists argue that the international community has an interest in monitoring human rights performance on the country level, which has in turn led to the creation of new international institutions that track local human rights behavior and even punish violators as criminals. The language of international human rights is carefully deployed so that human rights failures will capture international attention. The everyday language of international human rights advocates has been adopted as the cry of the everyday work of activists and community leaders, and nongovernmental organizations spread news of domestic human rights violators instantaneously via electronic media. "Ethnic cleansing" and "genocide" are more likely to attract a journalist's interest than simple "murder." "Children's rights" and "sweatshops" are the terms headlined in international campaigns about ten-year-olds chained to looms for twelve-hour work days because the sterile language of labor law simply cannot capture public imagination with the same intensity as the heated language of international human rights journalism. However, like colonization that carried the agenda of civilizing conquered societies, today's international human rights movement runs the risk of as-

suming that there is only one truly civilized way to live. The charge against the international human rights movement is that, just like colonialism, it invokes a rationale of benevolent transformation to European humanism as the inevitable goal of humankind. The habit of seeing the job of international law as encouraging the “uncivilized” to embrace civilization dies hard. Even John Rawls evoked nascent memories of Morgan’s “standard of civilization” in *The Law of Peoples*, his only work on international justice. Rawls proposed a hierarchy of five distinct groups within two subsets, the “well-ordered peoples” who are “worthy of membership” in a “Society of Peoples” on one hand, and the “not well-ordered”<sup>72</sup> states on the other. While Rawls made no explicit reference to “civilization,” his typology of societies is redolent of old colonial classifications.<sup>73</sup>

Still others point out that the entire edifice of international economic aid rests upon classifications of relative need, leading some Western human rights scholars to concede that human rights are today fraught with unhappy ghosts of the past because states are judged by whether they meet progressive ideals of international legitimacy.<sup>74</sup> Philosophically and empirically, international human rights as a uniform and universal goal appear to be on shaky ground.

### Three Responses to Three Critiques

To summarize so far, there are three central dilemmas in human rights today. First is the concern that international human rights is either powerless rhetoric in the face of national interests or perhaps an excuse for colonial or imperial projects that jeopardize the integrity and autonomy of individual nation-states. These are the realist and anticolonial faces of the sovereignty critique. Second is the notion that nongovernmental actors—whether nonprofit advocacy groups or corporations—are better placed, more effective, and more relevant to addressing human rights issues than are laws or legal institutions. This is the civil society critique. Third is the idea that what are called universal human rights are insensitive to cultural variety or are imperialist or oppressive. This is the multicultural critique.

A historical analysis shows that even though human rights are often borne of and even viewed as justifying aggression and imperialism there is also much evidence to the contrary. Human rights have catalyzed global social movements and altered the mind-set of politicians, creating an ideology to which even the powerful pay homage. The argument of this book is that historical, normative, and practical analysis of the three main lines of critique

about human rights, together with evidence of developments in contemporary international relations, suggest an institutional response.

*Sovereignty as Relational and Humanitarian*

The feature that emerges most clearly from an examination of the history of sovereignty is that state governments have a special responsibility for human rights. Part of the argument of this book is that sovereignty should be reconceived as a conditional entitlement of government—that a government is exempted from international interference so long as it cares adequately for the human rights of its citizens. Sovereignty has traditionally been seen as a matter of defining and defending national borders, but today it does much more than demarcate the line between one nation-state and another. Today sovereignty includes relationships of international interdependency and co-existence. The defense of sovereignty rests on normative ideas about the sovereign caring about the human rights of the citizens. Taken together, the old and the new ideas of sovereignty are creating new standards of international governance and human rights compliance that I describe in Chapter 3 as “relational sovereignty.”

The ever-growing expectation in world society is that national governments treat their citizenry with a baseline of human rights decency.<sup>75</sup> Citizens also ought to expect their governments to take a principled position towards how other governments treat their citizens. This is already the case in many affluent Western countries, where governments find themselves under greater pressure to spread the benefits of democracy and human rights. While the effects of globalization are profound and measurable, however, it is a patchwork development with different effects in different parts of the world. The conception of sovereignty also varies within a state depending on the subject of government regulation; for example, states will assert strong sovereignty over issues such as state security and immigration but a more negotiated version of sovereignty on economic issues.

My argument about sovereignty and globalization is that the functions of states have been altered under the influence of contemporary conditions such as the combined force of global economic expansion and rapid electronic communication about human rights in other parts of the world. Relational sovereignty does not stem from an inherent notion of state or territory but instead reflects a practice that binds global players together in a process of recognition and self-declaration. That practice does, and should, set conditions.

Citizens continue to have deep connections with their own governments and they also have relationships that transcend state borders. Increasingly, citizens are entitled to expect more from their governments than simply keeping order at home and managing threats beyond the border.

### *Legal Frameworks for Globalized Civil Society*

In Chapter 4 I argue that the civil society critique of formal legal institutions does not strike a fatal blow to the international human rights system. Rather, legal institutions are needed more than ever to formalize social politics into legal rules. It is true that globalization is reconfiguring the role of government by increasing the influence of non-state actors—corporations, civil society, even local warlords—within states, and also across borders, but these developments have not displaced law as an instrument of social change. Instead law has never been more important as one of the ways in which planning and predictability occur and as a component of custom and habit and a mechanism of enabling cooperative behavior, sometimes through enforcement, at other times through suggestion, and at still other times through the sheer force of moral argument. Legal institutions can mediate disputes in ways that neither social nor political institutions are able to do. Law can, however, provide a structure for disagreement, claims, and judgments that can in the future be overturned or superseded in light of newer disagreements. This has particular advantages when applied to human rights conflicts, both massive human rights disasters such as genocide and everyday human rights violations that take place below the international radar screen.

Law and courts have a continuing role in working out which rights ought to apply within a national system. The notion of “right” serves to define certain legal powers held by an individual against a government and also provides the master image for a philosophy of human nature, individuals, and their societies. It operates as a legal norm for everyday events and as an underlying justification of society. Haltingly international human rights are normalizing the *ideal* of such norms in a national legal system. Indeed the driving assumption behind massive international, regional, and national programs that promote the rule of law has been that formal legal order will reduce violence and increase political responsiveness. While reliable methods of measuring rule of law are yet to be fully developed, functioning courts are usually accepted as an indicator of political responsiveness of governments towards their people than where courts are either corrupt or otherwise dysfunctional.

### *Regional Human Rights Courts for Culture*

While the history of international human rights has often been a contradiction of its own principles of human equality, the underlying values of rights have continued as catalysts for legal change. After the Cold War ended in 1989, in the heady early days of new constitutions and bills of rights in the 1990s, great things were expected from international law. Some expectations were probably unrealistic. It is fanciful, for example, to expect the criminal prosecution of a single *genocidaire* to heal instantaneously deep rifts between neighbors caused by civil conflict. Trials may be an important symbolic step in the recovery of trust, but law cannot be expected to perform the work that can only come through everyday iterations of cordial relations. Societies are comprised of subsets of people who hold many values. The multicultural critique accurately points out how cultural difference poses challenges to universal standards of human rights.

To point out the limitations of the international human rights system, however, only increases the urgency to urge refinements to legal principles and legal institutions. My response to the multicultural critique is, as I show in Chapter 5, that the human rights vision of regional human rights courts can be a credible part of legal internationalism because courts are uniquely equipped to broker different cultural values through principles and process.

Regional institutions are particularly well placed to offer reflective equilibrium between general international norms and particular cultures. Regional human rights courts can participate in defining how the standards of human rights ought to be applied by stepping in to interpret the tension between local practices and international treaty standards.<sup>76</sup> Whereas international human rights documents declare universal principles, regional documents are often more specific, adding new rights or refining others and taking into account special differences within the particular region and between one region and another. International principles can be cashed out in regional standards. Allowing regional variation through principled legal concepts can have value, especially for controversial issues that have previously been resistant to UN prompting.

### **Today's Language of International Human Rights**

All the contemporary talk about globalization and civil society has not yet resolved *which* human rights, among the ever-enlarging list that is the stuff of international treaties, are the most essential part of each government's obligation



to its citizens. The Declaration of Human Rights was the result of intense negotiations among people representing different cultural and religious traditions as well as “new” and “old” democracies. As a compromise document, it contains

the first-generation political and civil rights found in the British, French, and American revolutionary declarations of the seventeenth and eighteenth centuries: protections of life, liberty, and property; and freedoms of speech, religion, and assembly. It also included the second-generation economic and social rights found in late nineteenth and early twentieth century constitutions such as those of Sweden, Norway, the Soviet Union, and several Latin American countries: rights to work, education, and basic subsistence.<sup>77</sup>

The peculiarity of the development of rights in the West was that a prohibition on the exercise of power (freedom *from* torture) became something belonging to individuals as part of their inherent status as citizens (right *to* bodily integrity). Crucial to the Western democratic tradition and political theory of the last three centuries, but not necessarily to other non-Western societies, is a philosophical view that emphasizes the right of individuals to consent to the arrangements under which they live. These two levels connect when they are steadily promoted in a legal system, and they are increasingly being formalized in charters of rights in many post-Cold War constitutions.

International human rights advocates articulate norms of dignity, fairness, and decency broken down into categories of “negative”—civil and political—and “positive”—social, economic, and cultural—rights. Negative rights—ensuring nondiscrimination in public institutions, for example—assume a smaller role for governments and a larger role for private action groups. Positive rights, on the other hand, expect the government to play a larger role. Whereas civil and political rights are the priority of Western governments, governments and advocates in Africa and parts of Latin America and Asia try to make social and economic rights more central.

Social rights have often been represented as incompatible with the rule of law, especially in the U.S. The notion that welfare structures impair the rule of law goes back to its earliest expression, when in the U.K. Albert Venn Dicey discredited the very notion of an administrative state apparatus.<sup>78</sup> In the United States the term “rule of law” emerged in general usage in the late 1930s at the time of the construction of the New Deal welfare apparatus. It soon became shorthand to distinguish liberal democracies from communist regimes, the latter being the supposed champions of social and economic rights. Still

later, critical legal scholars expressed outright hostility to a notional rule of law instead of real social justice.

Through the mid-twentieth-century welfare services expanded greatly in many industrial countries, coexisting uneasily with expansive human rights concerns. For many political conservatives, social rights fall outside the ordinary orbit of human rights, not necessarily as a matter of theory but as a matter of political history. In a debate that has been polarized from the outset, both sides have seen civil and political rights as consistent with private protections from government while viewing it as distinct from the discretionary or interventionist state action needed to ensure the availability of social rights. The great majority of human rights activists either focused exclusively on civil and political rights or invoked social and economic rights primarily through the lens of prior discriminatory access.<sup>79</sup> Especially in the U.S., but also among those who are regarded as legal scholars in the classical analytical tradition, civil and political rights are viewed as inviolable, while social and economic rights are considered negotiable. When, for example, the International Court of Justice defined the rule of law to embrace “the establishment of the social, economic, educational, and cultural conditions which are essential to the full development” of the human person, British analytical legal philosopher Joseph Raz criticized the court for its “promiscuous” usage of the rule of law.<sup>80</sup>

Today, even with rule of law ideas resurgent in the two decades since the collapse of communism in Eastern Europe, human rights are still rarely included in the same sentence as social and economic rights or welfare. The relative silence on social rights in rule-of-law literature is especially striking given the otherwise systematic nurturing of “rights awareness.”<sup>81</sup> In its transnational context a tacit consensus encourages key actors to avoid this vocabulary altogether in favor of “poverty reduction” and “governance.”<sup>82</sup> Despite this almost allergic reaction to the terminology of social and economic rights, there is ample evidence that today’s governments and citizens alike have assumptions about their respective roles that are different from those of earlier generations. Citizens in even moderately functioning states now expect their governments to provide vaccinations for children (the right to health) and some basic public education services that depend upon the central allocation of government resources and distribution among the population (the right to education).

The distinction between civil and political rights on the one hand, and social and economic rights on the other, is controversial and has different impacts in different countries. For example, Nobel Prize-winning economist

Amartya Sen argues that poverty is not simply low income but also the deprivation of freedom and equality.<sup>83</sup> For Sen, being able to exercise fully or to realize these human capabilities and capacities is crucial to improving the quality of people's lives, the goal of development. Quality of life can be assessed and measured by universal norms, such as human dignity, bodily integrity, and basic political rights, liberties, and economic opportunities. This approach to human rights stresses that human beings need the full panoply of social, political, and economic rights in order to exercise optimally their central human functions and capabilities.

A second level of debate involves who the holder of a human right ought to be, an individual or a group? The mainstream view sees rights as a relation between the individual and the state, where the former is a bearer of rights guaranteed by, or held against, the latter. In this view there are no grounds for arguing that liberal societies should subsidize minority rights, because group boundaries may become individual barriers that protect a group's culture from insiders' questioning by suppressing the choices of an individual and limiting the choices of future generations for the benefit of their elders.<sup>84</sup> Others find group rights to be philosophically justified on the basis that human identity derives from one's ethnic or cultural group. Proponents of group rights prioritize legal protection of markers of group of identity, such as government funding for teaching a minority language in schools.<sup>85</sup> Hierarchies within the group pose a problem for negotiating group rights within a dominant society, often since the members doing the negotiating are an elite who may not represent the interests of other members.<sup>86</sup>

In the chapters that follow, I will develop arguments that law has a critical role to play in these debates and that the philosophical premises of the international human rights system have continued validity. The correct response to the critiques of international human rights is to retain the values embodied in the international human rights system while adapting legal institutions and methodologies to meet contemporary challenges. In the Western tradition human rights do two things: first, they express norms of conduct and, second and equally important, they articulate the underlying justification for those norms. The evolution of Western rights is a legal tradition, legitimating certain kinds of legal moves and empowering certain kinds of people to make them, but equally important it is a moral tradition that stretches from classical Greek and Roman writings about political organization through the European secular and scientific revolutions that still inform modern constitutions.

In this opening chapter I have set out the paradox of human rights today, a fast-developing topic of political thought with particular roots in European history that encounters three contemporary critiques. Sovereignty, civil society, and multiculturalism each pose a challenge to crafting a workable legal apparatus for human rights.

Twentieth-century confidence in universal human rights, even in a pluralistic world, has led to the creation of an international legal system that seeks to promote and sometimes even enforce human rights. Chapter 2 looks at the advantages and disadvantages of this system and concludes that a new institutional feature, the hybrid court, can instruct institutional development of human rights under today's conditions of pluralism.

Chapters 3, 4, and 5 set out a three-part agenda for refinement of the international human rights notions, methods, and institutions. Chapter 3 takes up the sovereignty critique and addresses the consequences of globalization on sovereignty. I argue that the legal and political story about the development of the modern state has overlooked key aspects that are vital for contemporary conditions. Sovereignty today should be understood as relational rather than autonomous. Humanitarian intervention and promotion of democracy ought not be seen as interchangeable, either philosophically or pragmatically.

Chapter 4 takes up the civil society critique and examines the claim that law has been displaced by civil society and economic activity. I argue that a rapidly changing world order, one with dynamic economic relations and occasional catastrophic collective security problems, more than ever needs a stronger human rights structure, one that can wrestle with both the sovereignty and the cultural identity issues. I offer "margin of appreciation" as an adjudicative approach that can assist human rights courts to weigh claims of autonomous sovereignty and cultural identity.

Chapter 5 takes up the multicultural critique and argues for the enhancement and development of the regional system of human rights courts. Regionalism is already a force that has adjusted to the era of global trade relations and regional security. Adapting the insight of hybrid courts to include the articulation and administration of human rights is best rooted in principled human rights variation. I argue that properly designed regional human rights courts are uniquely suited to adjudicate human rights claims for cultural exceptionalism.

Chapter 6 draws these themes together and suggests how a multipronged approach might be applied to some controversial international human rights issues.