

COMMENTS

POWERFUL STATES, CUSTOMARY LAW AND THE EROSION OF HUMAN RIGHTS THROUGH REGIONAL ENFORCEMENT

INTRODUCTION

All people share a desire to live free from the horrors of violence, famine, disease, torture, and discrimination. Human rights are foreign to no culture and intrinsic to all nations. They belong not to a chosen few, but to all people. It is this universality that endows human rights with the power to cross any border and defy any force. Human rights are also indivisible; one cannot pick and choose among them, ignoring some, while insisting on others. Only as rights equally applied can they be rights universally accepted.

-Kofi Annan, Secretary General of the United Nations¹

With the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948,² the international community formally committed itself to worldwide protection of human rights. Since then, regional human rights arrangements have been developed, taking into account the specific social and cultural characteristics of each region of the world.³ While the international community has applauded the successes of these regional systems,⁴ such efforts are actually a step in the wrong direction. By decentralizing human rights enforcement away from the United Nations (UN) system, human rights, once heralded as universal values that cannot vary from nation to nation or from region to region, are now becoming increasingly region-specific. While cultural differences must be kept in mind when universal human rights standards are applied and violators are prosecuted, the expanding gulf between those rights espoused

1. Kirsten Hastrup, *The Quest for Universality: An Introduction*, in HUMAN RIGHTS ON COMMON GROUNDS: THE QUEST FOR UNIVERSALITY 1, 21 (Kirsten Hastrup ed., 2001).

2. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

3. See discussion *infra* Parts II(B), III.

4. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811, 849-50 (2003).

by one state and those espoused by another will only lead to the marginalization of rights.

The purpose behind the creation of international human rights law was to bind the states of the world together for the protection of individuals worldwide.⁵ The current focus on regional human rights systems has undermined this purpose of international human rights law by drawing arbitrary boundaries between people. These boundaries exclude some people from enjoying rights granted to citizens of other states. When human rights norms are formed and developed by customary international law, those states and regions with the power to influence custom formation have the power to define human rights. If the process of decentralization continues on its current path, those rights valued and protected only by less powerful regions of the world (primarily the Developing Countries) will disappear completely from international human rights discourse, being replaced instead by the will of the powerful. Rather than diverting attention and resources from the UN system of universal rights, states should work toward a more democratized UN, wherein the voices of all states are heard. Only then will human rights truly be “human” because they will be applied to all peoples.

This comment discusses the marginalization of human rights that will continue if the current trend toward regionalization continues. Part I provides background on two competing theories of human rights: universalism and cultural relativism. It is the debate between these competing philosophies that has led to the regionalization of human rights enforcement. Part II describes the established systems for enforcing human rights on the global level and on the regional level. Part III compares the regional human rights systems, drawing attention to similarities and differences in the rights contained in regional human rights charters. Part IV discusses the marginalization of economic, social and cultural rights resulting from the division of the draft International Covenant on Human Rights into two separate treaties. Part V discusses the ways in which customary international law is formed, and the ways in which powerful states can influence customary law. Finally, Part VI discusses the marginalization of human rights resulting from the formation of customary law by regional human rights systems.

5. See UDHR, *supra* note 2, pmb1.

I. UNIVERSALISM VS. CULTURAL RELATIVISM

International human rights scholars generally fall into two ideological categories: universalists and cultural relativists.⁶ Universalists believe a set of legal norms exists and should be applied universally to all persons.⁷ Human rights are seen as universal because they “adhere to the human being by virtue of being human, and for no other reason.”⁸ Accordingly, human rights cannot vary from state to state or individual to individual. They are to be applied equally and similarly to all persons, regardless of cultural differences. In attempting to define “human rights,” the universalist scholar Louis Henkin⁹ stated:

To call them human suggests that they are universal: they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender or race, class or status. To call them “rights” implies that they are claims “as of right,” not merely appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved. They are more than aspirations, or assertions of “the good,” but claims of entitlement and corresponding obligation in some political order under some applicable law¹⁰

In other words, rights are inherent in every individual, and all individuals are entitled to the protection of those rights. Since rights attach to people because they are human, and not because they belong to particular societies, there can be no cultural or regional variations between human rights.¹¹ Hence, rights inherent in a person born in Africa must be the same rights inherent in a person born in Europe. The rights to which a person is entitled are not defined by the society in which he lives nor the culture he possesses.¹² Rather, they are defined

6. See Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT’L L. 311 (2004). International scholars have also referred to cultural relativism as “regionalism.” JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW 5 (2003).

7. Camilla Elisabeth H. Kjeldsen, *Legal and Functional Universality*, in HUMAN RIGHTS ON COMMON GROUNDS: THE QUEST FOR UNIVERSALITY 39, 40 (Kirsten Hastrup ed., 2001).

8. Rhoda Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 81 (Abdullahi An-Na’im ed., 1991).

9. See Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17 (1999) (applauding the UDHR for universalizing human rights, a concept that had previously been viewed as purely American or French). Henkin states, “The Universal Declaration is a universal document for universal rights for all human beings in all societies.” *Id.*

10. Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1582 (1981).

11. Curran, *supra* note 6, at 316.

12. EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 3 (2001).

by virtue of his humanity.¹³ Accordingly, “human rights norms transcend cultural boundaries’ . . . [so states] are not permitted to pick and choose the rights applicable to (and enforceable by) their citizens.”¹⁴

In contrast, cultural relativists believe rights are defined by the particular cultural, political and social context in which one lives.¹⁵ Relativists assert that because there are no universally shared cultural values and norms, there can be no universal rights.¹⁶ Any system of human rights protection must “take into full account the individual as member of the social group of which he is part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.”¹⁷ Human rights “derive their meaning as values *entirely* from the concrete historical contexts and specific cultures in which they operate.”¹⁸ Because there are no specific trans-cultural rights or values, no state is justified in imposing its cultural ideas of right on any other state.¹⁹ As the Chinese delegate to the World Conference on Human Rights in Vienna expressed, “One should not and cannot think the human rights standard and model of certain countries as the only proper ones, and demand all other countries to comply with them.”²⁰ Any attempt to define rights in terms of universality “infringes on a State’s right to autonomy.”²¹

Cultural relativists often describe the universal view of human rights as a form of moral or “cultural imperialism.”²² They argue that

13. For a discussion of different definitions of universality, see generally Kjeldsen, *supra* note 7, and BREMS, *supra* note 12, at 4.

14. Curran, *supra* note 6, at 316 (quoting Susannah Smiley, *Taking The “Force” Out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law*, 29 CAL. W. INT’L L.J. 339, 344 n.51 (1999)).

15. *Id.*; REHMAN, *supra* note 6, at 5.

16. HENRY J. STEINER & PHILIP ALSTON, *Comment on the Universalist-Relativist Debate*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 366, 367 (2d ed. 2000).

17. MARY ANN GLENDON, ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 222 (2001) (quoting The American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947)).

18. PATRICK JAMES FLOOD, THE EFFECTIVENESS OF UN HUMAN RIGHTS INSTITUTIONS 18 (1998).

19. STEINER & ALSTON, *supra* note 16; Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 TOURO INT’L L. REV. 1, 6-7, 25 (2001).

20. Liu Hiaqiu, Head of the Chinese Delegation, Address at the World Conference on Human Rights, Vienna (June 14-25, 1993), *quoted in* Klein, *supra* note 19, at 6.

21. Curran, *supra* note 6; Smiley, *supra* note 14.

22. Renu Mandhane, *The Use of Human Rights Discourse to Secure Women’s Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 299 (2004); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 217 (1999); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 20, 58, 76 (2001).

the values of one culture should not be imposed on another culture, because to do so would infringe on a state's right to autonomy (including the right to define culturally acceptable practices).²³ If such imperialism is allowed, relativists fear, culture will become so diluted that it will lose all meaning.²⁴ "[T]he push to universalization of norms," arguably will "destroy diversity of cultures and hence . . . amount to another path toward cultural homogenization in the modern world."²⁵

II. BACKGROUND TO HUMAN RIGHTS SYSTEMS

A. *The United Nations System*

Though some scholars may argue there cannot be a universal set of human rights binding and enforceable on all states, due to the rich cultural differences between states and peoples, the international community committed itself to such a universal system by adopting the Universal Declaration of Human Rights.²⁶ This document arose out of a desire to elaborate on the vague references made to human rights in the Charter of the United Nations.²⁷ After the world was awakened to the atrocities committed during World War II, the international community dedicated itself to preventing similar atrocities from occurring in the future by establishing a system whereby human rights could be protected and abuses punished internationally.²⁸

The preamble to the Charter of the United Nations (Charter) states, "the peoples of the United Nations [have] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and . . . to [establish] international machinery" to ensure the protection and promotion of human rights and "the economic and social advancement of all peoples."²⁹ Article 1 of the Charter states, one of the purposes of the United Nations is "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinc-

23. Curran, *supra* note 6, at 315.

24. STEINER & ALSTON, *supra* note 16.

25. *Id.*

26. UDHR, *supra* note 2.

27. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 12 (1999).

28. *Id.* at 36-37; ROSEMARY FOOT, *RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA* 31 (2000).

29. U.N. CHARTER *pmb.*, available at <http://193.194.138.190/html/menu3/b/ch-cont.htm> (last visited Mar. 12, 2005).

tion as to race, sex, language, or religion”³⁰

With these statements, the member-states of the newly developed UN expressed their desire to protect human rights, but did not define exactly what qualified as “human rights.”³¹ To accomplish this goal, the Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly three years later.³² This non-binding declaration was drafted as a “common standard of achievement for all peoples and all nations,”³³ representing the fundamental values shared by all states. Originally proposed as the “International Declaration of Human Rights,” the title was changed to better reflect the truly universal nature of the human rights it espoused.³⁴

The UDHR professes, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience”³⁵ This implies that individuals are born with inherent human rights by virtue of their being born human (*i.e.*, with “reason and conscience”).³⁶ The declaration goes on to list those human rights to which every person is entitled, regardless of their nationality, state of origin, race, sex, or other status.³⁷ As such, the UDHR employs a universalist approach to human rights.

Because the UDHR took the form of a non-binding declaration, it was later supplanted by two treaties: the International Covenant on Civil and Political Rights (ICCPR)³⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁹ Together, these three documents make up the International Bill of Rights.⁴⁰ Though

30. *Id.* art. 1, para. 3.

31. *See id.*

32. UDHR, *supra* note 2.

33. *Id.* pmb1.

34. MORSINK, *supra* note 27, at 33.

35. UDHR, *supra* note 2, art. 1.

36. MORSINK, *supra* note 27, at 296.

37. UDHR, *supra* note 2, art. 2 (including “the right to life, liberty and the security of person,” *id.* art. 3, the “right to recognition everywhere as a person before the law,” *id.* art. 6, the right “to a fair and public hearing by an independent and impartial tribunal,” when charged with a criminal offense, *id.* art. 10, the “right to freedom of movement and residence,” *id.* art. 13, para. 1, the “right to a nationality,” *id.* art. 15, para. 1, the “right to own property,” *id.* art. 17, para. 1, the “right to marry,” *id.* art. 16, and the “right to freedom of opinion and expression” *id.* art. 19.).

38. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 52, U.N. Doc. A/6316 (1966), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 Annex (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 49, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ideological conflict that led to the creation and the continuing disparate enforcement of these two covenants is discussed *infra* Part IV.A.

40. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L &

the UDHR does not have the binding effect of a treaty, it has become the source of international legal obligations because it has risen to the level of customary international law.⁴¹ In particular, the preamble to the UDHR is significant because “it serves as part of the positive statement of international human rights law that is the whole of the Declaration.”⁴² Some scholars claim, in addition to forming part of the body of customary international law, the UDHR also derives universal binding force from the UN Charter itself.

The binding effect of the UDHR is a result of the fact that human rights protection is set out in the UN Charter as one of the purposes behind the UN itself. The UDHR has been unanimously accepted by the members of the organization in 1948, as specified and concretized in the rights referred to in the Charter. The Charter is binding on all members of the international community in virtue of their ratification of the Charter. Therefore, also the norms of the UDHR may be said to derive a universally binding force from the Charter.⁴³

The international community has accepted the UDHR as an elaboration of those human rights intended to be protected by the UN Charter. Since the UDHR merely clarifies the intentions of those who drafted the UN Charter, it receives binding force through the Charter.

The International Bill of Rights is enforced by a system of monitoring bodies established by the UN Charter and human rights treaties. Article 28 of the ICCPR established a Human Rights Committee (HRC) to monitor international compliance with the treaty.⁴⁴ States-parties to the Covenant submit reports to the HRC on “the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights”⁴⁵ The ICESCR provides that the Economic and Social Council is responsible for monitoring state compliance with the Covenant.⁴⁶ Specialized UN treaties, such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁴⁷ the Convention on the Elimination of All Forms of Discrimination against

COMP. L. REV. 157, n.1 (2004).

41. Johannes van Aggelen, *The Preamble of the United Nations Declaration of Human Rights*, 28 DENV. J. INT’L L. & POL’Y 129, 132 (2000). The formation of customary law and its binding effect is discussed below. See *infra* Part IVA.

42. *Id.* at 133.

43. Kjeldsen, *supra* note 7, at 46 (citations omitted).

44. ICCPR, *supra* note 38, art. 28.

45. *Id.* art. 40.

46. ICESCR, *supra* note 39, art. 16.

47. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

Women (CEDAW),⁴⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT),⁴⁹ and the Convention on the Rights of the Child (CRC),⁵⁰ establish special bodies to aid in implementing the treaties.

In addition to these treaty bodies, the UN Commission on Human Rights,⁵¹ the High Commissioner for Human Rights,⁵² and other subsidiary bodies⁵³ actively monitor human rights on the universal level. The Commission on Human Rights appoints special rapporteurs and working groups to investigate possible human rights violations in certain regions of the world, or in certain thematic areas.⁵⁴ Communication and complaint procedures allow states and individuals to report violations to the appropriate UN body or organ.⁵⁵ Once informed of state human rights violations, the UN can pass resolutions requiring states to comply with international human rights obligations, monitor state compliance with UN recommendations and impose economic or military sanctions on violator states.⁵⁶ In addition, the establishment of the International Criminal Court allows individuals who violate human rights to be tried and to be punished.⁵⁷

48. Convention on the Prevention of all Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, *opened for signature* Dec. 18, 1979, U.N. Doc. A/RES/34/180 (1979), *available at* <http://193.194.138.190/html/menu3/b/e1cedaw.htm> (last visited Mar. 10, 2005).

49. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR 3d Comm., Supp. No. 51, at 197, 93rd plen. mtg., *opened for signature* Dec. 10, 1984, U.N. Doc. A/RES/39/46 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985), *available at* http://193.194.138.190/html/menu3/b/h_cat39.htm (last visited Mar. 10, 2005) [hereinafter CAT].

50. Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/44/25 (1989), *available at* <http://www.un.org/documents/ga/res/44/a44r025.htm> (last visited Mar. 10, 2005).

51. MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 104-07 (2003); REHMAN, *supra* note 6, at 35-37; STEINER & ALSTON, *Comment on Charter Organs*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 16, at 597, 600-01; FLOOD, *supra* note 18, at 38-41.

52. NOWAK, *supra* note 51, at 133-34; STEINER & ALSTON, *supra* note 16, at 599.

53. *See* NOWAK, *supra* note 51, at 104-47.

54. Office of the High Commissioner for Human Rights, *Country and Thematic Special Rapporteurs (Extra-Conventional Mechanisms)*, at <http://www.unhchr.ch/html/menu2/xtraconv.htm> (last visited Mar. 10, 2005); FLOOD, *supra* note 18, at 41-43.

55. NOWAK, *supra* note 51, at 99-102; REHMAN, *supra* note 6, at 37-45; ANTONIO CASSESE, INTERNATIONAL LAW 363-65 (2001); STEINER & ALSTON, *The UN Commission's Main Procedures for Responding to Violations*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 16, at 611, 612; P.R. GHANDHI, THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION 48-79 (1998) (discussing the individual communication procedure under the ICCPR).

56. *See generally* REHMAN, *supra* note 6, ch. 2.

57. *See Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), *available at* <http://www.un.org/law/icc/statute/romefra.htm> (last visited Mar. 10,

B. The Regional Systems

In an attempt to link human rights more closely with cultural differences among states, states concentrated in various world regions established systems of enforcing human rights on the regional level. The regional systems currently functioning are: the European system,⁵⁸ the Inter-American system,⁵⁹ the Arab system⁶⁰ and the African system.⁶¹ While Asia does not yet have a regional system in place, there are indications such a system will be established in the future.⁶² A regional charter established each of these systems and, except for the Arab system, each has a judicial mechanism in place to try human rights violators.⁶³ The regional charters include lists of rights that are protected within each respective system, and provide for procedures by which individuals can seek redress for violations.⁶⁴ The systems have met with varied success, the discussion of which goes beyond the scope of this comment. Regardless of the apparent success of some of these regional systems, the current focus on regional human rights arrangements is actually a retrogressive step in the realization of human rights because the regionalization of rights will result only in the mar-

2005).

58. See Maxime Tardu, *The European Systems for the Protection of Human Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 135 (Janusz Symonides ed., 2003).

59. See SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (1992); Hugo Caminos, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 165 (Janusz Symonides ed., 2003).

60. See Bahey el Din Hassan, *Regional Protection of Human Rights in the Arab States In Statu Nascendi*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 239-247 (Janusz Symonides ed., 2003).

61. See Daniel D.C. Don Nanjira, *The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 213 (Janusz Symonides ed., 2003); Vincent O. Nmehielle, *Development of the African Human Rights System in the Last Decade*, 11 HUM. RTS. BRIEF 6 (2004).

62. Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 407, 413-18 (1998).

63. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/Convention/webConventionENG.pdf> (last visited Mar. 10, 2005) [hereinafter European Convention]; American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]; Arab Charter on Human Rights, Sept. 15, 1994, reprinted in 18 Hum. Rts. L.J. 151 (1997), available at <http://www1.umn.edu/humanrts/instreet/arabhrcharter.html> (last visited Mar. 10, 2005) [hereinafter Arab Charter].

64. See European Convention, *supra* note 63; American Convention, *supra* note 63; African Charter, *supra* note 63; Arab Charter, *supra* note 63.

ginalization of rights in less powerful regions, as addressed below.

III. COMPARISON OF REGIONAL HUMAN RIGHTS SYSTEMS

Some rights have reached a level of universal acceptance, as evidenced by the fact they appear in nearly all human rights instruments. The right to be free from racial discrimination, for example, is respected by all regional and universal human rights systems.⁶⁵ Similarly, the right to be free from torture and cruel, inhumane or degrading punishment has reached the level of universal acceptance,⁶⁶ along with the right not to be held in slavery or involuntary servitude.⁶⁷ Genocide is also universally condemned as one of the gravest of all human rights violations.⁶⁸

All regional human rights instruments include rights relating to fair trials,⁶⁹ the right to personal liberty and security⁷⁰ and the right to life.⁷¹ While facially it would appear that these rights are truly universal because they are protected by all regional systems, they are subject to differing interpretations. As stated by the Minister of Foreign Affairs of Singapore at the World Conference on Human Rights in Vienna, "There may be a general consensus [about human rights]. But this is coupled with continuing and, at least for the present, no less important conflicts of interpretation."⁷² Though some rights are included in all regional human rights instruments, they may still be in-

65. See U.N. CHARTER art. 1, para. 3, available at <http://193.194.138.190/html/menu3/b/ch-cont.htm> (last visited Mar. 12, 2005); UDHR, *supra* note 2, art. 2; European Convention, *supra* note 63, art. 14; American Convention, *supra* note 63, art. 24; African Charter, *supra* note 63, art. 2; Arab Charter, *supra* note 63, art. 2; CERD, *supra* note 47.

66. UDHR, *supra* note 2, art. 5; European Convention, *supra* note 63, art. 3; American Convention, *supra* note 63, art. 5, para. 2; African Charter, *supra* note 63, art. 5; Arab Charter, *supra* note 63, art. 13; CAT, *supra* note 49.

67. UDHR, *supra* note 2, art. 4; European Convention, *supra* note 63, art. 4; American Convention, *supra* note 63, art. 6; African Charter, *supra* note 63, art. 5; Arab Charter, *supra* note 63, art. 31.

68. IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 173 (2001); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III)A, Dec. 9, 1948, 78 U.N.T.S. 277 (1951).

69. European Convention, *supra* note 63, art. 6; American Convention, *supra* note 63, art. 8; African Charter, *supra* note 63, art. 7; Arab Charter, *supra* note 63, art. 7.

70. European Convention, *supra* note 63, art. 5; American Convention, *supra* note 63, art. 7; African Charter, *supra* note 63, art. 6; Arab Charter, *supra* note 63, art. 8.

71. European Convention, *supra* note 63, art. 2; American Convention, *supra* note 63, art. 4; African Charter, *supra* note 63, art. 4; Arab Charter, *supra* note 63, art. 5.

72. Michael Kirby, *Indicators for the Implementation of Human Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 325, 326 (Janusz Symonides ed., 2003) (alteration in original) (quoting Wong Kan Seng, Minister of Foreign Affairs of the Republic of Singapore, "The Real World of Human Rights" address to the World Conference on Human Rights, Vienna (June 1993)).

terpreted differently, and thus, not equally protected.

Aside from the handful of rights protected by all regional human rights bodies, there are a large number of rights that do not have universal acceptance. The American Convention is the only human rights instrument to grant a person the right “to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”⁷³ In an attempt to rid itself of the continuing effects of colonization, the African Charter draws specific attention to the right of all peoples to an existence,⁷⁴ and the right of colonized or oppressed peoples “to free themselves from the bonds of domination.”⁷⁵ The African Charter also requires state-parties to “undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies.”⁷⁶ The Arab Charter includes the right “to form trade unions,”⁷⁷ the right “of access to public office in his country,”⁷⁸ and the right “to enjoy literary and artistic works and to be given opportunities to develop his artistic, intellectual and creative talents.”⁷⁹ While each of these rights is valuable and could be described as a human right deserving of universal enforcement, their inclusion in regional human rights documents is problematic, because each of these rights is only protected in one region of the world. Individuals in other regions are not entitled to such protection.

One of the most controversial and potentially problematic aspects of regional enforcement systems is the focus some systems place on duties, in addition to rights.⁸⁰ Chapter II of the African Charter on Human and Peoples’ Rights deals exclusively with the duties every individual owes to the state and the society.⁸¹ The chapter begins by stating, “Every individual shall have duties toward his family and society, the State and other legally recognized communities and the international community.”⁸² The Charter further provides, individuals shall have the duty “not to compromise the security of the State whose national or resident he is,”⁸³ “to serve his national community by plac-

73. American Convention, *supra* note 63, art. 10.

74. African Charter, *supra* note 63, art. 20, para. 1.

75. *Id.* para. 2.

76. *Id.* art. 21, para. 5.

77. Arab Charter, *supra* note 63, art. 29.

78. *Id.* art. 33.

79. *Id.* art. 36.

80. Nmehielle, *supra* note 61, at 7.

81. African Charter, *supra* note 63, arts. 27-29.

82. *Id.* art. 27, para. 1.

83. *Id.* art. 29, para. 3.

ing his physical and intellectual abilities at its service,"⁸⁴ and "to preserve and strengthen positive African cultural values in his relations with other members of the society."⁸⁵

While the notion of duties was not completely foreign to the concept of human rights prior to the enactment of the African Charter,⁸⁶ the Charter went "beyond the conventional notion that duties may be correlative to rights, . . . [by] defining duties that are not simply the 'other side' of individual rights, and that run from individuals to the state as well as to other groups and individuals."⁸⁷ Many scholars view the African Charter's imposition of duties on the individual as problematic because it can be used by a state to actually infringe on the rights of the individual.⁸⁸ The duties spelled out in Articles 27 through 29 of the Charter "could be read as intended to recreate the bonds of the pre-colonial era among individuals and between individuals and the state."⁸⁹ Critics of the inclusion of duties in the Charter fear states may "capitalize on the duty concept to violate other guaranteed rights."⁹⁰ Individual duties may be used in this way to trump individual rights when the two come into conflict.⁹¹

The American Convention on Human Rights also contains a chapter on "Personal Responsibilities."⁹² Article 32 of the American Convention states, "Every person has responsibilities to his family, his community, and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."⁹³ The European Convention on Human Rights and Fundamental Freedoms, on the other hand, makes no reference to individual duties.⁹⁴ The European Convention lists only rights that the state owes to each individual citizen.⁹⁵

These differences between regional systems create disparities in

84. *Id.* art. 29, para. 2.

85. *Id.* art. 29, para. 7.

86. See generally Jordan J. Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

87. STEINER & ALSTON, *Comment on Comparisons Between Rights and Duties in the African Charter and in Other Human Rights Instruments*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 16, at 354, 355 (2d ed. 2000).

88. See Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995).

89. *Id.* at 368.

90. *Id.* at 373.

91. *Id.*

92. American Convention, *supra* note 63, art. 32.

93. *Id.*

94. See European Convention, *supra* note 63.

95. *Id.*

the interpretation and enforcement of human rights. Those rights granted to individuals in one system are often different from the rights granted to individuals in another system. The creation of these regional human rights systems has drawn the focus away from the universal nature of rights and led to disparate treatment of individuals from region to region.

IV. THE MARGINALIZATION OF RIGHTS OCCURRING WHEN ARBITRARY LINES ARE DRAWN: THE DECISION TO DIVIDE ONE COVENANT INTO TWO

After the United Nations Commission on Human Rights (UNCHR) composed the UDHR, it began the task of giving legal force to the ideals pronounced in that document. It accomplished this by drafting two international treaties: the International Covenant on Civil and Political Rights⁹⁶ and the International Covenant on Economic, Social and Cultural Rights.⁹⁷ When originally drafted, however, these two treaties formed one single covenant, containing both categories of rights.⁹⁸ The UNCHR saw no need to divide the rights into categories arbitrarily, since all rights are deserving of equal protection and thus “all rights should be promoted and protected at the same time.”⁹⁹

Those who favored drafting a single covenant feared that dividing the document into two separate treaties would create a hierarchy of values, with one category of rights taking precedence over the other.¹⁰⁰ Those with opposing views favoring the creation of two covenants saw the need to distinguish between those categories of rights that are justiciable and those that are aspirational.¹⁰¹ Civil and political rights were viewed as absolute in nature, making them enforceable, while economic, social and cultural rights were merely progressive rights that could not be enforced.¹⁰² This view largely stems from the presupposition that economic, social and cultural rights “are resource-

96. ICCPR, *supra* note 38.

97. ICESCR, *supra* note 39.

98. NOWAK, *supra* note 51, at 78. The UN General Assembly originally decided to include both categories of rights in a single Covenant, but was asked to reconsider its position by the Economic and Social Council. After reconsideration, the General Assembly was convinced to separate the two categories of rights into separate Covenants. *Id.* at 78-79.

99. *Annotations on the Text of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., Annex, Agenda Item 28, pt. II, ch. V, at 8, U.N. Doc. A/2929 (1955).

100. *Id.*

101. *Id.* at 9.

102. *Id.*

intensive and require the direct intervention of governments, whereas civil and political rights do not involve government expenditure but merely entail the government's forbearance from interfering with the rights of the people."¹⁰³

In the face of stark ideological clashes between Western capitalism, with its focus on civil and political rights, and Eastern socialism, with its focus on economic and social rights, the decision was made to divide human rights into two categories.¹⁰⁴ This division led scholars to label civil and political rights as "first generation" rights, while economic, social and cultural rights became "second generation."¹⁰⁵ In essence, first generation rights are those capable of immediate enforcement,¹⁰⁶ while second generation rights are those necessitating years, or even decades, to develop because they require governments to institute positive social policies.¹⁰⁷ This differentiation is reflected in the contrast between Article 2 of the ICCPR and Article 2 of the ICESCR. The ICCPR states, "Each State Party to the present Covenant *undertakes to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . ." ¹⁰⁸ In contrast, the ICESCR states, "Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and cooperation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . ." ¹⁰⁹ Taken together, the plain meaning of these two articles demonstrates states

103. Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. 177, 187 (2002) (citations omitted).

104. For an in depth discussion of the drafting process and ultimate decision to divide the Covenant into two treaties, see MORSINK, *supra* note 27, ch. 1.

105. J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 852 (2003); *see also* Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209, 1224 (2003).

106. *See* Udombana, *supra* note 105, at 1224.

First-generation rights are negative rights, or "immunity claims" by citizens toward the State, in the sense that they limit the power of a government to protect peoples' rights against its power. They relate to the sanctity of the individual and his rights within the socio-political milieu in which he is located. They imply that no government or society should act against individuals in certain ways that would deprive them of inherent political or personal rights, such as the rights to life, liberty, and security of person, freedom of speech, press, assembly, and religion.

Id. (citations omitted).

107. *See id.* at 1224-25; Oloka-Onyango, *supra* note 105, at 874.

108. ICCPR, *supra* note 38, art. 2, para. 1 (emphasis added).

109. ICESCR, *supra* note 39, art. 2, para. 1 (emphasis added).

ratifying both Covenants must immediately provide civil and political rights, but must only express a desire to someday provide economic, social and cultural rights.

Because the ICCPR and ICESCR are independent treaties, each open for signature and ratification by UN member-states, states are given the opportunity to sign one, neither or both.¹¹⁰ By ratifying only the ICCPR, some states have taken this opportunity to provide their citizens with only first generation rights while denying their citizens second generation rights.¹¹¹ In fact, “[n]early twenty years after the coming into force of the [ICESCR], over 30% of African states still [had] not ratified the instrument.”¹¹² While the ratification percentage has improved in recent years, powerful countries, such as the United States, have still failed to ratify the ICESCR.¹¹³ Developed states have been able to perpetuate the belief that economic, social and cultural rights are “prohibitively expensive, convincing less developed states that the path to economic wealth cannot include enforceable” economic, social and cultural rights.¹¹⁴

The division of the originally proposed Covenant into two separate treaties resulted in the marginalization of economic, social and cultural rights.¹¹⁵ These “second generation” rights are provided less weight in international legal discourse, and receive far less enforcement than their “first generation” cousins.¹¹⁶ Members of the international community have not only failed to provide active support of economic, social and cultural rights, but many also “actively hindered the development” of economic, social and cultural rights.¹¹⁷ Much of this is due to the continuing ideological conflict between political systems, which has changed since the end of the Cold War from an East-West divide to a North-South conflict.¹¹⁸ Generally speaking, civil

110. Although both the ICCPR and ICESCR were adopted by the UN General Assembly in the same resolution, they were opened to the UN member-States independently. Article 48 of the ICCPR and Article 26 of the ICESCR state each treaty has been opened for signature by member-States. ICCPR, *supra* note 38; ICESCR, *supra* note 39.

111. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (as of Oct. 1, 2004), at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last visited Mar. 10, 2005) [hereinafter *Status of Ratifications*].

112. Oloka-Onyango, *supra* note 105, at 14.

113. *Status of Ratifications*, *supra* note 111. The United States ratified the ICCPR on Sept. 8, 1992. It signed the ICESCR on Oct. 5, 1977, but has not yet ratified it. *Id.*

114. Agbakwa, *supra* note 103, at 202.

115. *Id.* at 200.

116. Oloka-Onyango, *supra* note 105, at 854-55.

117. Agbakwa, *supra* note 103, at 204.

118. Oloka-Onyango, *supra* note 105, at 853.

and political rights are valued over economic, social and cultural rights by Western nations, such as the United States and many European states.¹¹⁹ Economic, social and cultural rights, on the other hand, are valued over civil and political rights by developing countries, primarily in Africa and Asia.¹²⁰

The increased value of civil and political rights in the eyes of the international community can be seen in the names of the respective UN oversight committees. The Human Rights Committee oversees the ICCPR,¹²¹ while the Committee on Economic, Social and Cultural Rights oversees the ICESCR.¹²² These semantic choices evidence the value placed on civil and political rights, the true “human rights” and the secondary place to which economic, social and cultural rights are relegated.

Though the theoretical equality of rights falling into each of the two categories was reaffirmed by the international community at the World Conference on Human Rights in Vienna in 1993,¹²³ such equality does not exist in practice.¹²⁴ The Vienna Declaration states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹²⁵

Contrary to this declaration, human rights are not globally treated in a fair and equal manner, nor are they protected with the same vigor. Even Human Rights Watch, one of the leading human rights non-governmental organizations,¹²⁶ focused its attention almost exclusively on civil and political rights during the first twenty years of its exis-

119. *Id.*

120. Klein, *supra* note 19, at 31; Bernard H. Oxman & Dinah Shelton, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, 96 AM. J. INT’L L. 937, 941 (2002) (citing the African Commission on Human and Peoples’ Rights statement “collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa”).

121. ICCPR, *supra* note 38, art. 28, para. 1.

122. ICESCR, *supra* note 39, arts. 16-22.

123. *See Vienna Declaration and Programme of Action, World Conference on Human Rights*, U.N. Doc. A/CONF.157/23 (1993) [hereinafter *Vienna Declaration*].

124. *See discussion infra* Part IV.

125. *Vienna Declaration, supra* note 123, para. 5.

126. *See* Human Rights Watch, at <http://www.hrw.org> (last visited Mar. 10, 2005).

tence, and only turned its attention toward addressing economic, social and cultural rights in the past few years.¹²⁷

In countries such as the United States, the right to vote (a political right) is vehemently protected, while the right to “the enjoyment of the highest attainable standard of physical and mental health”¹²⁸ (a social right), or the right to “an adequate standard of living . . . including adequate food”¹²⁹ (an economic right) arguably are not protected with the same dedication. In other countries, such as China and Singapore, the exact opposite is true.¹³⁰ For example, the United States Constitution provides, “Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble,”¹³¹ whereas in China:

[M]any individuals who have done nothing but peacefully express views critical of the Party-state’s actions or policies, or attempted to exercise their freedom of association, even in private meetings, have been sentenced to long prison terms or detained for months or even years without the benefit of any judicial proceedings.¹³²

Similarly, in Singapore the government has been able to prevent public demonstrations of as few as two people by refusing to grant licenses under the Public Entertainment and Meetings Act.¹³³ Under Singapore’s Internal Security Act, persons deemed to be acting in a manner prejudicial to Singapore could be held indefinitely without trial.¹³⁴ However, Singapore’s health system was ranked sixth in the world by the World Health Organization, partially due to the availability of government subsidies to keep healthcare affordable,¹³⁵ while in the United States millions of people live without healthcare due to the overwhelming costs of private health insurance.¹³⁶

127. Human Rights Watch, *Economic, Social and Cultural Rights*, at <http://hrw.org/doc/?t=esc> (last visited Mar. 10, 2005).

128. ICESCR, *supra* note 39, art. 12, para 1.

129. *Id.* art. 11, para 1.

130. Klein, *supra* note 19, at 10.

131. U.S. CONST. amend. I.

132. Human Rights in China Report, *China: Freedom of Association Regulated Away* (June 1, 1999), at <http://www.hrichina.org/public/contents/article?revision%5fid=17154&item%5fid=14324> (last visited Mar 10, 2004).

133. Tai-Heng Cheng, *The Central Case Approach to Human Rights: Its Universal Application and the Singapore Example*, 13 PAC. RIM. L. & POL’Y J. 257, 264-65 (2004).

134. *Id.* at 266.

135. Sonia Kolesnikov, *Singapore Looks to Healthcare Changes*, UNITED PRESS INT’L, May 8, 2002, <http://www.upi.com/view.cfm?StoryID=07052002-113324-1956r>.

136. See Almanac of Policy Issues, *Health Insurance Coverage: 2001*, Sept. 30, 2002, http://www.policyalmanac.org/health/archive/health_insurance_coverage.shtml (adapted from a U.S. Census Bureau Report).

Arguably, individuals are better off in a State committed to protecting at least one category of rights as opposed to protecting no rights at all. However, scholars doubt one category of rights can be enjoyed fully absent protection for the other category.¹³⁷ As one scholar, Shedrack Agbakwa, states:

Since the different rights are interconnected and operate in support of each other, it logically follows that the full realization of one set remains dependent on the realization of the other. In a state of instability resulting from the denial of basic [economic, social and cultural rights], it becomes difficult, if not impossible, to realize civil and political rights, and vice versa.¹³⁸

Another scholar describes the problem by posing the questions: “what does it mean to have a right to vote if one is too hungry to lift the ballot paper[, and] [c]onversely, does it matter that you have a right to food if your freedom to speak out on the lack of it is muzzled?”¹³⁹

Because the decision was made to divide the International Covenant on Human Rights into two separate treaties, economic, social and cultural rights have been marginalized in international discourse and are provided disparate enforcement. When citizens are denied protection of one category of rights, their enjoyment of the other category suffers. Only by uniform and equal enforcement of both the ICCPR and the ICESCR can any human rights truly be protected.

V. HUMAN RIGHTS AND CUSTOMARY INTERNATIONAL LAW

A. Introduction to Customary International Law

In addition to the process of treaty formation that gave birth to the ICCPR, ICESCR and other legally binding international instruments, international law is also shaped by custom. A customary rule is one that gains legal force through general practice accepted as law.¹⁴⁰ Customary rules are based on consensus. When a majority of states expressly or implicitly demonstrate general acceptance of a rule and a

137. See, e.g., Agbakwa, *supra* note 103; Oloka-Onyango, *supra* note 105.

138. Agbakwa, *supra* note 103, at 183.

139. Oloka-Onyango, *supra* note 105, at 858. The idea that civil and political rights cannot be fully realized without the concurrent realization of economic, social and cultural rights has been referred to as the “full-belly thesis.” For an in-depth discussion, see Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights?*, 5 HUM. RTS. Q. 467 (1983).

140. Statute of the International Court of Justice, June 26, 1946, art. 38(1)(b), available at www.icj-cij.org/iccjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm [hereinafter ICJ Statute]; Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, 89-90 (July 25).

belief in its binding force, a customary rule is born.¹⁴¹ General practice does not require universal acceptance, but essentially requires a majority of states to “engage in a consistent practice corresponding with the rule.”¹⁴² This “majority rules” process results in customary rules being created, which bind all states, without the need for all states to consent to such rules.¹⁴³ In fact, states are no longer entitled under international law to defensively claim they are not bound by a customary rule, even if those states expressed opposition to the rule before it was formed.¹⁴⁴

Customary rules can be formed in various ways, either by the adoption of declarations like the UDHR,¹⁴⁵ by uniform practice among states in the absence of any written declaration or by the judicial process.¹⁴⁶

Judicial decisions do not immediately take on the effect of binding customary rules, but are often adopted by states into binding national or multi-national laws.¹⁴⁷ Even in the absence of such express adoption of judicial rulings, states may adopt rules that do not contradict a particular judicial ruling, thus showing consent to be bound by the judicially-formed rule.¹⁴⁸ In this way, “customary rules are capable of binding States which have neither participated in their development or change nor acknowledged their prescriptive force.”¹⁴⁹ Decisions handed down by the courts of various judicial systems also reach the level of binding customary law when they are quoted or relied upon by courts in other systems, thereby legitimizing the rules espoused therein.¹⁵⁰ Though decisions of the International Court of Justice (ICJ)

141. ORIOL CASANOVAS, UNITY AND PLURALISM IN PUBLIC INTERNATIONAL LAW 29 (2001).

142. CASSESE, *supra* note 55, at 123.

143. *Id.*

144. *Id.* at 124.

145. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 2 (1996).

146. CASSESE, *supra* note 55, at 121.

147. *Id.*

148. *Id.* at 120.

149. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 142 (1999).

150. For example, in the *Tadic* case, the ICJ held that joint criminal liability existed in customary international law at the time of *Tadic*’s crimes. Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. INT’L CRIM. JUST. 642, 652 (2004) (discussing Judgment, *Tadic* (IT-94-I-A), Appeals Chamber, 15 July 1999, paras. 185 et seq.). This decision was relied upon by the Court in the *Milutinovic* case to hold Ojdanic criminally liable under a joint criminal liability theory. *Id.* (discussing Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction, *Milutinovic* et. al. (IT-99-37-AR72), Appeals Chamber, 21 May 2003). In some situations, a state’s domestic courts may be asked to apply customary international rules. In order to do so, the courts first must determine

do not create binding precedent, the ICJ nevertheless seeks to maintain judicial consistency, by following its earlier decisions without directly relying on them.¹⁵¹ Accordingly, when the ICJ decides a case based on the rule it pronounced in an earlier case, it gives legitimacy to the rule previously announced and makes it more likely that the rule will be enforced consistently in the future. This process gives the ICJ a strong influence on the shaping of customary law.

Judicial interpretation is one of the key steps in the development of customary international rules. When a court is asked to apply a customary rule, it must first determine whether such rule exists and is binding on those who are parties to the case before it.¹⁵² In making such a determination, the court must look to general State practice to see if the necessary consensus exists.¹⁵³ The ICJ explained in the *Case Concerning Delimitation of Maritime Boundary in the Gulf of Maine Area* that the existence of a binding customary rule is determined by “analysis of a sufficiently extensive and convincing practice” among States.¹⁵⁴ This can be problematic, because what qualifies as “sufficiently extensive” necessarily will depend on the opinion of the court or other body conducting such a determination. What is sufficient practice to evidence a customary rule in the eyes of one court may be different from what would be considered sufficient by another court. It is therefore possible for a court to declare the existence of a customary rule based on fairly limited evidence of state practice, if the court was so inclined. This was the case when the Permanent Court of Justice found the existence of a customary rule in *The Case of the S.S.*

whether such a customary rule has been formed and is binding on the state. This situation is common when the rule in question is contained in a non-self-executing treaty ratified by the state, or a treaty the state has signed but not ratified. One author suggests, to decide whether a state is bound by such a rule, courts should consider the position adopted by the state during relevant treaty negotiations. Whether the state adopted a strictly universalist or cultural relativist position during negotiations of treaties on point can be relevant in deciding whether it would be fair for the state to be bound, because “a nation’s universalist stance during the negotiation of a non-self-executing or non-ratified treaty should serve as strong (indeed, conclusive) evidence of a customary international norm enforceable in that nation’s domestic tribunals.” Curran, *supra* note 6, at 317-18.

151. REHMAN, *supra* note 6, at 21; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 21 (6th ed. 2003).

152. For example, in the *Filartiga* case, the U.S. government argued to the U.S. Court of Appeals for the Second Circuit that there existed a customary international rule prohibiting torture, and that the rule was binding on the government of Paraguay. Memorandum for the United States as Amicus Curiae in *Filartiga v. Pena-Irala*, 19 I.L.M. 585 (1980). The Court agreed with the argument, and held a Paraguayan official guilty of torture. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

153. CASANOVAS, *supra* note 141, at 30.

154. (*Can. v. U.S.*), 1984 I.C.J. 246, 299 (Oct. 12).

“Wimbledon”¹⁵⁵ and the U.S. Supreme Court found the existence of a customary rule in *The Paquete Habana*¹⁵⁶ case, each court relying on the practice of fewer than a dozen states.¹⁵⁷

Since there is no hierarchy between sources of international law, once customary rules are born they bind states to the same degree as treaty law.¹⁵⁸ Customary rules are more dangerous, however, because treaties only bind those states that consent to them (by signature and ratification), while customary laws bind all states.¹⁵⁹ As noted by Michael Byers:

It is generally accepted that rules and procedures set out in human rights treaties apply only to those States which have ratified those treaties. Yet many States and scholars insist that even those States which have failed to ratify international human rights treaties nonetheless do have international human rights obligations.¹⁶⁰

Once international treaties gain broad acceptance and are relied upon by courts, those treaties enter the body of customary law and, consequently, they are binding on all states, even those electing not to ratify them.

Another critical component to consider regarding customary law is the effect that attention by legal scholars and publicists has on custom formation. The Statute of the International Court of Justice (Statute) lists as sources of international law: international convention, international custom “as evidence of a general practice accepted as law” and general principles of law.¹⁶¹ Additionally, the Statute states the court shall use “judicial decisions and the teachings of the most highly

155. (Fr. V. F.R.G.), 1923 P.C.I.J. (ser. A) No. 1 (June 28).

156. 175 U.S. 677, 700 (1900).

157. Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1, 6 (1988).

158. The Statute of the International Court of Justice lists sources of international law that the Court shall apply in its decisions, but does not establish any type of hierarchy between those sources. ICJ Statute, *supra* note 140. The express wording of Article 38 places no source of law as superior to the others. *Id.* art. 38. While some scholars choose to refer to custom as “soft law,” thus downplaying its legal significance, the majority of international scholars refer to both treaty and custom as “primary sources” of law, clearly indicating they have equal, binding force. SEIDERMAN, *supra* note 68, at 28. The only laws that are binding to a higher degree than treaty and custom are rules that have attained the status of *jus cogens*. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334. The international community recognizes these rules as peremptory norms of international law from which no derogation is permitted. REHMAN, *supra* note 6, at 23. Treaties (and other types of binding law) that conflict with *jus cogens* norms are void. *Id.*; BROWNLIE, *supra* note 151, at 488-90.

159. SEIDERMAN, *supra* note 68, at 18-20.

160. BYERS, *supra* note 149, at 43.

161. ICJ Statute, *supra* note 140, art. 38.

qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”¹⁶²

Some legal scholars have asserted publicists are the leading source of customary international law, especially regarding expert testimony addressing customary rules used in United States’ courts.¹⁶³ When United States’ courts decide cases based on the Alien Tort Claims Act (ATCA),¹⁶⁴ they are forced to interpret the ATCA’s applicability to sources of international law, including customary law.¹⁶⁵ In doing so, courts “attempt to ascertain customary international law ‘by consulting the works of jurists, writing professedly on public law . . . or by judicial decisions recognizing and enforcing the law.’”¹⁶⁶ In *The Paquete Habana* case, the United States Supreme Court emphasized the importance of consulting “the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly well acquainted with the subjects” of customary law being considered by the Court.¹⁶⁷ Courts look to the works of jurists “not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”¹⁶⁸ The work of jurists is believed to be a reliable statement of the current state of the law because jurists “are generally impartial in their judgment” and their testimony rests on years of experience and study.¹⁶⁹ Plaintiffs in several cases brought under the ATCA have successfully relied on affidavits from legal scholars that summarize the current state of customary international law.¹⁷⁰

One scholar asserts, because the “most authoritative statements synthesizing customary international law are found in the writings of publicists . . . it is not surprising that United States courts are likely to accept the conclusions of publicists without inquiring carefully into the empirical data from which the expert witness draws his inferences about the content and applicability of international law.”¹⁷¹ Another

162. *Id.*

163. *E.g.*, Lillich, *supra* note 145, at 22-23.

164. 28 U.S.C. § 1350 (2000).

165. Curran, *supra* note 6, at 312.

166. *Id.* at 313 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)); *see also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

167. 175 U.S. 677, 700 (1900).

168. *Id.*

169. *Id.* at 700-01.

170. Beth Stevens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT’L & COMP. L. 191, 199 (1996). *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

171. Lillich, *supra* note 145, at 23 (quoting Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J.

scholar goes even farther to suggest “states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals.”¹⁷² While such an assertion might be a bit of a stretch, the comments of both scholars point to the crucial role of publicists and scholars in creating customary international laws. If a widely respected and well-known author asserts a customary rule exists, the rest of the world is likely to listen, especially if the opinion of that author is cited by a court interpreting international law, as is often the case when United States courts decide cases under the ATCA.

B. *The Effects of Power on Customary Law*

While the formation of customary international norms can be a valuable tool for moving human rights protection forward,¹⁷³ it can also be a double-edged sword. When customary rules are formed and solidified by courts and international legal scholars, one must look carefully at which states are producing the judicial decisions and training the legal scholars. When the courts and scholars who take a principal role in articulating customary human rights norms are primarily Western, only rights valued by Western states will enter the body of customary law.

For many years the most prominent international scholars came almost exclusively from the West (i.e., the United States and Western Europe).¹⁷⁴ This is not due to any form of superior training or intelligence possessed by Western scholars, but rather because Western

INT’L & COMP. L. 205, 212 (1996)).

172. Louis B. Sohn, *The Status and Future of the Customary International Law of Human Rights: Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399, 399 (1996).

173. Many scholars embrace customary international law as a means for progressing human rights, because customary law can form and change to “respond to moral issues and global challenges, such as human rights violations.” Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT’L L. 721, 737 (2004).

174. During the 17th and 18th centuries, political thought was dominated by European philosophers such as Locke (“the father of liberal democracy” and the first to use the term “human rights” within its current meaning), Rousseau, Grotius, Voltaire and Hume, whose theories laid the groundwork for modern human rights law. Kirsten Hastrup, *To Follow a Rule: Rights and Responsibilities Revisited*, in HUMAN RIGHTS ON COMMON GROUNDS: THE QUEST FOR UNIVERSALITY, *supra* note 1, at 58-59; PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS 14-16 (1998); FLOOD, *supra* note 18, at 9-10. Also notable are Thomas Jefferson, whose writing of the Declaration of Independence inspired human rights law throughout Europe, and more recently Rene Cassin and Eleanor Roosevelt, who are credited with drafting and championing the UDHR. LAUREN, *supra*, at 17; van Aggelen, *supra* note 41, at 130; GLENDON, *supra* note 17.

states speak with louder voices in international relations than do less developed and less wealthy states.¹⁷⁵ Leaders from Western states took prominent roles in drafting the UN Charter and international treaties.¹⁷⁶ Western states were responsible for organizing the Nuremberg Tribunal to try Nazi war criminals after World War II.¹⁷⁷ Western states have also been responsible for organizing military interventions into states committing gross human rights violations¹⁷⁸ and for organizing *ad hoc* criminal tribunals to try the culpable leaders of those states.¹⁷⁹ The United States, as the one remaining world super-power, has been able to speak with the loudest voice in international relations, often imposing its will on states that do not have equally prominent roles within the world community.¹⁸⁰

Law is a reflection of power.¹⁸¹ Those who have the most power

175. Analogizing the process of custom formation to the "gradual formation of a road across vacant land," de Visscher wrote, "Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way." CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (1957), quoted in BYERS, *supra* note 149, at 37. States that have such "weight," due to their financial wealth, high level of technological development and influential positions in the U.N., are able to "mark the soil more deeply" in international law. *Id.*

176. Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) As We Know It?*, 15 EUR. J. INT'L L. 813, 821 (2004) (stating the U.S. was largely responsible for creating the normative structure of the UN).

177. The four allied powers responsible for organizing the Nuremberg military tribunal were the U.S., the U.K., France and the Soviet Union. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 170 (1997).

178. IGNATIEFF, *supra* note 22, at 37.

179. Lawrence Eagleburger, the American Secretary of State, was one of the first people to call for the establishment of the International Criminal Tribunal for the Former Yugoslavia. Mutua, *supra* note 177, at 174-75. The United States was also partially responsible for the failure of the UN to intervene in Rwanda to prevent the genocide occurring there, and for refusing to label the Rwandan holocaust as "genocide." *Id.* at 176. Because the decision to establish *ad hoc* tribunals is made by the U.N. Security Council, the five permanent members of the council are able to decide when and where to establish criminal tribunals. China, the one non-American and non-European member of the Security Council, has continually expressed reluctance to create tribunals, and abstained from voting on the resolution that established the Rwanda tribunal. Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169-70 n.8 (1995).

180. Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 783 (2004) (arguing that since the U.S. is the sole remaining superpower, it has the motive to withdraw from international dispute settlement); Johnstone, *supra* note 176, at 815 (stating that because the U.S. is the one remaining superpower, it is reluctant to accept UN constraints on its foreign policy). The U.S.'s position as a permanent member of the U.N. Security Council, with the accompanying veto power, gives it the ability to speak over the will of all other States, with only the four other permanent Security Council members possessing the same power. U.N. CHARTER art. 27, para. 3, available at <http://193.194.138.190/html/menu3/b/ch-cont.htm> (last visited Mar. 12, 2005).

181. Bastiaan de Gaay Fortman, *The Dialectics of Western Law in a Non-Western World*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVES 237, 238 (Jan

make the law and enforce it against the powerless. With respect to international human rights enforcement, no one state is responsible for drafting international treaties or shaping the future of human rights norms, but powerful states can take a prominent role in shaping the future of customary law.¹⁸² While in theory all states are afforded sovereign equality,¹⁸³ and thus equal entitlement to participate in the formation of customary law,¹⁸⁴ powerful states “often find it easier than less powerful States to engage in practice which will significantly affect the development, maintenance and change of customary rules.”¹⁸⁵

The ICJ implicitly recognized that powerful states have more influence on custom formation than less-powerful states in the *North Sea Continental Shelf* cases.¹⁸⁶ Regarding evidence of general state practice, the ICJ stated, “even without the passage of any considerable period of time, a very widespread and representative participation in the [Geneva] convention might suffice of itself, *provided it included that of States whose interests were specially affected.*”¹⁸⁷ The Court did not require universal participation in the applicable convention to find the convention had entered customary international law, but rather required only the participation of those states that were “specially affected” by the convention.¹⁸⁸ Since powerful states have a “broader range and greater frequency of their activities, [they] are more likely than less powerful States to have interests which are affected by any particular legal development,” so they will almost always be “specially affected” within the meaning of the Court.¹⁸⁹ Since the development of customary rules necessarily involves the weighing of evidence of varying state practice, states engaged in a wider range of activities, thus having more state practice to which courts and scholars can look, will have a greater influence on custom formation

Berting et al. eds., 1990). Power, in the sense intended in this comment, refers to international might. The most powerful states are those that possess the greatest amount of wealth and the highest level of economic and technological development, those that engage in the most wide-reaching forms of international trade, and those with the military power and prowess to engage in international military interventions, be they aggressive, humanitarian, or peace-keeping in nature.

182. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 78 (2d ed. 1993).

183. U.N. CHARTER, art. 2, para. 1, available at <http://193.194.138.190/html/menu3/b/ch-cont.htm> (last visited Mar. 12, 2005).

184. BYERS, *supra* note 149, at 37.

185. *Id.* at 205.

186. *Id.* at 37-38.

187. *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20) (emphasis added).

188. *Id.*

189. BYERS, *supra* note 149, at 38.

than states engaged in limited activities.¹⁹⁰ In this way, “the customary process ‘gives weight to effective power and responsibility.’”¹⁹¹

In addition to the implicit weight given to the practice of powerful states in assessing the existence of a customary rule, arguably special weight is (or should be) *explicitly* given to the practice of such states. One scholar claims, special weight should be given to “the size of the State, the volume of its international relations, and, in general, the contribution that it makes to the development of international law.”¹⁹² In general, “when authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them.”¹⁹³ If this is the case, then powerful states, who are heavily involved in UN and other international activities, have the ability to influence the formation of customary law so that it best serves their interests.

VI. THE INEVITABLE DISAPPEARANCE OF DEVELOPING COUNTRIES’ RIGHTS

The movement away from centralized, UN-governed enforcement of human rights law will result in the disappearance of rights valued only by developing countries. Because customary international law is the primary means for establishing human rights norms,¹⁹⁴ states and regional systems having the power to influence customary law have the ability to shape human rights. Regional human rights systems with more developed courts to enforce human rights violations, which are “better at publishing their actions and related legal opinions than others,” will produce the judicial decisions to which the rest of the world will look, as evidence of customary norms.¹⁹⁵ Systems with less developed court systems will not have the ability to produce the quality or quantity of judicial decisions of more developed systems. Legal scholars who hail from the states and regions with the most prestigious schools and the most highly regarded legal journals are able to produce works regarded worldwide as authoritative statements of cus-

190. *Id.* at 205; WOLFKE, *supra* note 182, at 78.

191. BYERS, *supra* note 149, at 205.

192. MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 32-33 (2d ed. 1997).

193. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 537 (1993).

194. Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 105 (1987) (labeling custom as the “primary source of international law”).

195. BYERS, *supra* note 149, at 39.

tomary law, while scholars from other regions are not.

Because human rights are increasingly being divided along regional lines, the power disparities between states will have an even larger impact than they have in the past. In establishing regional human rights arrangements, states are setting themselves apart from others as distinctly different, and placing special focus on rights not protected by other systems. Regions that differentiate themselves by focusing on distinctly different rights are setting up a clear “us versus them” dichotomy. Regions labeled as “the other” in the international community will only increase their marginal position in the world. Similarly, the only rights they strive to protect will be marginalized.

Just as economic, social and cultural rights were relegated to second-class status when they were separated and distinguished from civil and political rights, region-specific rights will take a secondary position to universal rights. Rights deemed to have reached the level of universal acceptance by the courts and legal scholars of powerful regions will take precedence over rights protected only by one or two regions of the world, especially when those regions are composed primarily of under-developed, less powerful states.

CONCLUSION

When arbitrary lines are drawn to distinguish human rights, whether along thematic or along regional lines, one set of rights takes precedence over the other. This was the case when the International Covenant on Human Rights was divided into the ICCPR and ICESCR, and it will be the case when the European human rights system, the Inter-American human rights system, and the African human rights system become the primary means of human rights enforcement. In order to prevent the further marginalization of human rights, the world community must move back towards the centralized UN human rights system.

The United States and the European Union currently play the most prominent role in the human rights regime.¹⁹⁶ If this monopolization continues, as will be the case if the European Union continues to gain power, rights that are non-Western in origin will disappear from human rights discourse. As one author describes, “Western monopolization of the debates directly results in a marginalization of alternative visions of society.”¹⁹⁷ When the opinions and judicial decisions of

196. FOOT, *supra* note 28, at 58.

197. J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Pros-*

powerful, Western states dominate international legal discourse, those influential states are allowed to create the customary norms that bind the rest of the world. The current emphasis on regional human rights systems has detracted from the universal nature of human rights, and has allowed states to turn inalienable human rights into merely regional rights. Those rights protected only by less powerful regions are marginalized in legal discourse, and naturally will disappear from it entirely.

In order to prevent the marginalization of rights that is currently underway, regional human rights arrangements must be abandoned in favor of a centralized, universal UN system. In the words of Kofi Annan, "It is the universality of human rights that gives them their strength."¹⁹⁸ Only through a universal system of human rights enforcement will human rights remain "human," as opposed to "European," "African" or "American."

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pects and Problems for a Democratic Global Future in the New Millennium, 15 AM. U. INT'L L. REV. 151, 180 (1999).

198. Kofi Annan, *Message by the United Nations Secretary-General*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 18 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998).

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