ONE

NORM SETTING IN INTERNATIONAL LAW AND HUMAN RIGHTS

Human rights advocates and those who seek an elaborate and effective human rights system confront an apparent slowing down of the traditional standard-setting forums and processes. Human rights standards were set at a torrid pace from the 1950s through the 1980s, but since then, the clip at which new standards have been made has considerably slowed. This is partly because most, though by no means all, basic rights have been recognized. But there are other reasons why norm setting has slowed and become harder. For one, more actors complicate the negotiating process. What does this mean for the future of standard setting? Will these reasons doom any fresh attempts at norm creation, or will they spur novel and innovative thinking in the formulation of standards? Should human rights actors abandon further work in standard setting and instead concentrate on the enforcement of existing norms? Is it, in this respect, plausible to argue that adequate standards have already been set in virtually all areas of concern, and that implementation should now become the overriding concern of states, human rights workers, and thinkers? In other words, is the era of standard setting in human rights over, or is it entering a new phase? Predictably, there are strong voices on both sides of this divide. Proponents and opponents of both views within—and outside—the human rights movement have made compelling arguments.

The development of human rights norms and standards has been a dynamic and evolutionary process. Although the process started long before the launch of the exercise by the Charter of the United Nations in 1945, the 1948 Universal Declaration of Human Rights must be taken as the effective modern starting point for the human rights corpus. In the years since that

seminal document, the process has unfolded with detail and complexity, with each new instrument adding to the fund of wisdom of arguably the most exciting development in international law. The evolution of the process has seen tepid incrementalism and revolutionary sparks of genius, and much wrong has been righted in the world in the past sixty years.

Yet the elasticity of human dignity is so complex that it seems implausible to declare that it has been established definitively and conclusively. That would be tantamount to declaring that we know all that we ought to, or could, about the human person. Indeed, the notion of human dignity, which the human rights movement seeks to define, is a work in progress. The contours and particulars of that notion are socially constructed and result from the evolution of human consciousness. As humanity stretches the frontiers of freedom and un-freedom and better understands the conditions that create powerlessness, more standards will be set to respond to new and emerging indignities and violations. To be sure, some of these indignities and violations may have always been there but were never recognized as such. Or perhaps new and novel violations will leap out of the pages of the future. Because human relations are never static, it is certain that the world will continue to "discover" new violations. Moreover, existing standards may need revision to chart better paths to implementation, particularly as our understanding of powerlessness evolves. This refinement or elaboration of existing standards may itself yield new standards. For these reasons, many human rights thinkers and activists believe that the era of standard setting is far from over.

Experience has demonstrated that the mere setting of standards is not sufficient. The purpose of establishing norms is to enforce them and to change conduct or sanction misconduct. Transforming the way people and institutions behave is first and foremost a conceptual matter, which must be followed by conforming an action to a norm. In fact, the push for the realization of human rights is a long and arduous journey, and standard setting is but the first step in that process. Norms become the signposts for future behavior, and standards—any standards—are meaningless if they remain abstract without a systemic structure for their implementation. Norms that mean something must provide a pathway for enforcement or a structural roadmap for their practical realization, or they will have no bite or effective purpose. Thus, the implementation of human rights standards is as important as their formulation or development. Standard setting should therefore be seen not as an end in itself, but as a means to an unknown end—an end that is still in flux and in the process of definition. The ultimate purpose of standard setting is to create a certain core of irreducible, incontestable norms that must be adhered to if human rights are to be respected. Only

in the observance and implementation of norms can we determine whether the norms were worth formulating in the first place.

The elaboration of standards, therefore, is a critical part of the human rights project. This conceptual part obviously draws on lawmaking skills that are informed by the wrongs that need to be righted or the practice being targeted. The act of setting standards signals that a matter of universal importance needs urgent attention and requires the international community to flesh out collectively a universally acceptable norm or standard around which consensus can be marshaled. This "negotiating" phase of norm setting is subject to virtually every conceivable influence, some not directly concerned with curbing the wrong in question. Many actors may seek to water down, or even defeat, the entire exercise. Whatever the case, the elaboration of standards is a realization of the existence of a gap, a lacuna, that many, if not most, think must be filled. Yet there is a danger of relying solely on the setting of standards to right wrongs, therefore creating too many of them to the point of redundancy or saturation. Rights discourse, some have argued, remains a powerful tool for protecting human dignity only if it is not employed loosely or invoked lightly. Nicolas Valticos, for instance, pointed to the difficulties inherent in the proliferation of standards, especially in the International Labor Organization (ILO).[1] While some may suggest that "deadwood" be trimmed out, a standard that is no longer urgent, or even relevant, for one country may still be of value to another or perhaps premature for a third. Further, there are legal problems in trying to delete or render moot a standard that has been passed formally. It is best to see standards that have already been set as a fundamental wisdom from which states and other actors can draw.

HISTORICAL ANTECEDENTS

The normative regime of international human rights law originates from liberal theory and philosophy, which is not to say that international law is responsive, *ab ignitio,* to the ideals of liberalism; the journey has been, and continues to be, a long and arduous one. The rise of the modern nation-state in Europe and its monopoly over violence and the instruments of coercion gave birth to a culture of individual rights to contain the abusive and invasive state. Rights were born of necessity as a shield against the predations of the state. John Locke reduced this relationship between the state and the individual to a philosophy in his *Two Treatises of Government*.[2] In liberal theory, individual rights act as a bar against the despotic proclivities of the state. By nature, the state is an ogre, an instrumentality bent on the consumption of humans because its tendency and nature is oppressive

and controlling of the individual. A state stalks the landscape to map out how to retain and fortify control. It is on this theoretical foundation that international human rights law arises. Ironically, the human rights corpus seeks to make the modern state the primary guarantor of human rights, even though the state is at the same time the basic target of international human rights law. In other words, human rights law encodes the treatment of individuals by their states.[3] The relationship between a state and its citizens is both symbiotic and oppositional: it is the paradox of the state and the notion of the social contract. For several centuries, however, these normative limitations remained the exclusive province of constitutional and other domestic legal regimes. It was not until after World War II—following the abominations of the Third Reich—that a binding system of international human rights law was created. Therefore, at its core, human rights law is an internationalization of the obligations of the liberal state.

Although human rights law is a species of international law, it differs significantly from other areas of international law. While virtually all fields of international law have an international character—that is, they of necessity involve relations between states, their citizens, or some other shared interest—human rights law is also a domestic compact within a state. Human rights matters depart from the "external" formula of other international law regimes because they do not necessarily involve an interstate or international question per se. Nevertheless, the formulation and implementation of human rights law has an international dimension. Moreover, human rights law does not obviously or always trigger cross-border repercussions. In fact, most human rights violations are committed by a state within its borders; only when violations pass a certain threshold does the international community take real notice. Because of this intrinsically internal character of human rights, their universalization has traveled a torturous route in international lawmaking. States still have wide latitude and enjoy substantial discretion in dealing with their populations. In fact, the schema and logic of human rights treaties and standards are such that the state is of necessity the first respondent. In other words, human rights law expects states to police themselves. Only when self-policing fails is the international machinery—at the bilateral and multilateral levels—activated.

To be certain, the postwar international human rights regime did not spring into existence overnight. A novel idea when conceived, its establishment was not an easy task. States had never before dealt with such a high level of scrutiny over their domestic affairs. Sovereignty on internal matters had never before been questioned so openly and effectively. As a result, the establishment of the international human rights regime was an elongated and deliberative process that transformed in radical ways the concept of state sovereignty. The postwar period is one of those singular moments in

history when a true paradigm shift took place, and the individual became a more present claimant at international forums that had previously been the exclusive preserve of states. This shift, from a completely state-centric system to a "shared" power with citizens, would transform how international law is made and who makes it. The shift seems only fair because human rights have their historical antecedents in a number of mass struggles, international law doctrines, and institutions. Principle among these human rights formative struggles are anticolonial struggles, antislavery resistance campaigns, state responsibility for injuries to aliens, struggles against (and from) religious persecution, treaties under the League of Nations to protect minorities, humanitarian intervention, international humanitarian law, the struggle for women's rights, and antiapartheid and other antiracist struggles.

Originally state-centered, international law governed relationships between nation-states, and in its original formulation was the exclusive preserve of the Society of Nations.[4] In fact, international law started as a racist project: a small exclusivist core group of states from white and Christian Western Europe. This group of states was responsible for the initial construction of the basic principles of international law. These states arrogated to themselves the term *civilized*. As such, they viewed themselves as God's gift to the rest of humanity. These "guardian states" and their habits, cultures, and practices became the standard by which all others were judged. Their ascendancy was closely related to the colonial project and the Industrial Revolution. Standard setting and norm creation at the dawn of international law were therefore an exclusively European exercise—and that is why the guts of the discipline of international law, as well as its theoretical and philosophical predicates, are regarded as Eurocentric.[5] Equally important was the fact that states—and they alone—made and applied international law. The same exclusive club of European states retained the authority to qualify which entities should be considered as states. International law did not even have the pretense of universality, as only a select few states were subjects of international law and, therefore, only they had rights under this legal order. Generally, individual human beings did not have any international legal rights; as such, a state's treatment of its natural persons was not the business of any other state or of the international community.

With the passage of time, the individual started gaining currency in international law. Very early in its development, the doctrine of humanitarian intervention had recognized "[a]s lawful the use of force by one or more states to stop the maltreatment by a state of its own nationals when the conduct was so brutal and large-scale as to shock the conscience of the community of nations."[6] Later, the individual gained more protection from the nineteenth-century treaties to ban the trans-Atlantic slave trade in Africans and the conclusion of treaties to protect Christians in the Turkish

(Ottoman) Empire. These were the early seeds of what would later come to be known as human rights norms. Like most phenomena, once the door was opened, reform was inevitable; it was simply a matter of time before more complex demands would be placed on the normative development of international law. Importantly, the voices of the global South would begin to emerge in international law, if only very tentatively at the start, even though some of those early voices from the global South were by proxy.

Then the modern anticolonialist movement started to take shape, bringing with it a rebuke of traditional assumptions in international law. The initial steps were small and incremental but important nonetheless. In the early twentieth century, the covenant for the newly formed League of Nations provided that colonial powers observe the "principle that the well-being and development" of native [colonized] peoples "form a sacred trust of civilization."[7] The League Covenant also called for "fair and humane conditions of labor for men, women, and children."[8] The International Labor Organization took up that challenge and produced a plethora of instruments on labor standards and workers' rights. The League pushed for the development of an international system for the protection of minorities, and international humanitarian law—the law of war—also provided for the care of the wounded or sick combatants and the protection of medical personnel and hospital facilities in wartime.[9] This humanist ethos would grow and provide the foundation for a higher form of human intelligence, in essence a more developed consciousness about how individuals ought to be treated with dignity by the state and their fellow beings. It is this consciousness that I call a higher form of human intelligence.

While these international legal doctrines and institutions played a critical role in the early foundation of human rights norm setting, popular mass struggles by marginalized groups and colonized peoples were the key catalysts in giving content to the postwar human rights movement. Human rights and international law would not be imbued with the doctrines of fairness were it not for popular struggles for rights among the marginalized, the despised, and the forgotten peoples and populations of the globe. Their struggles have been the difference between a frozen status quo and a more accepting universe. Of particular note here were the anticolonial and antiracist struggles by the peoples of Africa, Asia, the Pacific, the Caribbean, and Latin America. Whether it was the armed Mau Mau rebellion in Kenya against British colonialism, the pacific struggle by Mahatma Gandhi for Indian independence, or the struggle for civil rights by African Americans, the struggles by persons of color around the world wrote normative history. Apartheid in South Africa—extremist blatant and systemic legalized racism—provided an early impetus for the international human rights movement, even before its full codification after World War II. Similarly,

the struggles for women's rights—for universal suffrage, equal treatment, and nondiscrimination in the United States and the Europe and in all parts of the world—have been an indispensable building block in the normative development of the modern human rights movement. These movements were successful in spite of stiff opposition by vested interests, and they launched the transformation of norms and the introduction of new ones. While it is true that many anticolonial and antiracist struggles, for example, did not explicitly invoke the language of human rights to articulate their grievances, it is incorrect to argue, as Samuel Moyn does, that anticolonialist struggles were not human rights struggles.[10] It is the norms animating the struggle, and not their form, that is important. Moyn seems to think of human rights only in their atomistic, individualized sense, and does not realize that rights can be held by communities as opposed to individuals. The right to self-determination is an example of a right that inheres in a community. One can think of other so-called collective or community rights, such as the environment. Moreover, the human rights movement itself would have been that much poorer but for the struggle against Apartheid. Moyn returns to this debate to an embedded problem—the failure to recognize that the legitimacy of human rights can be enhanced by expanding its normative reach beyond individualism.

THE UNIVERSAL DECLARATION AND THE PROMISE OF A NORMATIVE FOUNDATION

The United Nations launched a new era in international relations and the development of international legal norms. Perhaps nowhere is the mark of the United Nations more indelible than in the development of human rights norms. In fact, the UN was born out of gross human rights violations. Its existence would arguably not have been possible without World War II and the defeat of German-led fascism. Credit is therefore due to the UN for launching the international human rights movement through the codification of a legal and binding system for the promotion and protection of human rights. With the adoption of the UN Charter, the world body unleashed a torrent of norms, processes, and institutions in human rights. The founders of the UN could not have imagined the ubiquity of human rights norms in the last stanza of the twentieth century, when the language of human rights became the credo of every oppressed people and marginalized cause. In its human rights work, the UN has increasingly drawn heavily from the normative antecedents in the various struggles for human dignity, liberal philosophy, and the legal traditions of several cultures.

Even so, one should not overstate the universality of the United Nations as it stood in 1945. The idea of true universality at the time was

only starting to be mentioned and was not accepted as a key plank of legitimacy. The world was still very decidedly Eurocentric, including at the UN, a very insular organization at its founding. In popular history books, World War II is depicted as a contest between good and evil, with the victorious triumph of the former. The world order that emerged from the ashes of the historic conflict left a lot to be desired, particularly because the postwar international order was anything but equitable. Mohamed Bedjaoui, a judge on the International Court of Justice, described the new world order as "scandalous."[11] The difficulties lay in the inherent inequalities within the structures of international governance, the asymmetries of power between the North and the South, the imbalances between states in the global economy, and the lopsided military domination of the world by the United States. These inequities find their expression in the setting of international standards and their enforcement. These deep structural deficits begot pathologies that persist to this day.

At its inception, the United Nations was not representative of all the global communities for whom it purported to speak. In 1945 the UN began with fifty-one member states, many from Europe and the Americas. Most African, Asian, and Pacific states were still European colonies and were therefore ineligible to be UN members. Led by the United States, the West dominated the United Nations and the new international order, particularly and symptomatically in its commanding presence in the UN Security Council, the central and most important organ of the United Nations.[12] Although today the UN Security Council is viewed as an anachronistic obsolescence, membership in it was then regarded as a right by the victorious allies. Paradoxically, the Preamble of the UN Charter states, in part, that it reaffirms "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."[13] The juridical equality of states, the supposed cornerstone of the UN idea, was its first casualty.

One of the purposes of the United Nations is to "achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[14] The UN Charter reiterates this ideal when it emphasizes that it shall promote "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[15] Despite its structural inequalities, the new international order aspired to the principles of sovereign equality, nondiscrimination, and equal protection. Into this world the Universal Declaration of Human Rights (UDHR), arguably the most important human rights instrument, arrived on December 10, 1948. Forty-eight states voted

to adopt the UDHR; eight states abstained, and none voted against it. It is instructive that UN membership at the time was not representative—a mere fifty-six states proclaimed the UDHR "a common standard of achievement for all peoples and nations."[16]

States, academics, human rights advocates, and the UN membership generally agree that the UDHR is the most significant embodiment of human rights standards. Many view it with the reverence reserved only for sacred texts. It has been described as "showing signs of having achieved the status of holy writ within the human rights movement"[17] and as the "spiritual parent" of other human rights documents.[18] Henry Steiner and Philip Alston, two intellectual leaders of the human rights movement, called it "the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement . . . the single most invoked human rights instrument."[19] As the normative foundation of the human rights movement, the UDHR has become the gold standard for the entire movement. Lost in this adulation, however, are more searching debates about the UDHR's normative content and import as a cultural text.

As wonderful a promise as the UDHR was, the dawn of the international human rights movement was fraught with serious limitations. The small membership of states in the UN at the time seriously compromised the normative universality of the movement's founding document. So argues Antonio Cassese, the former president of the International Criminal Tribunal for the former Yugoslavia, who has written that the West was able to impose its philosophy of human rights on the rest of the world because it dominated the United Nations at its inception.[20] His is a remarkable and laudable admission by one of the icons of the human rights academy. As noted in 1947 by the American Anthropological Association (AAA), one of the few nongovernmental bodies to express its view on the impending international Bill of Rights, the promulgation of a universal human rights instrument would be extremely difficult. This group saw the cultural and normative landmines that awaited any attempt at such an ambitious document, fearing that it would lead to a new form of cultural imperialism. The association noted that

> the problem of drawing up a Declaration of Rights was relatively simple in the eighteenth century, because it was not a matter of *human* rights, but of the rights of the men within the framework of the sanctions laid by a single society. . . . Today, the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing

> to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period.[21]

The AAA pointed out correctly the risks of constructing universal norms and standards, and it cautioned that the cross-cultural legitimacy of any such enterprise would reside in a truly *democratic*, *diverse*, and *participatory* exercise. The drafters of the UDHR did not appreciate this point, a fact that would make it difficult for the Universal Declaration to resonate in cultures outside the European West. The association recognized the central role that cultural legitimacy plays in internalizing norms. That is why it viewed with trepidation global universalization without cultural legitimization. While the composition of the UN Commission on Human Rights, the body that drafted the UDHR, attempted to be culturally and geographically inclusive, the pool of its membership was sharply limited by the exclusivity of the United Nations. Theo van Boven has suggested that it was pretentious of the drafters of the UDHR to call it "universal" when a large part of the world was still under colonial rule and therefore unable to participate in the framing of the document.[22] It would have been much more appropriate to acknowledge the obvious dearth of diversity—as a severe limitation—and reach out more broadly to those who were excluded. Yet no evidence of such outreach exists.

The commission was led by Eleanor Roosevelt and included such diplomats as Charles Malik of Lebanon and P. C. Chang of China.[23] Some writers have pointed to these two prominent non-Westerners as evidence of the universality of the commission's composition, and hence the cross-cultural legitimacy of the UDHR. Yet Malik was a Christian, and both he and Chang were rooted firmly in Western liberal conceptions of the individual and the purposes for political society. Both had their formative education in the United States at Ivy League schools. They were "global elites" in the finest tradition of the Eurocentric world. Thus, the primary bases of their worldviews were necessarily Western. Abdullahi Ahmed An-Na'im correctly notes that "all normative principles . . . are based necessarily on specific cultural and philosophical assumptions."[24] He concludes that "given the historical context within which the present standards have been formulated, it was unavoidable that they were initially based on Western cultural and philosophical assumptions."[25] An-Na'im quite rightly allows that the "sin of conception" is not irredeemable, but the task of overcoming it has been arduous.[26]

Several analysts, among them Bertrand Ramcharan, argue that it is a misunderstanding of history to say that the UDHR was a product of Western countries, as this denigrates the contribution of the majority of the members of the first Commission on Human Rights who came from Africa,

Asia, Latin America, and Eastern Europe.[27] According to him, it also denies the contribution to the intellectual patrimony of the world of those earlier, pre-Western societies in Asia and Africa, which developed the core ideas of freedom, democracy, and support for the rule of law. The argument is that while the application of these ideas may have evolved over time, their fundamental values and appeal remain universal. Ramcharan suggests that in essence the current debate regarding the universality of rights is more a political debate about power between the industrialized and industrializing countries than one of cultural relativism. This view suggests that cultural diversity might influence the way in which human rights are applied by different societies, but the underlying tenets remain the same.[28] But Ramcharan's view, while interesting, is labored. First, there is no doubt that the Commission on Human Rights was dominated by the West, a point that is, on the facts, unarguable. Second, even the members of the non-Western states on the commission were by orientation Eurocentric, as some of them openly professed. Third, there is no reason for the global South to be defensive, as Ramcharan is, about its absence in the construction of the early human rights doctrine. The South was excluded, and not by choice. Nor does the absence of the South at the table suggest that it was devoid of ideas. Quite the contrary. As the later history of the development of the human rights corpus would show, the South began to exert its intellectual and cultural fingerprint once it was allowed in the door. But its inclusion and participation have not made a normative departure either in the narrative or in the substance of the human rights project. In popular consciousness, human rights are seen as the gift of the West to the world. It is in that sense that the human rights project has its "owners" as well as its "beneficiaries." This dichotomous view of the human rights project—with the "origin" on the one hand and the "target" on the other—perpetuates the notion of the cultural inferiority of the South and the cultural dominance of the North. This partly explains the resistance of some states and societies in the South to the human rights project.

It is now an established fact that the early formulation and codification of human rights standards were dominated by Western cultural and political norms.[29] No serious scholar of the history of the human rights movement contests this fact. But it is important to note that arguments about origin are not necessarily condemnatory of the human rights movement as a whole, nor do they establish illegitimacy per se. Rather, they are a window into the genesis of the movement, its normative fingerprint, and its proclivities; these factors by themselves are not negative. What is important is whether, no matter its origins and philosophical template, the human rights movement has grown—normatively—into a truly universal corpus. These ethnocentric limitations notwithstanding, the UDHR is largely a plausible document. It

laid the foundation for the later development of both civil and political rights, as well as economic, social, and cultural rights. In this respect, the UDHR should be seen more as a credible promise than a holy text. Scholars and movement activists who want to endow the UDHR with sanctity miss the point of a legitimate human rights movement; in fact, they are its worst enemies. Nothing lasting can be gained in this historical age by imposing values or by insisting on the purity of texts. It is true that parts of the UDHR have entered into the rarefied stratosphere of customary international law, while the rest of it has achieved enormous moral authority.[30] But its success will mean little in the final analysis if the UDHR and the movement lack grassroots legitimacy. One of the drawbacks of the UDHR is that it is customary law, which by definition is a creature of state elites, usually from the North, but with the increasing participation and acquiescence of elites from the South. Historically, customary law has suffered from a "democratic deficit" because it is top-down, and not ground-up, norm making. Nevertheless, those elites have conferred on the UDHR—a declaration, not a treaty—the status of the most important human rights instrument:

> No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole. . . . [T]he Declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps realized. It proceeded to work its subversive path through many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace.[31]

Soon after 1945, the exclusivity of the United Nations would be challenged by decolonization, a phenomenon that would transform age-old assumptions about the relationship between the North and the South. Did this global shift mean a departure from the Eurocentric posture of the UN and from norm making? Would a seat at the table for hitherto colonial peoples transform governance at the center of the world body? There is not an easy answer to these questions. What is clear, however, is that global governance became an increasingly contested terrain in which its dominance by the North would no longer be an accepted fact. To be sure, the North would remain largely dominant, albeit with decreasing clout and power—both military and economic. By the close of the twentieth century, the United Nations would have more than 190 member states. Lawmaking—and standard setting—within the corridors of the UN and in the human rights

arena would have to respond to a more diverse world, thus rendering the process far more complex. But by the close of the first decade of the twenty-first century, China, India, Brazil, South Africa, and a number of other emerging states would seriously threaten the control of global governance by the North. Citizen movements from the South would start to exert themselves on international norm making.[32] Even so, that change has been largely in economic and military terms, not in culture or in the conceptions of the relationships between the citizen and the state, of which human rights is an integral part. Thus, human rights would remain a weapon of choice by the North in its relationship with the South.