

HUMAN RIGHTS STANDARDS

Hegemony, Law, and Politics



MAKAU MUTUA

HUMAN RIGHTS STANDARDS

SUNY series, James N. Rosenau series in Global Politics

David C. Earnest, editor

HUMAN RIGHTS STANDARDS

Hegemony, Law, and Politics

MAKAU MUTUA

STATE UNIVERSITY OF NEW YORK PRESS

Cover photograph by Henri Ismail, used with permission.

Published by
STATE UNIVERSITY OF NEW YORK PRESS, ALBANY

© 2016 State University of New York

All rights reserved

Printed in the United States of America

No part of this book may be used or reproduced in any manner whatsoever without written permission. No part of this book may be stored in a retrieval system or transmitted in any form or by any means including electronic, electrostatic, magnetic tape, mechanical, photocopying, recording, or otherwise without the prior permission in writing of the publisher.

For information, contact
State University of New York Press, Albany, NY
www.sunypress.edu

Production, Laurie D. Searl
Marketing, Michael Campochiaro

Library of Congress Cataloging-in-Publication Data

Mutua, Makau.

Human rights standards : hegemony, law, and politics / Makau Mutua.

pages cm. — (SUNY series, James N. Rosenau series in global politics)

Includes bibliographical references and index.

ISBN 978-1-4384-5939-4 (hardcover : alk. paper)

ISBN 978-1-4384-5941-7 (e-book)

1. Human rights. 2. International law. I. Title.

JC571.M954 2016

323—dc23

2015008209

10 9 8 7 6 5 4 3 2 1

CONTENTS

PREFACE	vii
ACKNOWLEDGMENTS	xi
INTRODUCTION	1
CHAPTER ONE Norm Setting in International Law and Human Rights	9
CHAPTER TWO The Process of Standard Setting in Human Rights	23
CHAPTER THREE The Multiplication of Actors	73
CHAPTER FOUR The Role of NGOs in the Creation of Norms	83
CHAPTER FIVE The Question of Deficits	111
CHAPTER SIX New and Emerging Standards	139
CHAPTER SEVEN A Normative Critique of Human Rights	165
NOTES	185
BIBLIOGRAPHY	217
INDEX	239

PREFACE

I have spent most of my life as a human rights thinker and advocate. My outlook on the human rights project has often been contradictory, but for a reason. I am both sympathetic and critical. This is a paradox to most, although not to me. There are aspects of the human rights corpus—and its movement—that are deeply seductive. But there are others that are completely repulsive. I feel that I am simultaneously both an outsider and an insider. The human rights project is an uneasy political home to those who, like me, have been orphaned by dominant political ideologies and economic theories. In it, I see a sliver of hope for the redemption of the worst excesses of negative human proclivities. But I do not see it—as currently conceived—as an adequate answer to human privation and powerlessness. That is why I have written this book—to critique the human rights movement for its normative shortcomings, but also to hold out hope that it can be reconstructed as a medium for a fuller human liberation.

No scholar can credibly deny that the human rights corpus has noble aspirations. Its impulses, grounded in humanism, are basically correct—to protect the individual and society from the tyranny of the state and the barbaric instincts of fellow human beings. But to do so, it purports to create what it thinks is the most liberating vision for the good society. Central to that vision is the nature of man according to the human rights project. It fundamentally thinks that man is an individual egoist, the sort of creature whose autonomy from, and equality to, others must drive society. Everything else, including the norms and structures of society, rises out of this basic premise. This, in my view, is the fundamental flaw of the logic of the official human rights movement. And, unfortunately, it is the rationale for virtually all human rights documents—the important founding texts such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as all the others that use them as starting points. In my view, this philosophical tradition necessarily creates a society governed by the market, that is, by norms related to open competition among individuals, communities, and societies.

I do not deny, nor do I disagree, that the human person is an extremely important index in the universe. But I refuse to worship the individual egoist

and to valorize her, although I will not abandon her atomized uniqueness. Human beings are not the only creatures, or things in the universe, that matter. Since we—humans—seem to have a large capacity to affect our universe, it only makes sense that we temper our selfishness with humility. Yet humankind has been anything but humble. Humans have abused each other and the universe in ways that haunt the conscience. Have political democracy and human rights tempered some of these abuses? The answer is certainly in the affirmative. But could they have done more? I think there is no doubt that the construction of political society could have been reimagined to produce less horrible results. The entire Cold War period, for example, was a blight on both the East and the West. So has been the current period of economic globalization and free market triumphalism. More people have been lifted out of dire poverty, but many more have been consigned to the margins. The environment is being destroyed by business interests, and there seems to be no sign of a return to environmental sobriety.

It is in this context that I ask myself, Can anything be done to redeem the human rights corpus, as well as its movement and discourse? I think so. I believe that the corpus as it stands today has nuggets of wisdom from which we can reconstruct a fuller project of humanity, but it will be a huge challenge. We can start by deconstruction. By this I mean treating the corpus not as a holy text, but as a suggestion for the human condition. Zealous advocates of the corpus should step back and accept that the status quo is not the answer. They must agree that theirs has been a valuable contribution but a woefully incomplete, and even at times misguided, one. The current corpus is largely a product of the West, which even the zealous advocates would accept without too much disagreement. It is a glass that is half-empty. If that is accepted, then we can think of inviting other milieus—cultural, religious, political, local, philosophical, normative, ethical, moral, and historical—to make their contributions. The human rights project must accept that there are ways of knowing other than European, white, and from the global North. It is only from a healthy intercourse of different types of knowledge that a new human rights project can emerge.

My hope for this book is that it will open new doors and permit more searching—and less defensive—conversations about the reconstruction of the human rights project. A reexamination of human rights standards, and how they have been set, is necessary. Where do I think most of the energy for rethinking the human rights project will come from? I argue here that universities will play a large role; in fact, I believe the leadership for deconstruction and reconstruction will come from the academy. However, I believe that the academy in the North—and academics whose primary intellectual orientation is from the North—are unlikely to lead this renaissance. The reason is that they are too steeped in the cultural milieu that gave us the

status quo. They can, and should, be partners. But this exercise needs fresh eyes, totally different perspectives, and a geopolitical shift in intellect. It is not that I doubt the ability of my colleagues in the North to exercise the skepticism that is necessary; rather, I think that the voices that have been shut out are the only ones that are likely to say something really new.

Like several other human rights thinkers, I have struggled to reconcile my competing fidelity and opposition to human rights. This is a cognitive condition that afflicts most scholars of international law whose native origin or intellectual orientation is of the South, or the so-called third world. I cannot really describe it in a way that my Northern colleagues can fully internalize. It is an “outsiderness” and “otherness” that is both imposed from the West on me, but also intrinsic in me because of my location in the human rights field, and in international law more generally. I know, as do most Africans and Asians, for example, that the human rights corpus has an “alienage” to it that smacks of the colonial project. Certainly that is the way the discourse and language of human rights has been constructed. As a person from the third world, I am supposed to be redeemed and “saved” by human rights, which supposes that my natural state is as the barbarian and the savage. In the past, I have decried this phenomenon of the human rights corpus as a project of the empire,¹ and I believe this is what must change for human rights to acquire the sort of legitimacy and effectiveness that could transform the world.

The human rights project has “othered” me. The question is how it can be rethought and remade so that I can be an insider. Perhaps this is not possible, but that would be too pessimistic. As a scholar who subscribes to the school of thought known as Third World Approaches to International Law (TWAAIL), I do not seek to throw the baby out with the bath water. My project is to deconstruct, reconstruct, and build a world without hegemonies where conditions of underdevelopment—especially in the South, but also the North—can be eradicated.²

For these reasons I am not vexed by the inherent contradiction in the way I view human rights. I am comfortable working with grassroots organizations—human rights actors and thinkers from below—in the South as they battle state tyranny, the ravages of globalization, domestic violence, environmental degradation and climate change, and other modern calamities. In these struggles, I often deploy human rights language, some of it very liberal, when the situation demands it. I have collaborated with human rights workers in the South to think through statutory and constitutional formulations and interpretation from a multiplicity of lenses, including some dominant Western theoretical predicates. A case in point has been in the fight for the rights of sexual minorities. But I have also worked with advocates in the South who had little normative help from the human rights corpus as they

confronted the indignities of globalization and primitive capitalism. This is where human rights thinkers need to depart from the status quo. There is no better place to start this journey than to unpack and reconstruct human rights standards. The time to do so is now.

Makau Mutua
Rome, Italy; Addis Ababa, Ethiopia; and Buffalo, New York
June 2015

ACKNOWLEDGMENTS

This book has been a labor of love. So long as I can remember, I have thought and written about the character of the human rights corpus. I have been particularly vexed by, and interested in, the cultural and philosophical orientation of the official human rights corpus. Almost as important, I have been fascinated by the construction of human rights discourse, and its language. It is a powerful and seductive idiom. That is why after writing, teaching, and speaking as both a critiquer and an advocate of human rights, I was happy to undertake a project on standard setting in human rights. I had no doubt that I would bring my skeptical mind to this project.

This project started with an invitation by Mohammad-Mahmoud Ould Mohamedou, then research director of the Geneva-based International Council on Human Rights Policy, the defunct industry think tank that produced policy research on behalf of the human rights movement. The initial charge was that I would produce a paper to help NGOs navigate the world of human rights standard setting. Mohamedou left the ICHRP before the project could be completed. As a result, I turned the project into a law review article which was published by the *Human Rights Quarterly* (Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis," *Human Rights Quarterly* 29 [2007], 547). That article is the inspiration for this book. I want to thank Mohamedou, an insightful thinker on politics, human rights, and transnational terrorism, for his wise counsel on this project. He generously continued to dialogue with me on it even after he left ICHRP to become the associate director of the Program on Humanitarian Policy and Conflict Research at the Harvard School of Health, and later, during his stint as minister for foreign affairs in Mauritania.

The ideas expressed in this book reach deep into my maturity as a human rights scholar, writer, and thinker. I have benefited tremendously from the works and advice of mentors and colleagues. Most prominently, this includes Willy Mutunga with whom, along with several others, I founded the Nairobi-based Kenya Human Rights Commission, and who was appointed chief justice of Kenya in 2011. Mutunga was the brainchild behind an innovative KHRC orientation known as "rooting human rights in communities." The project was an attempt to protect, promote, and recreate

human rights “from below.” This initiative was an inspiring theater about how marginalized communities in the South could become their own agents in the reconception of the human rights project. I have Mutunga to thank for teaching us this new ethos, and for inspiring many ideas in this book.

I am equally grateful to partners in crime in the school of thought we call Third World Approaches to International Law. My TWAIL colleagues and critical thinkers have kept the faith—James Thuo Gathii, Antony Anghie, Athena Mutua, Joel Ngugi, Balakrishnan Rajagopal, B. S. Chimni, Obiora Okafor, Roberto Aponte-Toro, Jeremy Levitt, Joel Ngugi, Henry J. Richardson, Boaventura Santos, Hope Lewis, Adrien Wing, Abdullahi Ahmed An-Na'im, Joe Oloka-Onyango, Sylvia Tamale, C. M. Peter, Ali. A. Mazrui, and Mahmoud Mamdani have helped me grow these ideas. Peter Rosenblum, David Kennedy, and Guyora Binder have been important thinkers and colleagues in my life, and especially on the matters I raise in this book. Henry Steiner, one of my key law school teachers, greatly influenced my thinking. I owe all of them a debt of gratitude.

The KHRC has taught me a lot as a human rights thinker and worker. The folks with whom I founded the KHRC—Mutunga, Maina Kiai, Peter Kareithi, and Kiraitu Murungi—all believed in the possibility of a better society. Both Mutunga and Kiai have continued to soldier on valiantly for freedom. Many who joined the KHRC family later—Betty Kaari Murungi, L. Muthoni Wanyeki, John Githongo, Godwin Murunga, Father Gabriel Dolan, George Kegoro, Tade Aina, Davinder Lamba, Alamin Mazrui, Karuti Kanyinga, Mwambi Mwasaru, Vincent Musebe, Davis Malombe, Mumina Konso, Steve Ouma, Wambui Kimathi, Atsango Chesoni, and others—have influenced my thinking. Raila Odinga, Paul Muite, Yash Ghai, Kepta Ombati, James Orenge, Irene Khan, Pheroze Nowrojee, Nzamba Kitonga, Ezra Mbogori, Gladwell Otieno, Ndung'u Wainaina—though not part of the KHRC—helped me unpack several concepts.

My research assistants at SUNY Buffalo Law School—Aleksandra Bojovic, Sean Mulligan, Tonya R. Lewis, Katy Gabel, Andy Devine, Elizabeth Castillo, and Elliot Raimondo—were fantastic. Their support, editorial work, and keen minds brought this book to completion. I am indebted to all of them. I am also in debt to Rebecca Donoghue, my executive assistant when I was dean. Rebecca was critical factor in making sure I completed this book. Last, but not least, I am grateful to Sue Caruso, my academic assistant, who put together the final draft of the manuscript. I would have been at sea without her yeoman work.

I cannot forget my immediate nuclear family. Athena, my partner and fellow critical thinker, offered many pithy ideas that sharpened the book. I am truly grateful for her support. My five children—men and women—Lumumba, Amani, Mwalimu, Mueni, and Jueria—were good sports as I immersed myself in writing the book. To them all, I say, thanks.

INTRODUCTION

Over the last several decades, the thinking among human rights scholars, states, and activists has been that international action on human rights should move from setting legal standards, or norms, to implementing existing standards. The usefulness of some new standards has been questioned, and there seems to be a growing disenchantment with the push for new standards. At its simplest, the issue is that treaty making in the area of human rights has, in some ways, become complicated and that, even in cases where a text is adopted, there is no guarantee that the treaty is effective. Both governments and nongovernmental organizations (NGOs) are divided over the value of undertaking negotiations for new texts. Recent negotiations on particular standards—for example, the Optional Protocols to the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—show that some states are reluctant to support new standards, even when ratification is optional.

The argument to move from standard setting to implementation comes from those who feel that there is already a rich corpus of norms that should be deployed to combat human powerlessness and egregious rights violations. Proponents of this view posit that there is an inflation of treaties and agreements that may dilute the impact of the rights language. Part of this argument is premised on the supposition that standards have already been set in all vital areas, and that more norm making is counterproductive. The counterargument is that the human condition is never fully knowable, and that new—and even old—rights violations are being continually created or exposed. New challenges in human relations and the dynamic transformation of the world by technology and globalization require constant vigilance. As barriers—both physical and cultural—give way to a more interconnected world, what was “normal” and “acceptable” may become a “violation.” Thus, human rights standards, and the ways in which states should respond to them, are a moving target and elastic, if truth be told. Violations are themselves as dynamic as the norms that must be devised to address them. This argument by the proponents of more standards is anchored in a belief that

there is no ultimate truth about the human condition and that flexibility in creating norms must remain a viable option.

The state of being—the human condition—that occasions a violation is not fixed or frozen in time. But the state of being is both physical and metaphysical. It is constantly evolving, and with it the complex ways in which abuses can occur. As a matter of logic, it is wrong to believe that there can be fixity in structures and conditions of power and powerlessness. There is no zenith to the vastness of the human condition. This means that the work of standard setting is not finite and will never end. To argue otherwise would be a failure to recognize that human and social relations are forever transforming, creating unforeseen privations and vistas. Two hundred years ago, who would have guessed that the gay rights movement would achieve the success—no matter how limited—that it enjoys today in the laws of various countries and recognition within certain international law milieus? Two hundred years ago, who would have dreamt that heads of state would be subject to sanction for war crimes, crimes against humanity, and genocide? Who would have expected then that people with disabilities would be protected by domestic and international law? Indeed, two hundred years ago who would have thought that women would achieve legal equality with men? The lesson of history here is that standard setting—norm creation—is a continuous, organic process.

This book proceeds from the premise that human rights are one of the key theaters of battle and conflict between the state and the citizen, between political society and the community. This tension, which is the most important one in any society governed by a state, is really about the normative definition of the individual and the community against the power and authority of the state. What, for example, can the state do—or not do—in constructing a vision for the society it governs? Thus, human rights norms and texts, although generally legal documents, are fundamentally at their core moral codes, compacts between the state and the individual as well as the community, on the one hand, and the state and the international legal system, on the other. As moral documents, they are a complex stew of norms that give justification to the state, the individual, the community, and the international legal order. Human rights delineate rights, obligations, and power—and the limits of its use—but these are not as important as the moral dimensions they seek to vindicate. The legal character of human rights is a means, not an end by itself. The end that they justify is human dignity. This moral dimension speaks to the vision of the human being that is imagined by the human rights project.

Standard setting in human rights may at times look like a mechanical process of negotiation among many stakeholders. But what is at stake is fundamentally a moral project. Human citizenship—broadly understood

as the right of belonging as a human—sits at the core of the human rights idea. But human citizenship does not require legal documents to legitimize one's humanity. It is, rather, a quest for a unifying philosophy of the moral and irreducible attributes of humans and the character of the society they should live in. That said, this book starts from the premise that human rights norms and standards—as conceived and historically developed—arise from liberal theory and philosophy. They call for a set of tenets, techniques, and processes that define the individual, the society, and the liberal state. Human rights norms revolve around the place of the individual within the state, with an emphasis on popular sovereignty and the sanctity of the human person. This book argues that human rights standards imagine a society in which abstract individual autonomy and formal equality are non-negotiable. This is both a virtue—because individuals are the smallest and most important aggregates of society—yet a vice—because the individual should not be constructed in a way that overwhelms society. The implied plea of this book is the need for a new dialogic dynamic within the human rights movement to imagine the new human being in a new society. Can this new dynamic overcome the limitations of the traditional and official human rights corpus and become the genus for a better society?

A belief that ideas of constitutionalism would be sufficient to guarantee meaningful citizenship has existed for more than two centuries. Human rights standards are the outgrowth at the international level of the municipal values of constitutionalism, that is, they are the attempt at the universalization of equal protection and antidiscrimination norms. Applied to their fullest, these norms would realize the sanctity of the human being imagined in runaway individualism, or in the individual as the egoist. This notion, which is rooted in the market, is limited as a pathway to full human freedom. But the existence of human privation, even in the so-called advanced political democracies of the West, has proven the assumption wrong at worst, and incomplete at best. What has happened? Why has the promise of the free-market society undergirded by individualism and constitutionalism not given the world nirvana? Today, many political leaders and thinkers believe in one inflexible truth—the centrality of the human rights idea—defined as a zenith of human civilization, a resting plateau for human aspiration as the *sine qua non* for the political society that will give human potential its largest opportunity to flourish. But is this a belief without underlying logic and fact? Why assume that the genius of the human rights idea—of the core tenets of liberalism—is incontestable? Is it, in fact, possible to imagine a postliberal society? If so, how would that society look, and by what norms would it be governed? How would its citizens live? Should critics of liberalism and the human rights corpus end their arguments and agree with the political leaders and intellectuals who assert that the only

project worth pursuing is the perfection of the liberal society? What does the political Left have to say about this, or is the Left bankrupt of ideas? Are there any great postliberal ideas? These questions are implied in this book because the persistence of human powerlessness seems to indicate the failure of constitutionalism, human rights, and liberalism to answer the challenges of privation.

Human progress has historically been possible because of irreverence to the status quo and to old ideas. The long stretch of human history has been a contest between dignity and indignity. Virtually every political revolution—up to and including the 2011 Arab Spring—has been a reaction against human indignity.¹ Just several hundred years ago, virtually every country on earth was undemocratic, as the term is understood today. Many things that are unacceptable today were the order of the day—slavery, colonialism, blatant racism and misogyny, European supremacy, and unfettered notions of property. So were absolute monarchs, one-party states, and inherited leaderships (although some of these historical anachronisms are still around); the state was supreme and the individual and community were completely subordinate to the state. Many of the worst excesses of the past are unacceptable today, and norms and standards—many expressed in human rights—have been agreed upon to repudiate many inhuman practices. Even so, many other inhuman practices that are an affront to human dignity remain. That is why revolutions for human dignity will continue. Today, there are new global forces that undermine old ideas and the status quo and are likely to drive more human revolutions. Some of these new forces—at least four of which I discuss here—threaten traditional human rights conceptions and seek to rewrite human rights and other standards.

The first disruptive idea is borderlessness, the modern phenomenon of the withering away of the physical and metaphysical borders between states. The physical border, the most enduring symbol of state sovereignty, as a barrier between cultures and peoples is fading fast because humans are increasingly resisting organization that assumes the permanency of borders between peoples and communities. What does this mean for the human rights project, which assumes the permanence of states and borders? The slow dissolution of borders is not just the function of global capitalism, or technology, or human interdependence. It is a function of a negative understanding of borders, that is, as barriers that advance very little human good and prevent a lot of positive synergies from happening. To be sure, migration has a lot to do with it, but much more contributes to the phenomenon of borderlessness, including new understandings of the global commons.

The second disruptive idea is the erosion of patriotism, the notion that a national citizen is defined in negative terms, as in opposition to the citizens of other countries. Historically, citizens fight wars for their coun-

tries against other people and states, but a new sense of global patriotism is replacing traditional state-based patriotism. Many people view themselves as increasingly postnational and denationalized.² This is the basis for global peace movements and civil societies that oppose the militarization of conflict or disagreement. This emerging movement “from below” challenges the traditional hostilities fostered by the nation-state. Instead, it promotes an emerging concept of global—in addition to national—citizenship. The loyalties of a growing number of people are not only to the state, but also to the global commons. This does not mean that people care less about their communities. Quite the contrary—they still care very much, but they do not see themselves as living in “gated” cocoons. What happens across the border or far away equally concerns them. Traditional nationalism is losing its once potent purchase. This breakdown of the “us” versus “them” is making people imagine new forms of citizenship.

The third disruptive force is global calamities. Climate change, droughts and extreme weather, geological catastrophes such as earthquakes and tsunamis, and diseases like Ebola, the pandemic that could be just be one flight away to New York from its 2014 epicenter in West Africa, contribute to a shrinking sense of security for people worldwide and create an unprecedented sense of vulnerability. People in the more affluent West thought they were immune to many of these calamities that more severely historically affected people in less-developed regions of the world. But this is no longer the case. Humans everywhere seem to be joined together by the brutal fate of nature. This may mean that people around the globe are willing to suspend the “fear” and “distrust” of “the other” for a common purpose. Perhaps a more united population can force the political will on elites to find universal solutions to these challenges. But one thing is clear— isolationism is no longer a viable strategy.

The last disruptive force is the withering away of the state. The state is not what it once was—the balance of power has tipped from the state to the individual, the community, nonstate actors, armed groups, corporations, and to international institutions and extraterritorial forces. This is true for the United States, still the most powerful state in the world today, as well as emerging China, another powerful state vis-à-vis its own citizens, where political elites are slowly coming under increasing domestic pressure. The mass upheavals of the 1980s and 1990s that collapsed one-party and Soviet bloc ruling elites in Eastern Europe and the Soviet Union, Africa, and Latin America will find and eventually overtake the opaque Chinese state. If anything, the Arab Spring seemed to spell doom for states that foster human indignity. Citizens are looking for a new compact and meaning to their lives, and civil societies are playing an ever-growing role. Technology and the Internet have taken from states the power to control information and prevent mass mobilization

and governance. Finally, capitalism, the great enabler of the liberal state, is in deep moral, practical, and economic crisis. The near collapse of the U.S. economy in 2008 and the resultant erasure of existing economic assumptions unhinged the sanctity of the market. More importantly, it showed just how fragile and temporary even the most stable states can be. All of these imponderables have come together to disrupt elites and states. They are changing the way the world thinks about citizenship and the responsibilities of individuals. What is evolving as citizenship will depend on how thinkers and grassroots mobilizers fashion new theories and practice. The old ideas of constitutionalism and liberalism—or standard human rights norms—may no longer fill the void, and, therefore, a reconstruction of the human rights project—and the standards and norms central to it—is unavoidable.

With this in mind, this book navigates the space between those who think new standards are necessary and those who believe that the era of standard setting is virtually over. It examines the nature and recent evolution of international human rights standard-setting processes and focuses attention on the complex and often highly politicized world in which norms are created in high councils of state. While it does not claim to be an exhaustive study of all recent standard-setting cases, this book identifies poignant issues and the peaks and valleys of the usually tortured processes. It analyzes the effectiveness of those processes and the role of different actors, and seeks to identify possible new avenues in standard setting. Key to this book's insights are the particular orientations, vantage points, biases, strengths, and weaknesses of the various actors. Through the examination of different standards and their context, this book seeks to understand the processes involved in standard setting and to draw lessons from them. The aim is to provide analyses and guidance, including fresh thinking, to human rights experts and human rights NGOs that seek to initiate or advocate for new human rights standards, as well as to officials in intergovernmental and governmental organizations that are involved in standard-setting processes. Ultimately, human rights standards are meant to reduce human powerlessness. That is why this book is a work of empathy as much as it is a labor of the intellect. It eschews the view that there is anything like disinterested scholarship because all scholarship has social relevance and, hopefully, utility.

This book specifically examines the history and genesis of four cases where standards have been recently drafted or amended: the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Declaration on Human Rights Defenders otherwise known as the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Declaration on the Right to Development; and the Guiding Principles on

Internal Displacement. These cases were chosen as much for their diversity as for their significance in the human rights corpus. They touch on old problems and emerging challenges. Some of them were attempts to plug a deficit in the original treaty instruments. In others, advocates were attempting to stretch the frontier of human freedom. Yet others focus on unpopular causes or interests. I consulted different actors involved in negotiations leading to the adoption of these instruments; some of them were intimately involved in the creation of the standards, while others were agitators at the margins of the processes. Several brought very distinct perspectives to their roles. Some saw themselves as complete outsiders to standard setting while others evinced the confidence of insiders—“owners” of the processes. Their insights were useful in allowing the research to draw conclusions in relation to each case study, and, eventually, in relation to standard setting in general. This phase of the research—interviewing live actors—was indispensable to the conclusions drawn in this book. Arguably, the actors are the most important element in the whole process.

Against this background, this book asks several primary sets of questions: First, by what formal and informal *processes* have recent standards been established? This question seeks to unveil both the “open” and “hidden” aspects of standard setting. While both formality and informality can mask deep-seated deficits and agendas, it is the informal processes that raise the most questions. Second, what have been the strengths and weaknesses of those processes in different cases? Did some of the processes exhibit particular issues of interest that would affect the final outcomes? Third, what *lessons* can be drawn from a study of these processes? Fourth, which benchmarks are useful? Fifth, what strategic *options* should NGOs consider as they plan ahead? In other words, how and what should NGOs learn from these options in crafting how to respond in the future? Sixth, what new approaches should be explored in relation to standard setting? Is there room, or reason, to explore new approaches? Seventh, should some of the resources that currently go into standard setting be focused elsewhere? Should there be a reallocation of resources based on what needs to be prioritized? If so, on what? Finally, which *new standards* are necessary and which are not, and why? Can organizations cooperate to agree on priorities and criteria? What constraints and opportunities need to be considered? Ultimately, this book wants to engage the academy in rethinking and reconstructing the human rights project.

The book opens with a discussion of the central question of whether international action on human rights should move from setting standards to implementing existing standards. This question—whether to drop the quest for new standards—forms an enduring thread in this book. This book then looks at the historical antecedents of the problem, and the origins of the

regime of the international human rights corpus, including an examination of the Universal Declaration of Human Rights as the key textual normative foundation. It addresses the historic, cultural, and political subtext of the human rights corpus. Establishment scholars and activists in human rights have been reluctant, if not hostile, to probing critiques of the human rights movement. Movement activists and thinkers display a great amount of zeal in treating criticism as heresy, or a form of human rights paganism, if the critiquers are “insiders.” So the pressure to conform and toe the party line is intense, and ostracism is not uncommon. Even so, there is hardly universal agreement about the universality of the human rights corpus. For this reason, this book casts a critical eye on the philosophical pivots of the movement. The book then describes and analyzes the actual process by which standards are set. This chapter is not mechanical, and is not meant to be. Rather, it is an attempt to unveil the nuts and bolts of the standard-making processes. It looks at the different types of documents that are used to encapsulate norms, the weight of these different platforms, and the bargaining techniques, including obstruction, that characterize the process. It considers the question of ownership of norms and the constituencies who stand behind the standards.

This book delves into the implications of the proliferation of actors in the standard-setting process over the past three decades. The base of actors at the beginning was narrow and very limited to a select group of powerful states and interests. Such exclusivity, although not completely gone, has been tempered by the entry onto the world stage of the so-called third world. This book argues that this diversity of players has significantly influenced lawmaking. Voices from Asia, Africa, the Pacific, Latin America, and other previously marginalized interests have added complexity and nuance to standard setting. More importantly, this multiplicity of actors has expanded the normative reach of the human rights corpus. The next chapter in the book examines closely the role of nongovernmental organizations—the establishment ones in the North,³ and the insurgent NGOs in the South—in relation to the processes. It identifies the leading, but complex, role that they often play in relation to the development and adoption of standards. What is the relationship between NGOs from these diverse parts of the globe, and how do their interactions shape norm-making processes? Nor does this book overlook the important question of deficits in the process of identifying and adopting standards. It analyzes that question in relation to three specific deficits: numbers, participation, and democracy, each of which speaks to weaknesses and shortcomings that plague standard setting. Finally, the book identifies those areas where new standards might be needed, and presents pointers for action to improve and, where necessary, transform human rights standard-setting processes.

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 initio*, 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.

TWO

THE PROCESS OF STANDARD SETTING IN HUMAN RIGHTS

Standard setting in human rights has been a contentious and complicated business since the dawn of the human rights movement more than sixty-five years ago. Never an easy task, standard setting is complicated by a factor of multiples when it concerns the regulation of the relationship between the state and the citizen and, in particular, the limitation of state power and reach versus the individual. States have traditionally viewed their power and authority over citizens as largely unlimited, which is why efforts to curb state power and impose red lines about what the state can and cannot do to its citizens, or those within its jurisdiction, have been highly contested. And perhaps no terrain has been more contested than the formulation of human rights standards, primarily because arbitrary state power is manifestly curbed by human rights norms. The diversity of societies compounds the difficulty of standard setting in human rights. Human rights norms arise out of liberal thought and philosophy, but that does not mean that liberal societies, which have traditionally been Western, always embrace human rights with enthusiasm. Every state jealously guards its power and authority over the citizenry and is loath to surrender such authority unless by so doing it enhances its own legitimacy. States that are not part of the liberal milieu—in Asia and Africa, for instance—have had a more strained relationship with the human rights movement. Even states in Latin America, which have a Eurocentric tradition, have been highly repressive. The diversity of states, therefore, complicates norm making. So does the multiplicity of actors. Although initially states were the principal actors in the process, the passage of time has multiplied the number of actors. In the past two decades, nonstate actors, such as NGOs, have become active players in the setting

of human rights norms. What is more, a larger and more complicated collection of states have become prominent players in standard setting. While states remain central to the process, all these competing interests make for a richer human rights corpus, even though it also makes it more difficult to reach consensus or to arrive at mutually shared values.

The process of standard setting at the international level suggests complexity, negotiation, vigorous disagreement, and consensus building. Each one of these variables is a potential hurdle to agreement. Complexity is a proxy for many intangibles, including intransigence. Negotiation could elongate the process ad infinitum. Consensus building could be a stand-in for inaction or watering down the final result, which may mean a hollow standard. Standard setting calls into play competing national interests, cultures, and ideologies. But it is important to state that these national interests may be parochial, elite-driven, or class-based, and may lack the legitimacy of large sectors of society in a particular state. A state may hide behind the veil of “national interest” in order to object to a particular standard for opaque or malignant reasons.

As if these questions were not enough, more difficult matters of the *asymmetry* of power, the *ability to participate effectively* in the process, and the *capacity to own* both the process and the end product come into play. Some states and cultures have a bigger say in norm formulation. The control that some states have over the process makes the final outcome predictable and sometimes moot. That influence explains why, in situations where complex and competing players exist, the process becomes as essential as the final product itself. In any discussion of process, therefore, participants should ask probing questions about fairness, transparency, ownership, democracy, and participation. Opening up these issues to greater scrutiny and public contestation is becoming increasingly unavoidable, as is the tradition of leaving norm making to a few select players.

But terminology is important, and the lexicon of the discourse can be contested. There is a tendency by those involved in the human rights project to use terms such as *standard*, or *norm*, and *right* interchangeably, as though they were synonymous. The distinctions between these words, however, are important to states—and to victims—and could mean the difference between commitment and laxity. The message sent by the use of one term as opposed to another may telegraph the seriousness with which a matter should be treated by a state. It may either dilute or thicken the obligation in question. For instance, *observance* implies one level of obligation and *violation* another; the difference hangs on the balance of the term chosen. Terms may indicate the state of mind of the norm creators and what should be expected of the norm’s targets. All of these terms suggest things that should be striven for and imply an expectation of the fulfillment

of a promise or a duty; they invoke an ideal, threshold, floor, benchmark, aspiration, and privilege. Yet because the human rights corpus is a species of international law—essentially a legal regime that binds states—it is imperative that analyses of the terms adopt a precise legal definition. For the language of the law seeks precision about the legal meaning of words and determines their legal status and the nature of the obligations or privileges it envisages. In fact, the process of standard setting in human rights is a struggle over the meaning of language and its implications on the conduct of states. Perhaps the most elastic of these terms is the word *standard* itself, which has no particular legal meaning and does not necessarily imply a legal obligation of any kind. A standard is a vacuous, empty receptacle into which one can fit almost anything. It refers to a level of achievement or expectation—an aspiration—that may carry with it moral, cultural, or other civilizational ambition. Needless to say, the more elastic, or vacuous, the term used, the less resistance is likely to be generated by states and other key targets. Consensus, or acceptance, is usually easier the lower the threshold of any duty or obligation on the state or duty bearers. States are loath to be commanded externally, especially by institutions that do not add resources to tackle the malady envisaged. To states, human rights diktats can seem like mandates without corresponding resource allocations.

Nothing demonstrates the importance of terminology more than the vaunted UDHR. Initially meant only to carry moral authority, the UDHR referred to itself as a “common *standard* of achievement for all peoples and nations.”¹ This pivotal document was not meant to be binding, and it is almost certain that the UDHR would not have acquired its current authority had it been a legally binding instrument. The reason is that many states—at the dawn of the human rights movement—would have balked or watered it down so drastically that it would have meant little. So the secret of the passage of the UDHR was its nonbinding legal status. But the term *standard* is not a loser. The flexibility of the term allows its wide reach and scope. Additionally, freeing the term from the narrow strictures of the law gives it more authority and propels it to the forefront as a universal civilizational value that knows no cultural or geographic boundary. In other words, a standard is a phenomenon that is above a mere legal rule; it is an inherent and self-revealing virtue, one that demands obedience without question. Its moral suasion towers over other more precise and constrained terms. Its soft and comforting posture means that it invites and does not command. It beckons a higher purpose without coercion. And it seeks nobility without forcing it. It allows for an evolutionary process, not the fiat of instant obedience. There are advantages, therefore, to employing the loose-ended term, particularly if one seeks a wider consensus without any obvious or immediate legal bond.

The term *norm* is more complicated than *standard*, although it, too, has the advantage of transcending the narrow confines of the law. But *norm*, from which “normal” is derived, suggests a threshold that should not be deviated from. In fact, a *norm* does not necessarily have a legal connotation, although it refers to a formulated principle, behavior, code of conduct, or rule. Like *standard*, it implies an evolutionary process, one in which the element in question coalesces into an expectation. Norms tend to indicate the element of custom in them. They gestate over time due to practice. Norms cannot be rushed because they grow slowly to ripen into a tested product. They are embedded deeply in the consciousness of an institution, society, or state. Norms also imply a hierarchy of values on which a ladder or edifice is constructed. Norms can be said on this basis to have more teeth than standards. A *norm* is more law-like than a *standard*. Deviation from a *norm* usually invites some form of social, legal, moral, or cultural censure or punishment. Norms are therefore closely linked to legal regimes without being contained by them. They are essential in any legal regime, as legal rules or laws are usually based on some *norm*. It is difficult to imagine a right that is not written on the larger canopy of the *norm*. In this sense, the *standard* may be the precursor of the *norm*, and the *norm* the harbinger of the right. While this may imply a progressivist trajectory in the refinement of a right, it does indicate a hierarchy. Each of these iterations of a civilizational value—*standard*, *norm*, and *right*—may occupy a more hallowed space depending on the context in which it is deployed.

Finally, a *right* is the most crystallized of all these terms. It forms the irreducible core of a *standard* or *norm*. It is the element that is laid bare once the other terms are boiled down to their simplest forms. Arguably, the single most important term in any legal regime, the word *right* is the foundation and basis of the human rights movement. The Western human rights movement, which is a product of liberalism, would not have been possible without the language of rights. In the global South, the language of dignity may hold sway, but in the North it is difficult, if not impossible, to definitively defend anything without the invocation of the rights language. In the global North, the human rights language provides the avenues through which human dignity is secured and guaranteed. The term *right* implicates the coexistence of both a duty and the bearer of that duty. In human rights law, which is the most precise expression of the human rights movement, the state bears the primary duty of protecting rights, which are enjoyed by individuals and groups. It is doubtful whether modern Western civilization would have been possible without the term *right*. One academic thus defined a *right* as an entitlement.

At its most basic level, a human right is a safeguarded prerogative granted because a person is alive. This means that any human

being granted personhood has rights by virtue of species membership. And a right is a claim to something (by the right holder) that can be exercised and enforced under a set of grounds or justifications without interference from others. The subject of the right can be an individual or a group and the object is that which is being laid claim to as a right.²

While the rule of law is regarded as the necessary minimum bar between tyranny and democracy, human rights are the most sacred of all legal entitlements. Presumably, it is not possible to have a society of laws without the rule of law. But once a claim achieves the status of a human right, it acquires the aura of irreversibility, irrevocability, timelessness, and universal validity. A claim is thus “immortalized” in the rights language. It achieves untouchability and cannot be easily molested either by the state or by nonstate actors without consequence. Human rights are regarded as a zenith of human civilization. The term *right* is equated to a puritanism of the modern state. In other words, human rights evoke a transcendent value that speaks of the nobility of human purpose. A human right is a crystal-clear phenomenon, an attribute that lacks the hazy outlines of a standard or a norm. It is a purification of the human person, denying all that is negative and encompassing all that is noble. It is in this respect that a right—in this case a human right—is a clear distillation and a more careful use of terminology than the more general norm or standard. A standard can be elastic and all-encompassing. It is, therefore, important to note that *the term standard could encompass both norms and rights*. That is why the process and exercise of the creation of expectations and obligations in human rights can be referred to as standard setting, an expression that covers both binding and nonbinding rules and codes of conduct. Clearly a “right” is the pinnacle, the superior term that can be concretely operationalized with less ambiguity, although even it, too, has been shown to be indeterminate as both a weapon and shield by contending social and political actors.

The distinctions among standards, norms, and rights require that actors in the field of human rights understand the meanings and implications of the use of each of these differing terms. Whatever term is chosen for a particular context requires a different tactic, and even strategy, to reach an intended goal. This is especially critical in the determination of the strategy that must be adopted if certain goals are to be accomplished. In some cases, one term may backfire where another may be the perfect tool. Although binding rights in treaties appear to be the most certain species of obligations, they may not always be the most effective or feasible means of advancing the human rights agenda. Using the most legal of the terms does not necessarily guarantee the desired outcome in fact; the opposite could happen. That is why advocates of a particular issue may choose to

pursue the adoption of soft law such as a declaration; a set of nonbinding guiding principles, resolutions, or recommendations; or a memorandum of understanding or a code of conduct. Certainty may be the enemy of the good or the occasion for unwanted resistance to a goal. Better to choose a “softer” device than a more concrete one that is then thwarted.

An excellent example of the significance of the strategic use of terminology is the UDHR, the very first universal human rights instrument. The UN Commission on Human Rights knew that it would be difficult, if not impossible, to persuade UN member states to agree to a legally binding human rights instrument at the dawn of the human rights movement. No state was willing to be hamstrung or severely limited in its internal affairs, but many were prepared—though not without considerable discomfort—to sign on to an aspirational document with a text that did not have any bite at the time. Sovereignty and the fear of intrusive norms and processes precluded anything but a declaration as a viable option. Equally, the UDHR has not suffered for not being a treaty. In fact, one might argue that the UDHR’s “voluntary” nature was its greatest strength.

STANDARDS, NORMS, AND RIGHTS: INTERNALLY DISPLACED PERSONS AS A CASE STUDY

Many instances illustrate the complexity of the choice of strategy to be used in advancing a human rights question. One of the best illustrations of the power of “soft law” over “hard law” was the formulation of rules and expectations on internally displaced persons (IDPs), which is a major contemporary problem. With the wars and civil conflicts in Iraq, Mali, Egypt, South Sudan, Sudan, Bahrain, Afghanistan, Libya, Syria, Yemen, the Democratic Republic of the Congo, the Central African Republic, Somalia, Ukraine, Palestine, Lebanon, and many other countries, IDPs have become a common feature of contemporary political upheavals. By some estimates, there more than thirty million IDPs worldwide, virtually all in conflict zones or in dictatorial, authoritarian, or war-torn states.³ This large human catastrophe afflicts many states, virtually none of which have the wherewithal to address the problem, and few, if any, of whom have the incentive to address it, primarily because the states created the problem in the first place. Since IDPs are not “refugees” who have crossed an international border to burden another state or risk its stability, states do not aggressively tackle this “internal” problem.

What is an internally displaced person? The Guiding Principles on Internal Displacement, the most authoritative international text on the matter, defines IDPs thus:

[I]nternally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes

or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.⁴

Unlike victims of traditional human rights violations, IDPs do not directly trigger international consequences in third states. They are a “local” problem, confined within the borders of their nation of origin and residence. Nonetheless, international law has taken an interest in the plight and deep suffering of IDPs because they are usually neglected or abused by their own states. This interest has been largely “humanitarian” and not required by “hard law.” Nevertheless, IDPs warrant international concern because they can—and often do—cause insecurity and instability in entire regions. So spillover effects of IDPs have compelled some states to take the matter seriously; even though the states’ urgency to act has been lacking, they have not been able to completely ignore IDPs. As noted by the Norwegian Refugee Council:

[T]hese people [IDPs] are forced to seek safety not through asylum in a second state, but before their own governments and within the confines of national borders. The welfare of internally displaced populations has become the subject of international attention because the governments legally accountable for their care and protection are often unable or even unwilling to act on their behalf. Indeed, in many cases, the government in question is at least partly if not wholly responsible for the displacement of its citizens in the first place.⁵

Internally displaced persons are not per se the subject of any specific or particular treaty or declaration. Not until 1992, when Francis Deng was appointed the Representative of the UN Secretary General on Internally Displaced Persons,⁶ had IDPs been the focus of any particular specialized office within the United Nations system. That no office existed to specifically address their plight poignantly tells how marginalized IDPs have been. Although the UN had been preoccupied with refugee matters for decades, and even though refugee law offers useful lessons to a regime for the treatment of IDPs, that law applies only to persons who have crossed an international border. As noted by Deng, “IDPs have been forced to leave their homes and find themselves in refugee-like situations.”⁷ As such, “refugee law, by analogy, can be useful in proposing rules and establishing guidelines to protect the needs of the internally displaced.”⁸ And, although refugee law cannot be used as the legal framework for addressing IDPs, Deng used it to inform the debate on IDPs and to build a large consensus.

The appointment of Deng and his subsequent work on IDPs is an object lesson on how clever lawyering can bring reluctant states along without employing the sledgehammer of hard law. Deng's initial mandate asked him to use existing legal regimes as a springboard for action: he was to determine the extent to which existing legal regimes—human rights, humanitarian law, and refugee law—provided a basis for the protection of IDPs. What he did next was textbook politics. He produced *Internally Displaced Persons: Compilation and Analysis of Legal Norms*,⁹ an innovative text of existing “rights” without calling them so. His report examined international human rights law, humanitarian law, and refugee law, and concluded that while these disparate legal regimes provided substantial coverage for IDPs, they included significant gaps and failures in protection. In particular, he identified weaknesses related to “the need for an expressed right not to be unlawfully displaced, to have access to protection and assistance during displacement and to enjoy a secure return and re-integration.”¹⁰ In this way he tightened elements of soft law around a set of obligations that states could embrace without the threat of being bound by legal rules. Perhaps this is lawmaking or norm making by stealth. What is clear from the narrative of Deng's work on IDPs is that he would have faced considerably longer odds, even failure, had he tried to go the route of hard law.

Deng's next task was to secure the commitment of member states to agree to work with him to develop a normative framework for addressing the malignancy of IDPs. That is why the top UN organs gave him the green light. The UN General Assembly and the Commission on Human Rights asked that his report be distributed widely and then mandated that he “develop an appropriate framework, on the basis of the *Compilation and Analysis*, for the protection and assistance of internally displaced persons.”¹¹ He developed the Guiding Principles on Internal Displacement as a response to this mandate. The Guiding Principles represent Deng's attempt to harmonize the different legal regimes and to fill the normative gaps in the protection and assistance of IDPs. Yet why did he develop Guiding Principles, a legal form without the force of law, instead of pushing for a treaty or a declaration—a single definitive instrument—on IDPs? He will always be second-guessed on this, although there is every reason to think that he was most likely right. Nor was it clear that a binding treaty would have accomplished much more than a soft law text.

Since there was no single human rights instrument addressing IDPs, some in the human rights movement expected a convention or a declaration, the default action to address a normative gap. Even if substantial protections existed in the disparate legal regimes—humanitarian law, human rights law, and refugee law—advocates of IDPs felt that the lack of a binding instrument was an impediment to protection.¹² They sought a legal docu-

ment with which they would put states in the headlock of tight legal obligations. But Deng and his team of legal experts chose a different approach. A former cabinet member in the government of Sudan, Deng was also a lifelong advocate for the rights of IDPs. He had the vantage point as a Sudanese from the South—a region wracked by war and teeming with IDPs. In rejecting the path of a treaty, Deng cited two reasons to use the softer approach of “guiding principles.”

First, he argued that the Guiding Principles would produce in a short time a normative framework “while the elaboration of a treaty or declaration would lead to prolonged negotiations affecting or even blocking the possibility of using international human rights law effectively in the context of internal displacement for a long time.”¹³ This was a tactical argument based on expediency. Deng felt that states might block a treaty or declaration, prolong their negotiation, or even water down existing and recognized legal protections. Here, Deng was expecting the possibility of the trap that NGOs negotiating with states often fall into—seek a maximum, legally binding document, but risk inaction at the end.

Second, Deng thought that a document that restated and reflected existing international law would be “sufficient to provide the necessary guidance to states, international agencies, NGOs and others dealing with IDPs.”¹⁴ He was interested in using existing rules to cobble together “customary” practices that states would find more palatable because they were already bound by most of them in different instruments and legal regimes. Since the existing law was largely sufficient—so the argument went—why not merely restate it in a nonbinding document instead of plunging into uncertain and risky waters, leaving the fate of IDPs exposed and open to the whims of states? The gamble was that states would find the Guiding Principles more palatable since ostensibly they did not create new norms or additional obligations. It would be easier to sell states on laws they had already committed to in other forms, rather than presenting them with a completely new, single binding instrument.

The speed with which Deng worked to produce a viable document may be the best vindication of the strategies that he adopted—a nonbinding document. In 1998, two years after he was asked to produce a normative framework for IDPs, Deng submitted the Guiding Principles to the Commission on Human Rights. By avoiding the lengthy negotiating processes with states at the UN—and instead opting for a closed circle of legal academics and other experts—he circumvented the traditional processes of standard setting. The complications of haggling among UN member states were obviated by the approach used by Deng—he and his cohorts treated his assignment much the same way an academic treats a research project. He was the sole driving force and deciding factor about what to include in

the document. This undemocratic approach to norm making circumvented obstruction, delay, and filibuster by states and other players. It is remarkable—given the growing sensibilities about popular participation in human rights standard setting—that this “democratic deficit” did not come back to haunt the guiding principles.

Lawyers find ingenious ways of solving complicated legal—and political—problems, often using language, the great ally of the lawyer. In the matter of IDPs, Deng did the same: he reached into his bag of legal tricks and played with language to restate existing legal obligations. Instead of *rights* he uses the term *principles*, but there is no doubt that the Guiding Principles refer to the “rights” of IDPs and the “binding obligations” of states with respect to IDPs. This masterstroke of restating rights as principles, on the one hand, avoids the “tired” language of rights, which is bound to raise hackles in some quarters; on the other hand, it ennoble the document by using the loftier-sounding “principles.” The use of “principles” implies that the recommended actions are a matter of conscience, a depiction that seemingly makes the principles more hallowed than the more mundane and overused language of “rights.”

The Guiding Principles represented the single most comprehensive universal instrument and could be the basis of any future convention on IDPs, if ever there were enough political will to adopt one. At the regional level, Africa adopted a treaty on IDPs in 2009—the African Union Convention for the Protection and Assistance of Internally Displaced Persons.¹⁵ The AU Convention was many decades in the making and most probably influenced Deng. Although Deng may have laid the groundwork and the terms of the debate for any future universal legal developments on IDPs, Africa was the first region to come up with a treaty on the question. Both the AU treaty and the Guiding Principles will no doubt influence the basis for any future universal convention. But it remains to be seen how deeply the AU treaty will influence any future norm making.

The success of any norm-setting exercise can be measured not only by the process itself, but also by the traction, or adherence that states and other targets show toward the standards. How genuinely and seriously do states regard the standards? What measures do they take—both legislatively and in policy and practice—to obey the norms? In the case of the Guiding Principles, they have generally been well received by a number of states. Many states, including those with serious IDP problems, have shown a willingness to dialogue and to take steps to improve the conditions of IDPs. In its mandate to Deng, the Commission on Human Rights did not ask him to propose a legal text of a treaty or declaration but to “develop an appropriate framework”¹⁶ for the protection of IDPs. States saw this language of a “framework” as less threatening, which partly accounts for the success of the

Guiding Principles. The transparency of the process must surely have been a factor for their success. Deng did not do his work in secret or conceal his intentions; he kept the UN General Assembly and the Commission on Human Rights fully advised of his work and he “regularly reported on the views expressed on the Guiding Principles by Governments and inter-governmental organizations, and on the efforts taken to promote, disseminate and apply the Guiding Principles.”¹⁷

Nevertheless, acclaim, or acceptance, for the Guiding Principles has not been universal. The standards have their detractors and opponents; some states, for example, demean the Guiding Principles because they are non-binding. Those criticisms notwithstanding, the Guiding Principles have won the acclaim and support of the UN General Assembly, the European Union, states in Central and Eastern Europe, Africa, the Americas, and Asia.¹⁸ The endorsements by such a wide and diverse array of states have given the Guiding Principles a strong *moral standing*, but their status is more than that. Their increasing status as a normative framework is underscored by the reported enthusiasm with which national, regional, and other international institutions continue to receive and promote them,¹⁹ and a convergence of states, NGOs, and INGOs²⁰ find the standards viable and persuasive. So far, the norms have received no serious criticism from a substantive perspective, and no major disagreements with the standards have been reported. Nor has there been a movement to persuade stakeholders to object to them or to push for noncompliance. Given the Guiding Principles were not developed by states per se, it is a remarkable feat that they have been so widely embraced by norm makers, who generally insist on being the guardians of standard setting. Perhaps their wide acceptance and efforts to put them into practice will provide the impetus for the evolution of customary rules.

Evidence suggests that the Principles are quickly becoming the standard by which the rights of IDPs are being promoted and protected. In the short time since their adoption, national, regional, and international bodies—state, nonstate, and intergovernmental—have sought training on the use of the principles. The highest tribute that a state and other stakeholders can pay a norm is to use it to inform and guide policy and action. As noted by the Norwegian Refugee Council,

The favorable reception of the UN Guiding Principles by the United Nations (UN) agencies and the international community at large in 1998 clearly marked a milestone in the ongoing efforts to enhance internally displaced person (IDP) protection and assistance. However, the important provisions in this instrument sharply contrasted with the deplorable situation for displaced people around the world, a reality urgently calling for concrete

measures to not only develop and disseminate the Principles, but also to implement them. This could only be achieved through a targeted effort to raise the awareness, knowledge and skills of those governmental and non-governmental officials directly responsible for the wellbeing of the displaced population. Therefore, in 1999 the Global IDP Project responded to the calls of the Representative of the Secretary General on Internally Displaced Persons and others for concrete training initiatives on the content and use of the UN Guiding Principles.²¹

The Guiding Principles demonstrate that in an era when making new norms through treaties has become increasingly challenging, other ways to create new standards are possible. This will be truer for some issues than for others. It is inconceivable, for example, that states would have sat by idly as a UN Special Representative fashioned new norms on terrorism or torture, to mention two hot-button issues. But the plight of IDPs was a cause of helpless handwringing, and states were probably relieved that nonbinding “principles” became the tool of choice for Deng. As a final note of caution, one could charge Deng with “complicity” with states by taking the easy way out—by adopting a device that he knew states would be comfortable with precisely because it did not expose them to legal jeopardy or hard law. As an example of the entrenchment of this standard, the UN created a permanent position to oversee the mandate, and in 2010 appointed Chaloka Beyani, an academic of Zambian descent based in the United Kingdom, as the Special Rapporteur on IDPs.²²

THE WEIGHT OF DECLARATIONS

There are many ways to create norms and set standards in human rights. Some are more conventional than others. Some have more legal bite than others. But it is often difficult to say with certainty what form of standard will turn out to be the most effective. Although treaties and conventions would seem to be more legally certain, they are not always more effective than other forms of standards. Declarations, for example, have shown some surprising power to affect the way states act. Their “civilizing” effect can be more constraining on states than the binding effect of treaties. The Universal Declaration of Human Rights, the most seminal human rights document, is a short statement of the attributes of the human person and the expectations of society on the state. No other succinct and epochal document in human rights has been produced, although the intervening years have seen a slew of other declarations covering a wide range of concerns. These include the 1998 Declaration on Human Rights Defenders,²³ the 1986 Declaration

on the Right to Development,²⁴ the 1994 Draft Declaration on the Rights of Indigenous Peoples,²⁵ and the 1993 Declaration on the Elimination of Violence against Women.²⁶ While subsequent declarations on other thematic areas have had a considerable influence on human rights discourse, the UDHR has been singular in its effect on states and the development of the relationship between the state and the citizen.

Typically, UN declarations are adopted on those human rights questions in which a treaty or some other binding instrument would be difficult to achieve. The adoption of a declaration—a document whose force is ordinarily far below that of a treaty—signals that the subject matter is serious and important enough to warrant adoption by states. Even so, the proliferation of declarations can diminish the importance of the device as a tool for advancing human rights standards. So the declaration serves as a kind of shortcut to either co-opt the issue or blunt the push for more biting obligations on states.

It would be a mistake to imagine that a declaration is an easy and uncomplicated path to standard setting. Declarations can take years to negotiate and adopt; some have been in limbo for years. The two declarations discussed below—on development and on human rights defenders—underline the complexity of standard setting. The Declaration on the Right to Development has been mired in a normative swamp, unable to claim a definitive jurisprudence or an academic consensus on its meaning and substantive contours. It is contested and maligned by some and praised and exalted by others. The Declaration on Human Rights Defenders came to maturity only after a long period of gestation, and the early evidence points to difficulties of implementation. These two declarations, as well as the Draft Declaration on the Rights of Indigenous Peoples, are a testimony to the obstinacy of states when they feel threatened by an international human rights instrument. Not even the use of less constraining language—a declaration as opposed to a treaty—will make states less obstructionist in the setting of certain standards. What matters is the issue being contested. The more a standard threatens state sovereignty, or has the potential to alter power relations in a state, the larger the probability of delay and obstruction.

Perhaps no other standard has been the subject of more controversy in human rights discourse than the right to development.²⁷ This “right” evokes strong fear and support in equal measure from opponents and advocates. Generally, the global South embraced the norm, while the global North either opposed it outright or treated it as a hortatory and laudable goal, but a completely unrealistic one. Given the high degree of human privation, especially in the South (but also increasingly in the North), however, it has been impossible to dim the allure and promise of the right to development. The UN Commission on Human Rights first asserted the existence

of a right to development in 1977, although it was the African Charter on Human and Peoples' Rights that in 1981 became the first human rights instrument to make it a binding norm and, in 2012, apply it in case law at the African Commission.²⁸ But in spite of jurisprudential African leadership on the right to development, nothing much has been done for a long time to give it meaning and map out its scope. What, for example, would the right entail? What duties and obligations would it impose on states and other duty bearers? In 1986 the General Assembly adopted the Declaration on the Right to Development. The GA, which is largely a political body without much legal authority to bind member states, nevertheless represents the true measure of the will of member states and is representative of the collectivity of the world body—certainly more than the exclusive and antiquated UN Security Council. In that sense, a declaration by the UN—because it requires adoption by the GA—may have more “moral” weight and “universal legitimacy” than a legally binding resolution of the Security Council. Momentum on the right to development built rather quickly after its adoption by the UN. In 1993, the Vienna World Conference on Human Rights declared the right to development “a universal and inalienable right and an integral part of fundamental human rights.”²⁹ This was a significant victory because the Vienna conference is regarded as one of the seminal events of the human rights movement. Since 1986, the UN Commission on Human Rights—and its successor, the UN Human Rights Council—have struggled mightily to clarify the meaning and content of the right to development, including shedding light on whether the right has a legal status, and what such a status entails in terms of state responsibility.

The commission set up working groups and, in 1998, appointed the first independent expert on the right to development. Opposition to the right to development has come from some states that see the global redistributive justice discourse as incompatible with free-market and capitalist structures of the global economy. Not surprisingly, then, opposition comes from the most powerful interests around the globe, while support for the right to development is drawn from the most vulnerable and marginalized communities and societies. It is literally a contest between the powerful and the powerless. In any event, a quarter-century after it was mooted, the right to development still nags at the human conscience. As Henry J. Steiner and Philip Alston recently wrote, “Extensive efforts to clarify [the right to development] content and, more importantly, its implications, have yielded little agreement on concrete issues. . . . While many reports have been produced, they have yet to lead to any consensus about the practical consequences of the recognition of the right.”³⁰

It is easy to blame the lack of progress on the inability of key players to frame the question in language that is acceptable. But it is not so much

a matter of language that has bedeviled the right to development; rather, the substance of the right is the sticking point. Until this concern can be addressed and overcome, the right to development will remain in limbo. Meanwhile, poverty and exploitation, which spurred the need to articulate the right to development, threaten to become more acute, even as many people in the global South attain better standards of living. What is clear is that the push for the right to development will not go away as long as human insecurity, food shortages, climate change, migration flows, and civil unrest and conflicts increasingly tear societies apart.

Several more recent declarations are beset with similar, although slightly different, obstacles. One such case is the Declaration on Human Rights Defenders, which curbed the power of the state to restrict the movement of human rights activists and their freedom to act flexibly. This declaration was not an easy standard to elaborate and implement. It was deeply contested by states and NGOs on both ends. Adopted in 1998, it took the UN Working Group thirteen long years to draft, a time frame closer to treaty development than declaration preparation. It seems certain that a treaty on the subject would have taken much longer with perhaps no prospect for adoption. The slow process in the completion of the Declaration has been attributed to two major factors, both related to its threat to states. First, there was tension and friction between the states that supported an instrument on human rights defenders and those that were opposed to it.³¹ This schism, which is a familiar one, pitted some states in the North against most states in the South. The latter group used the drafting process to delay, and hopefully scuttle, the project altogether, a time-tested tactic. Second, the consensus approach adopted allowed a small group of states to effectively “veto” and delay any meaningful steps to finalize the draft.³² Consensus is the obstructionist’s best ploy. In a world of many diverse and politically complex states, consensus assures that either all are pleased, or none is pleased. This means that a “veto” of one is all that is needed to scuttle an agreement. The other problem with consensus is that it allows malignant states to water down the threshold of agreement to a bare denominator, which often means robbing the final product of any real meaning or substance.

Like the Guiding Principles on IDPs, the Declaration on Human Rights Defenders did not break new normative ground, which made fear over its completion such a paradox. The declaration was a triumph for human rights, especially from the global North, which has had difficulty accessing and working on human rights questions in the South. But although the Declaration on Human Rights Defenders was not a binding instrument—and in fact only restated rights that are enshrined in other principal human rights treaties and documents—it still elicited opposition from a number of states. First, the relationship between national law and the declaration in its

implementation raised concern that it could be used to shrink state power. Second, states' concern that the declaration gave human rights defenders too many special responsibilities or duties would, they argued, give them special status and rights over state authorities. Third, some states feared that the declaration would give defenders the right to access and obtain resources, including funding, for their work without state regulation or control. Fourth, states were concerned that the declaration would give defenders the right to observe trials, especially sensitive ones crossing national borders; such a spotlight on political trials, for example, could cast a state in poor light. Fifth, states feared that defenders would have the right to act on behalf of the victims of human rights violations, thereby putting states on the defensive. Finally, states were afraid that defenders would have the ability to freely determine and choose what issues to focus and work on.³³ Clearly, the bone of contention was states' fear that they would lose to human rights defenders the initiative and control in implementing human rights.

NGOs, whose work it is to promote and protect human rights, invested a lot of time, influence, energy, and resources to push for the Declaration. This was especially true of imperial NGOs such as Amnesty International, Human Rights First, Human Rights Watch, and other large Western NGOs. Nevertheless, many NGOs, and the governments that supported them, knew that they could not get states to agree to a treaty since all the rights they wanted were already internationally recognized human rights. A triumph that vindicated the growing power of NGOs and the human rights defenders, the Declaration was also made possible by what the Western NGOs touted as a coalition of civil society groups from across the globe advocating for it.

Kofi Annan, then UN Secretary General, appointed Hina Jilani, the Pakistani lawyer and human rights advocate, the first Special Representative on Human Rights Defenders in August 2000³⁴ after the UN Commission on Human Rights created the post.³⁵ The resolution creating the mandate asked states to assist the Special Representative in the performance of her duties, which include monitoring and intervening in cases of the harassment of human rights monitors and defenders, as well as pressing for the implementation of the Declaration. Jilani conducted fact-finding and diplomatic missions, published reports on the conditions of human rights defenders, and lobbied states to honor their obligations under the Declaration. She was a worthy appointee and worked tirelessly, but was hamstrung by a lack of resources and the intransigence of states. Even so, she was viewed as a dogged advocate and her tenure seen as positive.

It is clear that the mandate on Human Rights Defenders would not have come to fruition without the herculean work of NGOs. That is why NGOs feel that they own this mandate—they pushed for it and are its primary beneficiaries. They raised funds to support it to ensure that it does

not suffer the fate of so many UN human rights mandates, which often struggle with insufficient funding. As such, the more enterprising appointees mobilize their constituencies for funding support.

The examples above demonstrate that it matters little what form a human rights instrument takes, or whether its provisions are cast as rights, standards, or principles. While treaties are generally arguably the most difficult to realize, the implementation or respect that a text garners often has little to do with its legal status or form. It does not even seem to be a key consideration whether a document is binding, although the ratification of a treaty can spur domestic advocacy and embolden activists. Ultimately, what seems to be of consequence is *the degree of acceptance* by states of the particular instrument, and their willingness or ability to enforce or implement it. In this sense, the state remains the most important actor in the formulation, and certainly in the implementation, of human rights norms. Even so, that statement must be tempered with the gathering clout of international civil society, which is strengthened by the growing and robust civil societies in most countries around the globe.

TRADITIONAL OBSTACLES TO STANDARD SETTING

The making of human rights law requires states to work together to create standards. This process has been an arduous one because states were not used to being overseen by international institutions on their domestic affairs, particularly in their direct relationships with citizens and other inhabitants. However, once this door was opened, states have moved steadily—albeit reluctantly—to allow more scrutiny. Increasingly, states have accepted international supervision as human rights norms have achieved an ever greater purchase in international relations. And other nonstate actors have become more active in standard setting, as civil society groups and NGOs have in several cases originated and led UN or regional bodies in creating standards.

Historically, two devices have been used frequently in setting standards for human rights law—treaties and declarations. These devices, which are state-centered, harken back to the dawn of the Westphalian state, the genesis of the expectation that states should act in concert and as the key players in international law and relations, and, as such, their collective will would be expressed through mutually agreed-upon texts. Usually, these devices for the promotion or protection of human rights were negotiated under the auspices of the now-defunct UN Commission on Human Rights. Its successor, the UN Human Rights Council, has since 2007 inherited its duties, including standard setting.

The primary instrument for the regulation and stabilization of relationships between and among states has been the treaty. NGOs and nonstate

actors favor it over other devices because of its legal status as a binding instrument. An article of faith among NGOs is that states will sacrifice human rights for other hard interests unless the obligations are ironclad in a binding treaty. The treaty, much like customary law, takes longer to coalesce into a binding obligation, and creates legal norms among states. The treaty, then, is a contract whose core is the maxim *pacta sunt servanda*, which describes a rigid understanding that commitments, which are undertaken by states voluntarily, publicly, and formally, must be honored.³⁶ The treaty pivots on the “free will” of the state; since states voluntarily submit themselves to treaties, they ought to enforce them without external coercion.

In international law and human rights, the treaty has achieved iconic status, which explains its popularity among human rights advocates. But it is also why treaties are the most difficult instruments to negotiate. Progress on treaties cannot advance unless states signal their willingness to go ahead; even when they do, they can stall and delay in the hopes of either scuttling the treaty path or watering down the outcome. The choice of the treaty is a highly political one based on tactics and strategies by proponents. It is rarely the path of least resistance, but its culmination into a tangible text is often worth the wait and the resources spent in lobbying for it.

Treaty making is at its core a state-centered process, even if the initiative and drive come from the nongovernmental sector. NGOs are aware of this basic truth, and their tactics and strategies often reflect this reality. Smart NGOs target NGO-friendly states and use them as conduits to other states for their views. Often vibrant democratic states tend to be more NGO-friendly, although in a small number of cases there have been surprises. Such was the case, for example, when Mexico became the voice for the rights of the disabled. President Vicente Fox turned out to be a strong supporter of disability rights. In June 2011, South Africa, whose constitution protects homosexuality, led the UN Human Rights Council in approving a resolution to prohibit discrimination and violence against people because of their sexual orientation or gender identity.³⁷ Because of its long struggle against many forms of discrimination, particularly apartheid, and its robust civil society that remains vigilant of many rights, including those of gays and lesbians, South Africa is responsive to its domestic constituencies and therefore became an NGO-friendly state for the evolving standard on sexual orientation.

The treaty-making process provides states with ample opportunities to shape the course of negotiations, determine the content of the treaty, and decide if, when, and how the instrument is implemented. States can manifest obstructionist tendencies at any stage of the treaty-making process. They can, of course, reject it entirely if they can muster enough numbers to derail the project. An early supporter of a treaty may change the course of

the treaty's focus, depending on that state's domestic politics or the nature of the obligations being contemplated. States retain a trump card over the treaty-making process, although smart NGOs usually cajole, persuade, pressure, and even isolate obstructionist states. Occasionally these clever political ploys have shamed some obstructionist states into reluctantly coming on board.

The treaty-making process is often an elongated, drawn-out affair, more akin to a marathon than a sprint. In some cases, the officials who initiate the process often retire, die, or are recalled before the process is complete. Few people involved in the treaty process retain institutional memories, with the exception perhaps of long-serving members of the Human Rights Council. Thus, home ministries in the various states and the paper records at the UN are the only links to real continuity. Additionally, the negotiating, drafting, adopting, or ratifying stages all present each state with a chance to influence the shape and timing of the final product. A treaty, for example, can pass through all the stages up to adoption but still fail to come into force if it does not garner the necessary ratifications. Generally, however, after long waits, most treaties manage to scrape through with the bare minimum of ratifications to come into force. Such was the fate of the 1990 Convention on the Rights of Migrant Workers and Their Families before July 2003, when it finally came into force after receiving the minimum required twenty-seven ratifications.³⁸ The long and arduous road faced by this convention is but one sign that states may be more reluctant now to accept new human rights treaties. For example, a 1995 amendment to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³⁹—which simply allowed the Committee on the Elimination of Discrimination against Women, the treaty body, to meet more often and for a longer period—remained without the necessary ratifications.⁴⁰

Denying ratification is a traditionally effective strategy to cripple a human rights instrument. But it is also a double-edged sword. While a state may deny ratification to try to kill a standard-setting process, the fact that it participated in the making of the treaty, and may even have signed it, opens the state to pressure from domestic and external constituencies to live up to its good-faith promises. This is especially the case where the state has signed the treaty, which is usually an indication of the intent to ratify and be bound by the treaty, absent a radical change of circumstances or the state's inability to prevail on its legislature to give advice and consent for ratification. Procrastination, procedural delays, and artificially prolonged negotiations over the drafting of a treaty or declaration constitute an array of other options that allow states to resist or scuttle the creation or enforcement of human rights norms. The complicated and politicized process of the Draft Optional Protocol to the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (CAT)⁴¹ is a testament to these maneuvers. Although negotiations on the Draft Protocol commenced in 1992, it was not until 2002—a decade later—that it was adopted by a majority vote. On December 18, 2002, the Draft Protocol to CAT was approved by 104 states.⁴² The Optional Protocol, which came into effect after twenty ratifications on June 22, 2006,⁴³ does not accept reservations.⁴⁴

Torture has long been an instrument of policy for controlling dissent and stifling the public voice in virtually all states. Every state tortures—the question is whether torture is carried out as official policy or by disparate “rogue” officers of police and security agencies. Many interrogation techniques are either considered torture by human rights groups or come close to qualifying as torture according to the definition of the CAT. That is why states are particularly sensitive about standards on torture: because they fear that what they consider “legitimate” interrogation practices could be swept under the rubric of torture. The Draft Protocol to CAT was opposed by many states because they perceived it as being too intrusive on their sovereignty, although some states, such as the United States, knowingly but falsely claimed that it would be too expensive to implement and would infringe on states’ rights.⁴⁵ Most, like China, based their opposition on substantive sovereignty arguments.⁴⁶ To be fair, the CAT Optional Protocol is a very intrusive document. But that was precisely the point of it—to establish a high bar for states to prevent and eliminate a horrible practice. The Protocol’s mandate is complex, highly refined, and very intrusive and leaves very little wiggle room for states. It creates a global system for the mandatory inspection of detention facilities⁴⁷ and requires states to set up domestic, national preventive mechanisms,⁴⁸ an oversight system that no other treaty body has. Even the domestic mechanisms that the Protocol sets up are independent inspection bodies whose purpose is to monitor the places of detention.

Other, equally effective, strategies for obstruction include a state’s refusal to participate in the norm-creation process. Nonparticipation—which does not have to be explicitly stated or announced—is one way of denying standard-setting legitimacy or support. And states could block consensus, create a variety of obstacles, or employ any number of delaying techniques along the way, making it difficult for the process to get through the drafting stage. Where consensus is understood to be part of the process, states can buy themselves time to obstruct by simply withholding consensus under any number of pretexts.

If all of these maneuvers fail, the state could, of course, withhold ratification and lobby other states to do the same, denying the instrument the requisite number of ratifications to come into force. If all these routes turn out to be fruitless or prove costly to the state, it could ratify the treaty, but

with a bevy of reservations. Reservations can be genuine vehicles allowing a state to accept a treaty without compromising an important interest or norm. In this proper use of a reservation, a state intends to be bound by the treaty and to execute its obligations faithfully, without chicanery. The nature of the reservation lodged by the state would normally indicate the degree of commitment that the state has to the treaty. Reservations that, for example, dance close to the “object and purpose” of the treaty are usually not in good faith. But reservations can also be used deceptively by states intent on hollowing out the treaty. Thus, a reservation on CEDAW that attacks the basic norm of the treaty—equality—would be deemed out of consonance with the “object and purpose” of the treaty and therefore intended to damage the treaty.

The difficulty of finding common ground makes reservations an important escape valve if treaties are to find acceptance in a gallery of divided and competing cultural, political, and historical values. Without the device of reservations, many a treaty would conceivably not have seen the light of day. Reservations become the excuse for states not to abandon standard setting because the device allows them to “have their cake and eat it too.” Empirical evidence suggests that reservations have become so commonplace in the human rights field that they threaten the integrity of the commitments negotiated by states and undertaken by them.⁴⁹ Reservations also pose a paradox for progress in international human rights law. Standard setting would grind to a halt if reservations did not exist. The challenge is how civil society actors police the use of reservations and develop more effective strategies to either stop them before they are lodged, or work with or against states to remove them once they are lodged.

NGOs have increasingly paid more attention to reservations. Many feel that reservations make nonsense of treaty ratification.⁵⁰ The Vienna Convention on the Law of Treaties defines a reservation as any “unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.”⁵¹ This broad provision gives the false impression that a state can express reservations to a treaty at virtually any stage after its adoption, but that is not the case. In fact, the Vienna Convention forbids states from formulating reservations that are “prohibited by the treaty” and are “incompatible with the object and purpose of the treaty.”⁵² Thus, a reservation is any unilateral statement made by a state when signing or adhering to an international agreement—whatever that statement is termed—if it purports to exclude, limit, alter, modify, or change in any way the state’s obligations under that instrument.⁵³ Such a statement cannot go to the “object and purpose” of the treaty.

In 1951, the International Court of Justice added another layer to the role of reservations as norm-setting devices when it stated in an advisory opinion on the Genocide Convention that states were free to make reservations, but that other states were also free to object to them.⁵⁴ Thus, the ICJ added the element of “peer review,” so to speak, allowing one state to object to another’s reservation. This option increases pressure among peers to behave in a particular way because of the doctrine of *pacta sunt servanda*. The key question, the ICJ stated, was “the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a state in making the reservation on accession as well as for the appraisal by a state in objecting to the reservation.”⁵⁵ Thus, a state’s reservation must be “compatible” with the *raison d’être* of the treaty. Stated otherwise, a reservation would not nullify a state’s membership to a treaty even if another state objected to its reservation, so long as that reservation is compatible with the object and purpose of the treaty. A state that objects to another’s reservation can consider the reserving state not a party to the treaty if it deems the reservation incompatible with the object and purpose of the treaty. This opinion exemplifies the difficulties of sorting out conflicts relating to reservations. It also points to the complexity of the treaty as a standard-setting tool and underlines the fact that a treaty is not the certain, problem-free vehicle that some human rights advocates think it is. Nevertheless, since treaties are a way of regulating relationships between states, this bilateral approach to the suitability of reservations is a desirable device as a check on states too eager to water down their obligations to treaties.

Reservations are a common feature of human rights treaties, such as the historic women’s rights document, the Convention on the Elimination of Discrimination against Women (CEDAW). In fact, CEDAW contains the greatest number of reservations entered against any one document, which is not surprising, given the many cultural, religious, and historical problems that prevent states from fully protecting the rights of women. Widespread acceptance of misogyny and violence against women as well as the woe-ful underrepresentation of women in state organs and in the public square encourages states to feel at liberty to lodge the most devastating reservations to CEDAW. Whether a treaty expressly prohibits reservations that are incompatible with its object and purpose, as CEDAW does, is of little consequence.⁵⁶ The International Covenant on Civil and Political Rights (ICCPR), which is silent on the issue, has more than its share of troubling reservations. In sum, *reservations are viewed permissively and tolerated widely. There is a reluctance to declare any reservation invalid because of the perceived need for treaties to attract the highest number of adherents.*

Reservations against CEDAW are the clearest sign yet of the need to rethink the view that treaties are the preferred method for standard

setting in human rights. Many of the reservations to CEDAW go to its fundamental provisions—the object and purpose of the treaty. Many are no more than admissions of misogyny and discrimination against women by states. Reservations to Article 2—a blanket condemnation of discrimination against women and an ironclad obligation on the state to immediately eliminate such discrimination—are particularly odious and incompatible with the object and purpose of CEDAW. It cannot be permissible to oust the provision on nondiscrimination in a treaty whose central purpose is to eliminate discrimination—yet that is precisely what many states have done with CEDAW. Commentaries by scholars and the work of human rights advocates have not produced any demonstrable effect on the states bent on circumventing their obligations under CEDAW through reservations. At the very least, the CEDAW experience should suggest a more tempered approach to treaties as the avenue of choice for standard setting in human rights.

OBSTINACY OF GLOBAL POWERS IN HUMAN RIGHTS STANDARD SETTING

In the last decade, standard setting in human rights has become more difficult. The difficulties were initially traced to the fifty-three member UN Commission on Human Rights, which was highly politicized and paralyzed by the Cold War and competing geopolitical interests. Has the commission's successor, the forty-seven member UN Human Rights Council, been less problematic? It is perhaps too early to tell because the council is still young. But there are indications that ultimately this resistance to standard setting is a manifestation of the changed geopolitical makeup since the end of the Cold War. Walter Kälin, a Swiss academic and former member of the UN Human Rights Committee, noted that “unlike during the decades before 1990, it is no longer possible to adopt a text once the big powers have found a compromise.”⁵⁷ He attributed this problem to the “rapidly growing plurality of ideas and positions among states on human rights since the end of the cold war.”⁵⁸ Previously, the so-called big powers in the West would reach agreement and their allies or satellites would follow suit. But the end of the Cold War and the growing democratization of countries have loosened the grip of the big powers. The result is that more countries are acting more independently or in response to the dictates of their domestic constituencies and policies.

There are competing interpretations of this development. On the one hand, there is nostalgia in some quarters for the more predictable world of yesterday with a few “bosses” and many “followers.” But, on the other, there is elation that more and diverse voices can now be heard in the corridors of the United Nations. The question is whether these discordant voices are

good for the human rights project or whether they retard its development. One view is that the diversity of independent voices in the formulation of human rights must be a positive development, even if it results in delays in finding agreement. Such diversity of opinions may also point to a more genuine end product, one that is more universal and that is bound to find more acceptance and legitimacy in many regions of the world. Thus, as more societies participate in the formulation of standards, their ownership and respect for standards increase and become truly genuine. The thinking is that it is better to get a watered-down, but honestly contested norm, than to impose standards on people who did not participate in making them and have no stake in embracing them. This represents more of a “bottom-up” than a “top-down” process of norm making.

The Cold War geopolitical map froze many societies in place, but the end of the West-East conflict liberated former satellite states from the ideological tyranny of their sponsors, making freelancers of many a state. Rather than look to Washington or Moscow, states now often look inward to their core domestic interests before acting internationally. This return to internal sovereignty is bound to legitimize more states and spur more internal dialogues about human rights. For example, grassroots movements for political openness have sprung up in many states since the end of the Cold War. These enormous changes first took place in the Soviet bloc and Africa in the late 1980s and 1990s, and more democratic regimes also started to emerge in Latin America and Asia. By 2011, in an unexpected burst of popular revolt, citizens in North Africa and the Middle East drove long-serving despots out of power and loosened the grip of others. The Arab Spring did the unthinkable—it unleashed a mass fever for regime change not witnessed in the modern era in the Arab world. In this climate, peoples and states are able to articulate many interests in the formulation of human rights norms, including giving the religious, cultural, or political considerations relevant to the particular state more weight than was previously possible. Alternatively, it may use that latitude to strike deals with other states in ways that are more consonant with the state’s national interest. Less directed and eclectic processes for the formulation of human rights standards are now possible, devoid of the orchestrated plasticity of the past where the big powers struck deals and imposed them on weaker states. And a strong internal dynamic means that a state cannot simply force its own version of human rights on its populace.

The other view is that the absence of the few guardian states gives governments that have no interest in advancing human rights a stronger voice. Without a few leading states carrying the baton for human rights, little would be accomplished and many violator states would turn back the clock. This view prefers to see the leadership of a few committed and

devoted states, who can promote the human rights agenda. This argument held that the leadership of the West was essential not only to standard setting, but also to the implementation and enforcement of human rights. What mattered, so the argument went, was not diversity for its own sake, but the elaboration and formulation of standards that would enhance, promote, and protect human dignity, even at the risk of denying a wider global participation. This “eyes on the prize” or “the end justifies the means” approach has been popular with some leading Western international human rights nongovernmental organizations (INGOs). Many of them, in particular the American-based NGOs such as Human Rights Watch and Human Rights First, made no secret of their partnership with Western governments in promoting human rights in the South. Quite often, these INGOs see the foreign policies of Western governments as tools to advance human rights, and they backed Northern states’ attempts to link the human rights performance of states in the South to aid. This cohabitation between INGOs and Western states has been one of the Achilles heels of the human rights project.

The argument that human rights standard setting has become more difficult since the end of the Cold War, however, may not be entirely correct. In the first period of standard setting—1948 to the late 1970s—a raft of important treaties and standards were completed. Many of these were the most obvious, and on most there was a high degree of urgency and consensus among states. More difficult and nuanced human rights claims have taken longer to legislate because of the lack of courage and clarity by proponents and states. Yet at the dawn of the human rights movement, the time frame for passage of human rights standards was lengthy. It took eighteen years between the UDHR and the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the two principal human rights treaties. This nearly two-decade lag was evidence of the reluctance of states to subject themselves to new forms of international scrutiny and to outsource chunks of their sovereignty. It took another ten years for the ICCPR and the ICESCR to obtain the required ratifications to come into force—a total of almost three decades from beginning to completion. But once these covenants were ratified, the human rights project became unstoppable. Using the UDHR and the two covenants as props, a torrent of claims framed as human rights poured from every aggrieved group and demographic. A new language of human liberation had been born. Yet the long period of gestation for the UDHR and the two covenants was not unique; in fact, several other human rights treaties in the period before the 1990s took as long or longer to negotiate and come into force.⁵⁹ What is important, in hindsight, was not the time it took to negotiate and bring treaties into force, but their wide acceptance once they were adopted.

Other examples point to even more tortured processes of treaty negotiation and formulation. The internationalization of accountability for the most heinous human rights crimes is one poignant example: attempts to create norms and an institution to try international crimes took more than a half-century to come to fruition. The reluctance of states to establish an international criminal tribunal straddled the entire Cold War period and beyond. Not even the gruesome genocides in Cambodia, Uganda, Nigeria (Biafra), and other countries were enough to spur the conscience of the international community—the big powers—to establish a permanent court. Although the idea of an International Criminal Court (ICC) had been on the agenda of the human rights movement since 1948, the Rome Statute on the International Criminal Court was not adopted until 1998.⁶⁰ The ICC became a reality five years later, when the UN elected eighteen judges to the ICC in February 2003 and swore them into office the following month at The Hague. Even at that late date, strong and powerful opponents of the ICC tried to kill the project completely. In its opposition to the ICC, the United States found itself in cahoots with some of the most egregious human rights violators—Iran, Iraq, Libya, Israel, China, Algeria, and Sudan, among others.⁶¹ Most of its close allies in Europe and elsewhere voted for the ICC, as did many African countries.⁶² In fact, Africa, which is viewed in popular narratives in the West as rife with human rights violations, has the single largest bloc of member states in the ICC, yet it has also been the target of virtually all ICC prosecutions.⁶³

Standard setting and the implementation of human rights came under new challenges in the wake of the September 11, 2001, terrorist attacks in New York City and Washington, D.C. Those attacks on the United States—the first of their magnitude since the assault on Pearl Harbor by the Japanese military at the onset of World War II—shocked the conscience of the lone superpower and put the world in a security and military frenzy. Led by the United States, or taking their cue and excuse from Washington and its avowed “war on terror,” many states sharply qualified their commitment to the promotion and protection of human rights.⁶⁴ Terrorism became a convenient excuse for states with undemocratic proclivities to ramp up security and restrict civil liberties. Security and the war on terror took center stage and pushed human rights farther down the ladder of international concerns. Images of suicide attacks—usually in Muslim or Arab countries—became an enduring rationale to institute states of fear. The American-led wars in Iraq and Afghanistan deepened retaliatory terror attacks and spawned many Al-Qaeda franchises around the world from the Middle East to North Africa, Asia, and East Africa. The relative tranquility of the pre-September 11 period was gone—apparently forever. Since the terror attacks, the United States has enacted and promulgated laws, policies, and measures that

have contracted civil liberties in the United States.⁶⁵ Some of the measures, including the Executive Order by the Bush administration to establish military tribunals to try individuals designated as terrorists, are more reminiscent of authoritarian and undemocratic states and not of the self-proclaimed leader of the free world.⁶⁶ Undemocratic and authoritarian states—which are prone to human rights abuses—have seized on the American restriction of civil liberties and disrespect for international law to crush domestic dissent and oppose more open human rights initiatives at global forums. While the reality of terror attacks cannot be denied, the militarization of the response to them is another matter. Amnesty International argued that police work and smart intelligence gathering would have been a more effective—and human rights-friendly—response to terror attacks.⁶⁷ The human rights community and states are still engaged in robust conversations about establishing standards to address the balance between security—which is itself a core human right—and human rights. But every new terror attack strengthens the hand of states and weakens the voice of the human rights movement.

Historically, the United States has had an ambivalent relationship with international law and human rights law, and the September 11 attacks exacerbated that ambivalence. The problem is rooted in American exceptionalism: the United States plays by international rules when they suit its domestic and external interests but ignores or denigrates them when they are in conflict with its internal predicates and politics. Not surprisingly, this America-knows-best attitude has done much to erode its credibility abroad since the 2001 suicide attacks.

Although the self-styled champion of democracy, constitutionalism, and human rights, the United States qualified its support for universal human rights initiatives almost at the dawn of the human rights movement. An early supporter of the UDHR at the inception of the codification of the human rights corpus, the United States did not see itself either as a beneficiary of the human rights corpus or its obligor. Eleanor Roosevelt, the former First Lady of the United States, might rightly be described as the mother of the UDHR. Yet U.S. enthusiasm for human rights treaties waned quickly, and in 1953 the country withdrew from the drafting process of the ICCPR and the ICESCR.⁶⁸ Fearing international scrutiny for racism and other human rights violations—but citing sovereignty concerns—the United States refused to participate in human rights standard setting, let alone the ratification of human rights instruments. It was not until 1992 that the United States ratified the ICCPR, almost forty years later. Under the George W. Bush administration (2001–08), American unilateralism in international affairs became much more affirmed, as demonstrated by the rejection of the Kyoto Protocol, withdrawal from a number of international commitments, and the 2003 war in Iraq.⁶⁹ The go-it-alone approach by the

United States took the country's international reputation to a nadir. The United States was despised abroad, and the Bush policies—both domestic and external—deeply polarized the country itself.

President Bush's unilateralist approach was a sharp departure from the more consultative administrations of John F. Kennedy, Jimmy Carter, and Bill Clinton. Kennedy sought to create a more endearing image of America abroad through programs such as the Peace Corps and assistance to emergent postcolonial states. The testament of his popularity abroad is the number of people who carry his name. There is nostalgia about Kennedy, perhaps because he was killed before he could demonstrate his fallibility. The Carter administration gave human rights rhetoric unprecedented prominence in U.S. foreign policy. The first American president to imprint human rights directly in the foreign policy of the United States, he created a human rights bureau in the State Department and put in place a number of measures to include human rights considerations—for example, foreign assistance and aid tied to human rights conditions—in the calculus of American policy. Even today, long after he left the White House, Carter is regarded as an influential and revered figure in the human rights universe. Clinton revived the more humanist American tradition by emphasizing human rights, democracy, and labor rights as important benchmarks of U.S. foreign policy. Although he helped end the killings under Slobodan Milosevic in the Balkans, it was on his watch that the Rwanda genocide of 1994 took place while America stood by passively.

Barack Hussein Obama was elected president in 2008 amid high hopes that he would restore America's standing in the world. Much of that hope was based on an exhilarating and rhetorically uplifting campaign. Because of his background—a black American whose father was a black Kenyan and Muslim—Obama was viewed as capable of healing America's image abroad and restoring faith in democracy at home. He took firm positions on some important human rights issues. For instance, he promised to close Guantanamo Bay, where hundreds of Muslim terror suspects had been held for years without trial. An international hot-button issue, detention at Guantanamo was a blatant violation of due process protections—for detention without trial was mostly associated with tyrannical regimes, not the United States. Obama had promised to transfer the suspects from Guantanamo and try them in American civilian courts, instead of the much-maligned military tribunals that did not meet international standards for a fair trial. Yet, Obama reneged on promises to close Guantanamo, even after his reelection in 2012. Another issue he promised to reverse was the policy of renditions and torture, by which the Bush administration would take terror suspects to secret detention centers where they were tortured and waterboarded to force confessions. Obama also promised to end “don't ask don't tell,”

the policy that denied gay Americans from serving openly in the military. Obama fulfilled the last of these promises in 2011. But he failed to close Guantanamo, end military trials, or halt the rendition and torture of terror detainees to third-party countries. Instead, he issued an Executive Order⁷⁰ (Ensuring Lawful Interrogations) in 2009 regulating renditions, but without banning or stopping them. Obama ratcheted up the controversial use of unmanned aircraft (drones) to find and kill terror suspects abroad, including at least one American citizen. The drone strikes raise complex moral, legal, constitutional, and human rights dilemmas, and many human rights and civil rights advocates vehemently oppose this policy. Nor did Obama seek to have the United States join the International Criminal Court, which Bush had vehemently opposed.

The long view of history shows that standard setting is complicated by the failure of big powers such as the United States to join other countries in making new norms. For example, the United States was a major stumbling block to the formulation of the Rome Statute. Ostensibly, the U.S. feared that the ICC would be used as a “political court” to prosecute American leaders and military personnel for its many—and seemingly unending—wars abroad. Even after the negotiators made major concessions to accommodate its concerns, the United States still refused to ratify the Rome Statute. In fact, to underscore his contempt for international law, Bush “unsigned” the Rome Statute,⁷¹ an action that perhaps has no precedent in the history of treaty law. Interestingly, the United States has often found itself alienated from its European allies when it comes to standard setting. Such is the case with the growing international trend to prohibit the death penalty. The EU has banned the death penalty, as have a number of countries in Africa. The United States finds itself—once again—in league with China, Iran, Saudi Arabia, and a diminishing number of states that still put people to death. None of these states are paragons of human rights virtue. U.S. participation, and even leadership, would alleviate some of the political difficulties and problems of standard setting in human rights.

POLITICS AS OBSTRUCTION

No other discourse evokes as much public sympathy, or emotion, as does human rights, and opponents of human rights are demonized as inhumane, power hungry, or plain evil. States rarely disagree with the content of a particular human right, but they hide behind spurious arguments to oppose compliance. Their objections to particular human rights standards are usually couched in arguments about sovereignty, self-determination, development, and the struggle against foreign domination or imperialism. Human rights are viewed as a noble ideal, and the only way to credibly confront

them—without appearing negative—is by pitting them against another equally noble ideal. This perception game has turned the human rights agenda into a sport of organized politics and public relations within the corridors of the United Nations. For example, the United States, which is party to only a few human rights treaties, is usually quick to point out that it already encodes human rights norms in its state and federal laws and practices and does not need to duplicate the effort by ratifying treaties. To be fair, some of these arguments have some validity, but that argument misses the whole point about international human rights law. Domesticating human rights norms is an ideal, but that does not mean that subscribing to international treaties is a cynical or useless duplication. One strengthens the other and gives the state influence over violating states. Moreover, treaties give citizens more forums and materiel to vindicate their rights. International oversight should not be treated as a discretionary matter. As in many other situations, one must always peel back the layers of argument to appreciate the genuine reasons behind a state's reluctance to submit to particular human rights standards.

Nonetheless, the politicization of human rights standard making should not necessarily be viewed in a negative light. Politics is the medium of doing international business; in fact, politics is neutral—and should simply be viewed as process. That is why politics by itself does not always lead to a rejection of human rights instruments. In many cases, states will readily accede to or ratify human rights instruments, knowing that they do not intend to implement them and may not have the capacity or resources to do so. That action is not necessarily “negative” politics; rather, it shows the power of human rights—even a cynical state wants to be seen as supportive of human rights. The former Zaire, now the Democratic Republic of Congo, under the late Mobutu Sese Seko, itched to ratify every human rights instrument.⁷² In 1989, the then-human rights minister told the author that Zaire had no normative problems with any human rights treaty.⁷³ Yet Zaire, despite its raft of human rights treaty ratifications, was one of the most egregious human rights violators and honored its treaty obligations in the breach rather than in observance.⁷⁴ Adopting a trigger-happy approach to treaty ratification, many states have no problem buying into a fashionable discourse without the slightest intention of carrying out its obligations. Indeed, hypocrisy is the homage that vice pays to virtue. Many states still see the universal mechanisms and institutions for the elaboration and enforcement of human rights as impotent and therefore posing no real threat to either the political elite in power or to state sovereignty. To such states, there are no real costs to joining a treaty. But ratification per se is likely to give internal human rights advocates—as well as INGOs—a language

with which to confront the state. Additionally, such ratifications can open opportunities for dialogue between the state and other stakeholders.

In many cases, states will pay lip service and heap platitudes on certain standards but take no steps to advance or consolidate them. A case in point is the much-maligned right to development. Virtually all states agree that development is an essential requirement for global peace and for improving the conditions of many people around the globe. Yet surprisingly little agreement exists among states, international institutions, and NGOs on what constitutes development, let alone how to bring billions of people out of poverty and privation. Increasingly, emphasis on development has turned to more than economic remedies. Development encompasses many aspects, such as advances in culture, political organization, or military achievement. Amartya Sen has written about development as the complex combination and interaction of instrumental freedoms—political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security.⁷⁵ This nuanced and complex understanding of development is essential if humanity is not to be reduced to economic statistics driven by the consumerism of modern globalization. As Sen writes,

[T]hese instrumental freedoms tend to contribute to the general capability of a person to live more freely, but they also serve to complement one another. While development analysis must, on the one hand, be concerned with the objectives and aims that make these instrumental freedoms consequentially important, it must also take note of these empirical linkages that tie the distinct types of freedom together, strengthening their joint importance. . . . The claim that freedom is not only the primary object of development but also its principal means relates particularly to these linkages.⁷⁶

The complexity of development and the difficulties that its achievement poses are matched only by the seduction it offers. Who could have imagined two decades ago the dazzling developments in technology driven by innovations in the capacity of the Internet to transform the way people communicate and interact with their states? Large segments of the population in Africa, Asia, and Latin America leapfrogged the fixed landline and went straight to cell phones, mobile devices, and computers. The result has been rapid economic growth and new forms of political activism. In 2011 Facebook, Twitter, and other Internet-driven tools spawned the so-called Arab Spring and disrupted the power of long-serving dictatorships in North Africa and the Middle East.⁷⁷ Those popular revolts were centered on

demands for democracy and economic opportunity for majorities, especially among the youth in the Arab world. Political liberalization may be more easily achieved, but economic development is likely to be slow in coming because it requires the dislocation and radical reconfiguration of many vested interests, structures of power, and deeply embedded attitudes. States will have to do more than simply pay lip service to development, even if they couch it in the language of rights. Commentators and citizens in the midst of the Arab Spring were not urging for support of the Declaration on the Right to Development, but its spirit as a norm could not be denied.

Political elites in both the North and the South talk about the importance of development, but neither has the will or vision to bring it about. In the last decade, a lot has been made of the rise of several powers in the South, most notably China, India, and Brazil. Their growth rates have been extraordinary by historical standards. In these three countries alone, hundreds of millions of people have moved out of poverty, an unprecedented statistic. Even Africa, which had lagged behind, has recorded impressive growth rates since 2000. The question is whether such growth is equitable and sustainable over the long term. In India, for example, the dizzying economic achievements benefit only the top 20 percent of the population.⁷⁸ How the majority who is still locked out reacts to these egregious disparities does not auger well for the long-term stability and development of India. China has an even more complex path ahead. Its closed political system may implode if and when growth slows down. Additionally, the rate at which both India and China are consuming resources is likely unsustainable. The other problem is one of demographics: How will India and China deal with an aging population once the “youth bulge” passes and hundreds of millions retire from the active workforce? How will the retirees be supported? There are indications that as these three states grow, they are leaving the “third world” behind and developing imperial economic and political postures. How will this affect the ability of the South to speak with one voice to advance the right to development? Will this ring the death knell for the right to development? Will other states in the South—such as South Africa—whose economies are also growing at a fast pace take the lead in speaking for the global South? These developments will complicate the work of the UN bodies concerned with the right to development, which will find it increasingly difficult to develop a cogent jurisprudence and a universally acceptable formula or blueprint for implementing the right to development.⁷⁹ The murky status of the right to development, which is not likely to be encoded in a binding treaty any time soon, will not change. In the meantime, NGOs, states in the South, and UN bodies must redouble their efforts to flesh out the standards and other benchmarks for this important right so that the paths to its implementation can become clearer and more persuasive

to the states in the North and the multilateral development and financial institutions they control. Perhaps NGOs in the North, which have been particularly lukewarm or even hostile to the right to development, should use their clout and muscle in advancing debate. Perhaps the elaboration of the right could be more fruitfully pursued within the Committee on Economic, Social and Cultural Rights, or the various bodies or working groups of the UN Human Rights Council.

THE OWNERSHIP OF NORMS AND STANDARDS

Standards and norms have a specific place of origin; they arise from particular circumstances and are sheathed in time, culture, and identity. That does not mean that they cannot become transcendent and universal; they quite often do. In the days of yesteryear, this transcendence may have taken years or even decades to achieve, but today, with the advent of instantaneous technology, norms can be embraced far and wide in a relatively short period. The universality of any norm or standard occurs through conquest, persuasion, deceit, fraud, conversion or dissemination, domination, or through the displacement or the supplanting of a local particularism with a foreign or external truth or myth. As correctly noted by Abdullahi An-Na'im, all norms are founded on specific cultures and philosophies.⁸⁰ No norm arises from its cultural mores as universal, especially if it is a human rights norm. Adamantia Pollis and Peter Schwab have asserted that "the Western political philosophy upon which the [UN] Charter and the Declaration [UDHR] are based provides only one interpretation of human rights, and this Western notion may not be successfully applicable to non-Western areas for several reasons."⁸¹ In other cultures, human rights may be more correctly expressed in the language of human dignity. In the United States, human rights are generally regarded "as designed to improve the condition of human rights in countries other than the United States (and a few like-minded liberal states)."⁸² This view sees human rights as a language applicable not to the empire but to the subject states of the empire; that is, human rights are for "them" but not for "us." Despite this early foundation and formulation of human rights in Eurocentrism and American exceptionalism, human rights norms have at least gained rhetorical acceptance in virtually every state. That is because human rights have a core truth that can be found in all cultures—a universal resonance of human civilizations. These include norms such as respect for human life, reverence for procreation, desire to limit pain and suffering, the use of social institutions for a common good, generosity, hospitality, human dignity, and so on. While these norms may not be expressed in the rights language, they cut across cultures and historical milieus. They form a common language in which humankind can communicate.

The contest about human rights is whether the medium of rights—and the specific iteration of Western liberal jurisprudence—is a language comprehensive enough to express and mediate diverse and particular norms of human dignity. If so, where does that leave other “languages” of human dignity? Can they be captured in the language of rights? The key questions, then, are the following: Should human rights—with their European cultural and philosophical roots—be celebrated as having attained universal, cross-cultural legitimacy? Are they elastic enough to accommodate other expressions of human dignity? Put differently, is the language of rights open enough to be transformed by other languages of human dignity? Is the language of rights open to normative penetration and counterpenetration? Are the norms and standards of the human rights corpus now owned and held in common by humanity as a whole? What makes norms universal, and how is the ownership of standards claimed by diverse peoples and interests? If states remain the key actors in human rights standard setting, is it fair to say that they largely retain their ownership? Is ownership dominated by particular states, to the exclusion of others? How can other actors, including individuals, NGOs, intergovernmental and other international institutions and entities, claim ownership? These questions are important because ownership is critical to legitimacy, relevance, effectiveness, and implementation. If ownership of human rights norms is not widely shared, then the corpus will have few guardians, those who are interested in their success and operationalization. And in that case, human rights standards would lack the committed constituencies to champion their implementation and enforcement.

International nongovernmental organizations (INGOs) in the North have a tendency to treat human rights as an unimpeachable regime of rules and standards, and they expect cultures outside the West to accept this as a basic, nonnegotiable truth. In their view, human rights are akin to antibiotics that would cure the “disease” whether the patient is Asian, African, or Latin American. The identity of the patient is deemed wholly irrelevant. In 1998, I had an exchange with Kenneth Roth, the executive director of Human Rights Watch, at a public forum at the John F. Kennedy School of Government at Harvard University, in which Roth referred to human rights as “antibiotics” that any culture would be foolish to reject. The notion that human rights are a precise science in terms of their effect on the malady leads to prescriptions for non-Western societies. Formulas are given as to how particular political and social problems can be resolved through the regime of human rights. Roth’s view is not isolated, but a deeply held perspective. Human rights education has been advanced as “cure” for despotism and bad culture.⁸³ This arrogant benevolence of the West has historically been embedded in human rights missionaries in the academy and at INGOs such as Amnesty International and Human Rights Watch. This analogy

remains poignant because it is an unvarnished expression of the self-image of some INGOs. The fact that Roth's statement was made without a hint of sarcasm or irony was illustrative of the deeply entrenched "savior" mentality of some Western NGO leaders. Human rights—in their original Western liberal iteration—have made an indelible mark on human civilization in the last seventy years. The contention here is not about impact. Rather, the question is whether the liberal tradition is humble enough to accept the contributions of other traditions and cultures to validate a universal corpus of human dignity. Is the human rights corpus, and its language, capable of negotiating across cultures to create a new universal consensus?

THE EVOLUTION OF OWNERSHIP

The political liberation of former colonies since World War II increased the voices in global governance, and the circle of actors in the human rights movement expanded rapidly. The fastest-growing human rights movements today are not in the West but in Asia, Africa, Latin America, and the Middle East. In India alone, the world's largest democracy, there are human rights movements in virtually every village and hamlet. Not even the drafters of the UDHR could have foreseen this phenomenon in 1948. The post-1945 norms of the human rights movement have drawn from a variety of struggles, including those against colonialism, slavery, racism, ethnic demagoguery, religious intolerance, the discrimination against women, and the suppression and exploitation of workers, among others. But a distinction should be made between, on one hand, the official UN human rights corpus and the human rights movement around it, which is tied to INGOs such as Amnesty International and Human Rights Watch, and, on the other hand, the popular human rights movements that have arisen in the South. This dichotomy—between "human rights from above" and "human rights from below"—is a contest for the future of the human rights movement and its identity. The leaders, victims, and activists in the struggles of "human rights from below" do not, and have not, sat at the high councils of the UN and other forums to craft the human rights corpus. Historically, they have been excluded from participation at the highest levels of norm making, with the exception of the more recent inclusion of Dalits and indigenous peoples.⁸⁴

At its inception, particularly during the formulation of the UDHR, the codification of human rights norms was the work of two key actors. The most important group of actors was the cluster of Western and European states, the victorious allies, who dominated the United Nations. Their concept of human rights, as noted by Antonio Cassese, was imposed on the world.⁸⁵ The other important voices were those of nonstate actors drawn largely from Western civil society organizations, for example, the International

Committee of the Red Cross, Jewish groups, Christian organizations, women's organizations, and professional and trade union organizations.⁸⁶ But even their voices were very few, and they were drawn from largely affluent white groups. The two sides—the states and Western NGOs—shared a basic vision of society, although they disagreed on how to deal with the South. Some of these groups, including the American Anthropological Association, submitted either memoranda or their own draft versions of the UDHR to the UN Commission on Human Rights.⁸⁷ Some groups advocated for a more interventionist human rights corpus, while others were more relativist. Nevertheless, the state and nonstate actors can hardly be said to have been diversely inclusive of most peoples, cultures, and traditions, because virtually no Southern, nonstate actors participated at this stage, and no other normative, religious, or cultural traditions were represented. The writing of the original template of the human rights project—the UDHR—was an act of exclusion, which is why its near-universal approval today is so surprising. The nations that drafted the UDHR directly colonized three-quarters of the earth and enforced brutal, racist, and even genocidal policies in many places. It is a paradox of history that colonial empires and abusive regimes, including the United States with its apartheid Jim Crow laws, was a major player in the birth of the human rights movement. The few states from the South present in the standard-setting process—such as India, Lebanon, Burma, Pakistan, the Philippines, Ceylon, and Syria—had recently gained independence and joined the UN, but they were completely new to the world of statecraft. One analyst put it this way:

[I]n 1914, Lenin calculated that more than half of the world's population lived in colonies, which covered three quarters of the world's territory, a calculation that was still correct at the end of the 1940s. This fits the estimate Phillipe De La Chappelle made of the United Nations membership at the time the Declaration [UDHR] was adopted: "North and South America with twenty-one countries represented thirty-six per cent of the total, Europe with sixteen countries twenty-seven per cent, Asia with fourteen countries twenty-four per cent, Africa with four countries a mere six per cent, and the South Sea Islands with three countries five per cent." This shows that the continents of Africa and Asia were grossly under-represented. And this is where in the 1940s most of the most prominent drafting nations still had their colonial empires.⁸⁸

But this global order would be challenged in the following decades, especially after the 1960s. The postwar period was a time of great political

ferment. Colony after colony shook off the yoke of European direct rule. Anglo-American free market values struggled for global supremacy against Soviet communism, and the political landscape in the South changed dramatically with the defeat of direct colonialism in the 1960s. Although the West largely dominated the United Nations, decolonization transformed the face of the United Nations and other institutions of global governance. New voices and faces would soon congest and enrich the character of these bodies. Progressively, the normative concerns and political interests of these new state actors sought to exert themselves and to diversify both the form and content of lawmaking and standard setting in international law and human rights. The debates at the UN and other international forums, as well as the nature of the norms adopted, illustrate this new political dispensation. The proverbial glass began increasingly, if slowly and painfully, to look half-full rather than half-empty. But this change would be long and difficult. Control over norm making could not be wrested from the West, but it could be enriched by wider global participation. Even so, problems of poverty, the asymmetry of power, and the lack of basic diplomatic and technical skills continued to hamper the ability of the South to deeply impact standard setting. Undemocratic regimes in the South—and their distaste for their own civil societies—did not help participation. Their influence would be felt more in the obstruction of the creation of norms, rather than their construction. But as single party regimes, civilian dictatorships, and Cold War—allied regimes gave way to more open states in Africa, Asia, and Latin America, civil societies and states in the South became stronger players in standard setting. By the close of the first decade of the twenty-first century, the world of international standard setting looked much less skewed than it did in 1948.

The political evolution of the international community of states directly impacted global governance. Slowly but surely, human rights norms started to reflect sensibilities that had not been present hitherto. These changes in the character of international community are reflected in the human rights instruments and standards that the UN adopted, particularly after the 1960s. The UDHR and the ICCPR, which in practice have been regarded as the most important human rights documents, are characterized by their emphasis on individual rights, perhaps the most essential element of the rule of law in a Western liberal democratic state. The two instruments are pillars of Western liberal jurisprudence. Perhaps the only exception is the somewhat minimal inclusion of economic and social rights in the UDHR. The ICESCR, which is ratified by roughly the same number of states as the ICCPR, is much maligned and regarded by many as the “other” covenant. But the ICESCR included many of the concerns of states in the South, including the newly independent states, and a coalition of the Soviet bloc

states and states in the South pushed for its passage. As a result, the ICESCR was heavily influenced by socialism and by Latin American and Caribbean states. Western states have interpreted its focus on economic and social justice as a threat to free market values. Although the ICCPR regards the individual as the center of the moral universe, it also includes provisions for collective or group rights. Its provisions on the right to self-determination of peoples⁸⁹ and on the integrity and survival of cultures⁹⁰ are a departure from the focus on individual rights. Even so, the “radical” nature of the ICESCR should not be overstated. Read carefully, it reveals a cautious and highly porous set of norms—and implementation processes—that should not threaten vested free market interests. Its tentative and vague language on the obligation on states provides wide latitude to evade compliance. Unlike the ICCPR, the ICESCR was not given an oversight body, and its enforcement committee was established much later. These deficits were meant to temper its force and to slow down its impact on states.

The historical concern and development of social and economic claims in the West should not be denigrated. The West does not lack a concept of economic and social equity; rather, the role of the state in realizing economic rights is in dispute. In a liberal democracy such as the United States, there are different ideological strains with respect to the role of the state in the economy. The conservative Republican Party prefers less government intervention in support of social services and the poor, while the Democratic Party advocates a more equitable tax structure to support the most vulnerable members of society. The development of the welfare state and social democracy is a testimony to the development of economic and social entitlements or rights. The European Social Charter and the extensive social programs of Canada and the Nordic countries point to a version of social democracy that tends to balance civil and political rights with social and economic rights. Even the United States, cast as a vehement opponent of economic, social, and cultural rights in the human rights movement, has a tradition of advocacy and protection of these rights. During periods of economic boom, the United States has been more generous with the poor. The tradition of the welfare state runs deep in the United States, and not just in the nongovernmental sector. In the 1930s the New Deal, an antipoverty program, responded to economic deprivation after the Great Depression. It can be argued, in fact, that U.S. resistance to economic and social rights is not a sign of their rejection *per se*. In 1944, President Roosevelt in his “four freedoms” address emphasized “freedom from want” as a cardinal principle that should underpin future U.S. policy. Other freedoms included the rights to health care, education, food, clothing, and the right to work. That speech would be so radical today that it is virtually impossible that an American president could deliver it, although at least one senior official in the Obama

administration recently devoted an important speech to it. Michael Posner, then Assistant Secretary of State for Human Rights, Democracy and Labor, connected the “Four Freedoms” to a more effective U.S. strategy to combat the root causes of terrorism in the world.⁹¹ The labor movement for many years was a strong advocate of protections for the working class, and the years of economic growth and equity in the 1950s and 1960s owe much to the strength of that movement. But with the strains on the economy since 2008, state and federal governments have cut back on so-called entitlements and passed legislation to curtail the power of labor unions.

There is no doubt that emergent states in the global South have exerted some influence on the debate on economic, social, and cultural rights. They are primarily responsible for the movement from the cultural individualism of the West toward a more community-centered perspective in the formulation of the more recent human rights texts. This normative chasm between the North and the South has been an enduring one in human rights debates. And it is true that societies outside the European world exhibit a tendency to emphasize group and collective rights, sometimes to the detriment of the individual. The balance to be struck here must be delicate. The African Charter on Human and Peoples’ Rights, the regional human rights system for the continent, attempts this balance.⁹² The African Charter creates the so-called three generations of rights: civil and political rights; economic, social, and cultural rights; and people’s rights, such as the rights to development,⁹³ peace,⁹⁴ and a satisfactory environment.⁹⁵ The Charter also departs from the script of other human rights instruments and imposes duties on individuals.⁹⁶ Such duties are owed to individuals, the family, society, and the state. In Asia, the lines between the individual, the society, and the state are blurred similarly by conceptions of duty.⁹⁷ Although an oversimplification of both positions, non-European cultures seek more balance between the individual and the society than do their European counterparts. It is easy to romanticize this view and overlook its potential to emasculate the individual at the behest of the state. The less problematic position is to seek a more thoughtful equilibrium between the individual and the community to avoid the excessive pull by either. That is why the South has something to teach the North, and vice versa.

The normative preferences of many of the human rights instruments adopted since the 1960s display the tendency of societies in the South to highlight the community and group or collective rights. For example, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, the 1976 International Convention on the Suppression and the Punishment of the Crime of Apartheid, CEDAW in 1981, the 1986 Declaration on the Right to Development, and the 1990 Convention on the Rights of the Child are progressively more detailed and either address

matters left out by the UDHR, ICCPR, and the ICESCR or further elaborate on them. They increasingly move away from the singular focus on the individual and tackle issues affecting groups and group rights or systemic and deeply embedded social and economic problems that require radical solutions. Efforts to set standards on the disabled,⁹⁸ indigenous peoples, and women address concerns that go beyond the individualist focus of the earlier human rights instruments. These latter-day instruments show that it is possible to reconstruct the human rights corpus to give it a more universal fingerprint.

CONSTITUENCIES AND OWNERSHIP

Like all norms, human rights norms come about because of particular material conditions; they arise out of concrete and real life circumstances. They respond to specific and real violations, or to denials of what a group or individuals regard as an essential entitlement or protection. Thus, human rights norms seek to address the plight of victims and those who are vulnerable. But often human rights standards cannot be developed unless there is an identifiable, usually sympathetic, victim—whether it is a person, a group, or a thing, such as the environment. The case has to be made that harm will come to that person or thing unless an inviolable status is conferred on the victim, whether potential or actual. Once the victim is established, the norm must identify the villain, either as the state itself, a person, or some other instrumentality acting as a proxy for the state or over which the state exercises control. That entity could be an individual or group or an entity perpetrating the violation with the tacit approval and support of the state. In other cases, the state may be unwilling or unable to stop the victimizer, but still be accountable for the abuse. For instance, nonstate actors beyond the control of the state, such as militias or armed groups that operate without the consent of the state and over which the state exercises no control, can be violators of human rights. Terror groups, such as the Islamist Al-Shabaab in Somalia, or the more notorious Al-Qaeda, which operate outside the control of any state, are accountable for human rights violations. The important thing is that there must be a nexus between the state, or the nonstate actor, and the abuse committed. This nexus is necessary because the state, or the nonstate actor, is the basic obligor of the human rights corpus because the state is responsible for everything that takes place within its jurisdiction. Since the state is the primary international actor and the key to international law, it becomes the target of human rights standards. But standards can be made only when either the victims become advocates of their own cause or others take up their plight. Rarely does the state drive the initiative in expanding the human rights corpus.

The plight must be made visible, compelling, and manifest to broad sectors of the global public for standards on promotion, assistance, and protection to be created. The urgency of the problem and the need for protection are central to the generation of a standard, or a human right.

Historically, however, victims have not been the key movers of norms. Paradoxically, the victims rarely own the standards relevant to their plight. Usually, powerful sympathetic groups or individuals with access to power and influence fight for standards. This is because *standard setting in human rights is an elite-driven and not victim-centered process*. The corridors of power at the UN in New York or Geneva, where most rights are hammered out, sit at a far remove from the victims, who usually live at the margins of society. Some recent exceptions to this rule are the struggles for gay rights and women's rights, where some of the victims are also very powerful advocates for their own cause. For the most part, though, standard setting as a process is state-, not people-centered.⁹⁹ The people rarely see norm setting in action. It usually takes place in a UN conference room where diplomats and nonstate actors of means mingle and debate over the nuances of lawmaking. Rarely, if ever, are the victims in sight, although sometimes they are paraded for effect. It is these elites—government, on the one hand, and nonstate actors, on the other—that “speak for the voiceless” in norm making. There is no direct democracy in standard setting at the UN. The people are out of sight, but represented usually by self-chosen, or self-imposed, proxies. Do these self-professed representatives of the victims actually represent the aggrieved, or do they fight for their version and vision of society? Often, INGOs, who are the most powerful brokers for standards, claim to be working in what they call “international civil society” or a “coalition” of NGOs from across the world. But how democratic is this global coalition of international civil society? Who dominates and controls it? Generally, ownership of standards remains with those who agitate for them and work to police their development and enforcement. Thus, although victims may know their rights—and in some cases may even know the mechanisms for influencing or vindicating them—the definition of their suffering usually rests with a faceless bureaucrat or an opaque and obscure committee somewhere in Geneva or New York.

Each human rights standard or norm, therefore, has a constituency or constituencies of owners—with some notable exceptions. The Declaration on Human Rights Defenders is unique because it affects directly the most engaged community in the human rights movement—the NGO and INGO human rights community, who initiated and advocated for it. The Declaration could even be seen as self-serving were it not for the incredible brutalities visited on human rights advocates across the world. The International Service for Human Rights,¹⁰⁰ in particular, was instrumental in its realization.¹⁰¹ That group's advocacy notwithstanding, INGOs were at the

forefront of this standard, and they stood to be the major beneficiaries of it, since the Declaration gave INGOs more legitimacy in fighting for access in the global South and in enabling them to work to protect human rights defenders in the South. This mandate is bound to remain effective and visible because its owners—and beneficiaries—constitute the active engine of the human rights movement.

Standard setting is an expensive proposition. It requires enormous resources for travel, lobbying, communication, and mobilization. Who has access to resources and funding for these activities? How do funders influence the struggle for standards? What is their stake in it? Will funders favor some standards and discourage or refuse to fund others? The reality is that marked differences exist among the energies and resources expended on various standards. The mix of constituencies and ownership, political biases, and social preferences speaks volumes about how much effort and money are put into fighting for different norms, and in this area the wealth and influence of the North over the South makes a huge difference. A lot of resources were expended on the Declaration on the Right to Development, the Protocol to the Torture Convention, and the Declaration on Human Rights Defenders. The latter two instruments were either backed by powerful states or formidable NGOs. In contrast, the right to development—although backed by a strong collection of states and the emergent civil society in the South—lacked the funding support of powerful governments and NGOs in the North.

The power of INGOs cannot be overstated—at least that was the case until the recent past, when more NGOs from the South have become more effective, better organized, and funded lobbyists in the corridors of power at the UN. Western INGOs have effective organizational skills, adequate funding, credible reputations, and access to powerful and sympathetic states, variables that make them formidable actors. Their access to renowned scholars in the academy in the West means that they can draw on impeccable research and intellectual support that the South has been hard-pressed to match, although that gap has considerably narrowed in recent years. INGOs also have a deep familiarity with the United Nations, the world of international politics and lobbying, as well as trusted contacts within powerful international media organizations that give them much power and clout. They can put pressure on their political elites and mobilize public attention easily. Not to be underestimated is the fact that the key UN offices are located in New York and Geneva, which for many of the INGOs is “home territory” or at least familiar cultural and political territory. These “cultural” advantages are not easily quantifiable, but they are critically important. What is clear is that they sharply tilt the playing field in favor of the Western groups. The

game of standard setting is played, in a manner of speaking, in the West where the INGOs have home field advantage.

A lot of the advance work for standards is not done at the UN. Well-organized constituencies conduct most of their activities outside of that building. Key stakeholders and likely obstructionists need to be won over, neutralized, or given a reason to rethink their positions. Public support needs to be expanded among the elite classes in various states as well as within the media and other constituencies. In the cases of the Declaration on Human Rights Defenders and the Optional Protocol to CAT, a lot of the necessary work was done by NGOs outside—and not within—the corridors of the United Nations, which is often the case when the standard in question is viewed as threatening to an array of stakeholders. The mobilization of such powerful players is only possible where a constituency has an elite base that is willing to publicly commit moral and material support for the cause. This requires funding, an influential NGO or a credible umbrella body, a cadre of good scholars, and seasoned activists—resources that individuals, NGOs, or groups from the South have not historically been able to readily or easily command. There are very few philanthropies in the South, and in some countries there are none. Such a gap can only be breached if groups in the South team up with groups in the North to work toward a common goal. Often, a group in the South will compete with a more established one in the North for funding on the same issue, another reason why coordinating between NGOs in the North and the South is more productive. For that cooperation to be successful, however, groups in the North must feel invested in those standards that motivate, drive, and interest groups in the South. One way to reduce the asymmetry of power between the North and the South, and to make sure that the human rights agenda is driven by interests from all areas, is humility by groups from the privileged parts of the world. It is a well-known fact that some groups in the North suffer from a seemingly incurable hubris because they are large, influential, and the established pioneers of the NGO world. These INGOs see themselves as the “fathers” and “guardians” of human rights, and they are captive to a cadre of activists who are trapped in a colonialist milieu. Even when led by a person of color from the South, INGOs do not seem capable of cultural change. For example, the highly capable Irene Khan, the former secretary general of Amnesty International, worked hard to transform the organization from a Eurocentric behemoth to a truly universal human rights group. In the end, she was a casualty of Amnesty’s conservatism and its European and North American opaque and undemocratic make-up. While the erudite Khan was widely respected and admired within AI’s grassroots movement, the organization’s predominantly white governing power structure did not

appreciate, nor fully accept, the mental and political shift to the South. Nevertheless, Khan left an indelible mark on AI. It remains to be seen whether the astute Salil Shetty, the Indian national who succeeded Khan, will fare any better. He has continued to build on the transformative work of Khan. The staff and structural changes that Shetty has initiated have been impressive. But only time will tell whether AI becomes a truly global group.

INGOs can be very successful in pushing for a standard when they put their muscle behind a campaign. The energy and resources that INGOs in the West put into the campaign for the Declaration on Human Rights Defenders illustrates this point. INGOs in the North pushed zealously for that instrument because their interests and those of their counterparts in the South converged rather perfectly. Clearly, INGOs in the North are not the major targets of repression by states in the South, where the work of human rights advocacy has historically been perilous. But groups in the North understand that the success of the human rights movement will rest on their ability to support their counterparts in the South. Groups in the North do most of their human rights work in the South, and many of them, especially Amnesty International and Human Rights Watch, would not exist but for their work in the South. So often their work in the area consists of brief missions on the ground, where they talk with a few players and victims and then head back to the safety of the West. So the only way they can remain credible is through cooperative relationships with local NGOs in the South, who become the funnels for information for INGOs. Nevertheless, INGOs such as Amnesty and Human Rights are ambivalent about how strong or independent they would like human rights civil society in the South to become.

Yet most groups in the South do not wish to be tethered or subordinate to dominant groups in the North. At one point, emergent groups in the South played subservient roles out of necessity—they needed the legitimation of their more powerful counterparts and the access to resources and networks. Groups in the South used the groups in the North as cover and protection against their own repressive governments. In many places—if not most—local NGOs in the South are increasingly able to operate without the protection of their Northern counterparts and are asserting their ideological and operational independence from groups in the North. INGOs find their Southern counterparts' independence challenging, and the change raises questions of constituency: Will this make INGOs irrelevant, and put them out of business? Or will they adjust and find a new niche for themselves and fashion a new relationship with groups in the South?

Human rights work by NGOs in the South is still a very perilous business, usually risking life and limb. Take the case of David Kato, a gay rights activist in Uganda, for example; Kato was murdered in 2011 in the midst of

a violent homophobic debate over a proposed antigay law that included the death penalty for gays and lesbians.¹⁰² Similarly, human rights workers met violent deaths in the Democratic Republic of Congo and in Egypt, Syria, and other Arab countries gripped by the so-called Arab Spring. That is why a mechanism to defend and protect rights workers was essential.

One of the obvious reasons for Western leadership on the human rights defenders declaration was access to global power structures and availability of resources for advocacy. It was not that NGOs in the South were not interested in their own protection, but wanting a standard and being able to effectively push for it are two different things. *There is a distinction between those who need norms and those who are able to lobby effectively for their formulation.* Often, human rights groups in the South were too preoccupied with basic survival—mobilization of resources, personal safety, and the tenuousness of a young civil society—to focus on the larger question of protection of human rights defenders at the global level. These basic survival questions were absent for groups in the North, and Western NGOs became an important actor in securing Norway as the lead state to push for the Declaration on Human Rights Defenders. One of the most supportive states for NGOs and for the growth of civil society in the South, Norway was a natural choice to lobby for the declaration. Most European states were heavily in favor of the declaration, while the United States, which has a wary relationship with NGOs in the South, refrained from opposing it. African states did not openly oppose the Declaration because there had been NGO pressure on the African Commission on Human and Peoples' Rights to establish a human rights defenders unit.¹⁰³ In addition, African states did not want to fall into the trap of being demonized as anti-civil society or opposed to the protection of human rights defenders. The Inter-American human rights system already has established a unit for the promotion and protection of the rights of human rights defenders.¹⁰⁴

The Declaration protects NGOs in the South from strangulation by the state and provides them with operational space and freedom from the state to conduct their advocacy. Importantly, it allows them to solicit and receive funds and resources from any source to support their work.¹⁰⁵ This is an important victory because states in the South feel that they often compete for donor—Western—funding with NGOs.¹⁰⁶ Some states have tried to control, limit, and even prevent NGOs from directly receiving donor funding, without which they would most likely wither away, collapse, or become completely ineffective.¹⁰⁷ Without doubt, there are some troubling questions if Western aid is funneled primarily through NGOs. One outcome is to further weaken the state and rob it of the ability to provide services, a genuine concern given the emasculation of the state in the South by the Bretton Woods Institutions. For Western NGOs—many of whom exist primarily to

monitor, expose, and limit human rights violations in Southern states—the Declaration further extends their reach because it creates a borderless universe for advocacy. It effectively abolishes, for operational purposes, the distinction between domestic and international human rights NGOs, and accords them virtually the same protections from the national state. This means that international nongovernmental human rights organizations, such as Amnesty International, enjoy substantially the same freedoms that the Kenya Human Rights Commission, a domestic NGO, is entitled to in its work in Kenya.¹⁰⁸ In fact, some INGOs, such as Amnesty, are establishing local offices in the South with varying degrees of success. That is why the Declaration was a perfect convergence of the interests of NGOs in both the North and the South. Coalitionary synergies are constructed easily around such shared and mutually beneficial standards, a fact that makes their passage by states less difficult.

The contrasting fates of the Declaration on Human Rights Defenders and the Declaration on the Right to Development indicate the importance of the ownership of standards. Who wants a standard, cares for it, and is able to fight for it makes all the difference in its chances for ratification. Rights are fights. They are struggles over resources, identity, and location. Once a claim attains the status of a right, then it becomes very difficult to claw that claim back. That is why stakeholders—both for and against a claim—fight pitched battles at the moment of conception to either realize the right or to make sure it never sees the light of day. These are struggles over the vision of society—not just at the international level but also at the state level. Once a claim becomes a right at the international level, a state has little wiggle room to stop its implementation domestically, whether it ratifies the treaty in question or adopts the particular declaration. Take CEDAW, The Convention on the Elimination of Discrimination against Women, for example. The norms and rights that CEDAW institutionalizes—based on the equality of the sexes—have become widely accepted. It is no longer a question of the validity of those rights, but when they will be enforced, even in states that have not ratified CEDAW. Women's rights are captured most comprehensively in CEDAW, and states are required to comply with it.

Yet powerful interests, who have inherent biases for and against certain standards, can block standards and rights in the human rights movement and in the standard-setting forums in general. As Joe Oloka-Onyango points out, relativism pervades the entire norm-making and standard-setting processes at the United Nations.¹⁰⁹ What he calls “empirical relativism” leads, for example, to more energy being applied toward the Optional Protocol to CAT or the Declaration on Human Rights Defenders than on the right to development.¹¹⁰ How quickly a standard will be realized is based on who backs it, a problem that can be traced back to how the human rights agenda

is set. Why is a certain matter important, who thinks it is important, and why? The politics of power and influence speaks volumes about the success or failure of a standard.

Some rights or standards are more polarizing than others. One of the most divisive rights in the history of norm making has been the right to development. Debates on the right to development have dichotomized the world: the South insisted on its absolute importance, and the North questioned its wisdom, practicality, and even desirability. Whatever virtue some saw in it in some parts of the world, others thought it would undermine free market policies and become a warrant for international welfare to take away from the “haves” and freely give resources undeservedly to the “have-nots.” Although the two sides’ arguments were equally divided, their resources for advocacy for and against right were not. Lacking any independence on economic matters and heavily dependent on the global economy, poor states cannot challenge effectively the hegemony of rich states. While that is slowly changing with the rise of Southern countries such as India, China, and Brazil, the balance of global power still resides in the West. Many countries in Asia, Africa, and Latin America remain largely impoverished. Lamentably, many poor states do not have the focus, the will, or sometimes the expertise to argue their positions within standard-setting forums. Marshaling great presentations and arguments at international forums requires a highly educated and refined bureaucracy that most states in the South often lack. On such deliberations within the UN, Oloka-Onyango points out that the “South is not well prepared for these debates; it is happy with the high rhetoric of the debate, but it is not prepared for the nitty-gritty of the issues, like the scope of the obligations imposed by norms and their details.”¹¹¹ Oloka-Onyango and other highly skilled experts from the South were often frustrated by the reluctance, or inability, of states in the South to tap into their civil societies to augment their negotiating capacity. But on the right to development, both NGOs and states from the South were at a distinct disadvantage. The incompetence of the states from the South was a huge setback compounded only by the preponderance of NGOs from the South who lacked the appropriate skills and resources to advocate for the right. Regrettably, NGOs from rich countries—whose interest and clout could make a difference—did not take the lead in the fight for the right to development, which left it at the mercy of politics. States could agree to adopt the Declaration knowing fully well that it would lack clarity or substance for implementation. In the end, the right to development was given a nod, but largely on the understanding that it was a “political right,” one that was so vacuous as to be largely meaningless in practice.

The struggles and processes for the realization of the Guiding Principles on Internal Displacement and the Optional Protocol on the Torture

Convention tell a unique story of ownership. Francis Deng, the former Sudanese diplomat and government minister, was by temperament and origin the ideal choice for appointment as the Special Representative of the UN Secretary General on Internally Displaced Persons. His native Sudan was home to an estimated 4.4 million IDPs, the most of any state at the time.¹¹² Only Angola, with 4.1 million IDPs, came close.¹¹³ In that sense, Deng, a Dinka, was himself a sympathetic figure. Here was a highly educated Southern Sudanese—Yale Law School graduate—who was a leading intellectual based at the Brookings Institution in Washington, D.C. He was the perfect foil for a skeptical international community. Although not an IDP himself, Deng's credibility and personal interest in the issue were obvious. The sad fortunes of his people at the hands of a brutal Islamic regime in Khartoum would soften every heart at the UN. In this case the standard setter was an indirect victim, someone who understood and appreciated the magnitude of the problem and the plight of IDPs. As Bacre Waly Ndiaye, then director of the UN Office of the High Commissioner for Human Rights in New York, said, the "Guiding Principles were primarily the work of one individual, the Special Representative."¹¹⁴ But Deng would not have been successful had he not put his enormous networks and contacts to ingenious use—as a former minister, respected academic, and policy analyst.

The success of a standard is to be found in its legitimacy and acceptance. Standards that are hard-won but leave a sour taste with the opposition may not be successful. The idea of using a less adversarial process, where possible, to involve stakeholders and encourage them to embrace a standard is always preferable. The less acrimony a standard-setting process attracts, the more likely its acceptance. The high approval of the Guiding Principles is attributable to the conciliatory and nonconfrontational process that Deng adopted. The International Committee of the Red Cross (ICRC), in particular, had repeatedly underlined the necessity of a nuanced approach, given that in most humanitarian crisis situations—including those involving internal displacement—the problem is more an intentional disregard for the rules than a lack of rules as such.¹¹⁵

One important fact to bear in mind is that the Guiding Principles were mostly a restatement of existing obligations. They were intended to reaffirm and clarify the most important protection rules in the field of human rights and humanitarian law. Another significant piece of the process was that the relevant binding law should be invoked as the basis for the Principles. That is, stakeholders were reminded that in cases dealing with IDPs, the detailed provisions of international humanitarian law in situations of armed conflict would rule. The fact that the Guiding Principles were never intended to displace, or replace, existing human rights and international humanitarian law—was crystal clear. At the same time, scholars and activists agree that

the sum of the Guiding Principles is greater than its parts. In other words, the Guiding Principles have effectively made maximum use of international human rights and humanitarian law and the end product provides more comprehensive protection of IDPs and more concrete guidance than the individual instruments alone.¹¹⁶ Ultimately, the success of the Guiding Principles is attributable to a *legitimate* appointee who adopted the *appropriate* strategy and mobilized a *committed* group of experts as the constituency for developing and advocating for them. It was a novel approach that found the perfect interlocutor.

The Optional Protocol to the Torture Convention found success on a different road. It, too, was realized ultimately because its constituencies were equally committed, focused, and influential. The Optional Protocol was initially the idea of Swiss intellectuals, not a project conceived in the South. In that sense, it was not that different from the Guiding Principles, also a result of intellectuals. The 1987 European Convention inspired the notion of an Optional Protocol for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT),¹¹⁷ an improvement over the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹⁸ because it emphasizes prevention and adopts a more innovative and intrusive supervision regime.¹¹⁹ Europeans did not think they needed the Torture Convention but they wanted a more effective instrument to set an example for the rest of the world. As it has turned out, a number of European states have been found in violation of their own Torture Convention.¹²⁰

Advocates for the Optional Protocol—the Swiss intellectuals as well as the Association for the Prevention of Torture—sought a state sponsor and recruited Costa Rica to cosponsor the Optional Protocol to CAT.¹²¹ Costa Rica also was important because it was imperative that the project have the backing from the South so that it would have a global character. It became clear, at a later stage in the drafting process, that European and Latin American states, including Mexico, were supportive of the Optional Protocol. Most opposition came from the United States, Russia, China, India, the Middle East, and some African states. The strategy employed in the formulation of the Optional Protocol sought to achieve geographic inclusivity with a particular emphasis on ownership and participation by governments and civil society organizations from the South.¹²² The 104 states that adopted the Optional Protocol underlined this broad, geographic support for an initiative that had started out as a project of European intellectuals. The lesson from the adoption of the Optional Protocol to CAT is that clever and serious strategies and broad coalition building can lead to a wide acceptance of a standard, no matter its place of origin. Nevertheless, it is difficult to see how the Optional Protocol would have been

successful without its European origin and the clever lobbying employed by its proponents, including creating a “Southern front” with Costa Rica at the helm.

Human rights standards cannot be developed or realized unless constituencies for them exist, or until sympathetic, vocal, knowledgeable, and supportive thinkers and advocates join the campaign for them. Standards will be successful in the various stages of their being—from formulation to implementation—only if they are based on the widest possible coalitions and consultations so that the most diverse communities can claim ownership. The failure or success of the standards examined here rest squarely on the nature of their constituencies and owners. If those constituencies and owners can pursue all human rights standards with equal vigor, perhaps the human rights movement will be able to count more gains than losses. That is the challenge of standard setting in human rights.

THREE

THE MULTIPLICATION OF ACTORS

The world that emerged immediately after World War II is virtually unrecognizable from the vantage of today. Direct colonial rule has virtually ended. Two notable exceptions are Western Sahara, with Morocco in charge, and Palestine, which Israel continues to occupy and control. New states have multiplied to a total that stands at 193 with the vote by the UN General Assembly to admit newly independent South Sudan on July 14, 2011.¹ That is a remarkable change, given that at the founding of the UN in 1945, there were just over fifty states. This transformative change in numbers has been followed by the growing clout—economic, military, cultural, and demographic—of the new states, most of which are African and Asian. Slowly, Europe and the United States are becoming less central to global affairs. In the last two decades alone, the world has witnessed perhaps the most dramatic shift in power since the Age of Europe. Asia, led by China and India, is becoming the new pivot of global politics. Africa’s voice is slowly emerging. In the arena of human rights and standard setting, nongovernmental and governmental voices from the South are becoming increasingly assertive on the global scene. This expansion of the actors in norm setting has complicated the process but also made it richer. Western states are being decentered, but so are states of all stripes. There is a growing sense that the democratic deficit in norm making is being closed.² For the first time in human history, the globe’s “silent majority” is starting to find its voice.

These changes notwithstanding, the basic postwar global power structure is still largely in place, as reflected in the unchanged structure of the UN Security Council, which no longer reflects global power realities and democratic values. Yet the United Nations has retained its centrality as the single most important forum for standard setting and norm creation in the field of human rights since 1945. Even with regional bodies such as the

European Union, the African Union, and the Organization of American States, the UN remains the one unifying global entity that is seemingly indispensable for global governance; no other, alternative body with the history and legitimacy of the UN exists. Although many agree that the UN is out of date in important respects and that it urgently needs to be reformed, there are no calls to abandon it or replace it with another body. Perhaps the lack of urgency to reform the UN is because it is no longer the exclusive generator of human rights standards. More actors, many of them outside the UN, are becoming important players. Even though an insular club of states still retains a disproportionate amount of power and influence over the content and processes of standard generation, states today find their power and place in global governance and norm setting increasingly under attack.³ Today they must share the process of lawmaking with a multiplicity of new actors, many of whom were peripheral a few decades ago. These new actors now find that the new power of knowledge has demarginalized them; information and access to tools that shape public opinion are widely available to individuals and groups who in the past had no access to these tools. Nevertheless, it would be a mistake to conflate the increased number of actors with popular participation or democracy and transparency in international governance. Nor does the increased number of actors indicate that states are bound to demonstrate more respect for human rights standards. Instead, more actors simply increase the number of pressure points to which states are now subject. Whether this redounds to the benefit of democracy and a more robust and inclusive norm-making process remains to be seen.

THE UN HUMAN RIGHTS COMMISSION/ HUMAN RIGHTS COUNCIL

The United Nations came into being, as its Charter professes in the Preamble, “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.”⁴ This central mission of the UN is often lost because of the emphasis given to its twin—and equally important—mission, which is “to save succeeding generations from the scourge of war.”⁵ The ideal world these twin missions envision would be an international environment in which states lived peaceably in a just and respectful world regulated by international law. Because human rights are regarded today as the basis for human civilization, the UN placed primary importance on two key institutions within it: the Security Council, for the maintenance of global peace, and the UN Commission on Human Rights, to safeguard human rights. The centrality of the UN Human Rights Commission (which was in 2006 succeeded by the Human Rights Council) to the new global

order cannot be overstated; it was meant to be the creator and guardian of a new global morality. By producing a torrent of norms and structures that would transform the nature of state obligations and the oversight of states by international bodies, the Human Rights Commission did more than any other international body to redefine the internal character of states and their relationships with individuals under their jurisdiction. It could not have been immediately clear to the states that the commission would turn out to be such an instrumental body in shaping the future and nature of global affairs, which is perhaps why it became an object of attack by many a state.

In 1948, the UN Commission on Human Rights produced the Universal Declaration of Human Rights, the document that became the guidepost for other human rights instruments. The majesty and moral power of the UDHR set the stage and opened the door for the cascade of norms that were to follow; its initial success blunted efforts to permanently stifle the elaboration of more human rights texts. The commission was composed of fifty-three member states elected by the United Nations Economic and Social Council (ECOSOC)—roughly one-quarter of UN membership—for three-year terms. It was large enough to accommodate the diversity of the UN, yet small enough to get business done. The critical nature of its inclusivity could not be gainsaid; a less inclusive body would have been viewed as illegitimate, given the sensitive norms it generated. One of the challenges that the commission faced was the inclusion of members from a number of states that were undisputedly egregious human rights violators. Yet this may have been part of its unintended genius: those abusive states could not claim to have been excluded in standard setting. Predictably, they would frequently try to obstruct or water down standards. Yet the commission drafted one human rights text after another and placed them before the UN for adoption, signature, and ratification by states. In spite of such resounding success, the commission was never an easy forum by which to reach consensus or adopt human rights standards, as the experience of the UDHR and subsequent treaties and instruments shows. After the UDHR, the commission drafted treaties and texts on most widely accepted conditions of human powerlessness, including race, gender, civil and political rights, economic, social and cultural rights, children, and torture.

The success of the commission in crafting standards belies the complexity and difficulty of its tasks. To begin with, states viewed human rights norms with suspicion, particularly at the dawn of the human rights movement when they were unaccustomed to international oversight or regulation in an area that had historically been a domestic issue. This difficulty arose in large part because of the nature of human rights obligations, which constrain state sovereignty and limit the freedom of the state within its borders. And states are reluctant to succumb to external institutions, to surrender their

authority to supranational bodies, or to accept restriction by norms external to them. The example of the massive and genocidal killings of innocents by the Nazis during World War II and subsequent pogroms and genocides in other states, however, provided the most convincing evidence that human rights were the necessary response to state tyranny. Ironically, the intrusiveness of human rights norms on state sovereignty was the chief argument for their necessity. Yet the internally restrictive nature of human rights norms on states induced them to lessen the impact of human rights norms on their power. That is why states almost always opt for normatively weak human rights standards—with either impotent or ineffectual enforcement mechanisms. They jealously guard their sovereignty. States may welcome norms or standards that bite to the bone of sovereignty so long as they have no clear path or strong vehicle for enforcement or implementation. This duality works in favor of states, and can be reinforced by devices such as reservations.

At the outset of human rights standard setting, states played the key role. It was the centrality of the state in standard setting that determined the legal status of the UDHR. The fear of a binding instrument gave way to a declaration, a document with only moral—not legal—force at its adoption. The commission was correct in reading the mood of states. With no experience in the field of human rights, states would have been averse to accept far-reaching curbs on their power. As noted by Thomas Buergenthal, the “Commission soon realized that it would be relatively easy to adopt a text of hortatory declaration, but it would prove much more difficult to reach agreement on the wording of a legally binding treaty.”⁶ The more important a human rights text—in terms of its effect on states—the lesser the likelihood that states would readily agree to the instrument. That is why it took eighteen years—almost two decades—before the United Nations could adopt the two most important general-scope human rights treaties, the International Covenant on Civil and Political Rights⁷ and the International Covenant on Economic, Social and Cultural Rights,⁸ both of which were opened for signature in 1966. It then took another ten years before the two treaties came into force in 1976—a total of twenty-eight years between the UDHR and the two key binding human rights instruments. This time lapse underscores the caution of states at the onset of the human rights movement. Only a number of specialized treaties, most principally the Genocide Convention, entered into force during that long interlude.⁹ This long period of debate, inaction, obstruction, and disagreement was used to water down the obligations of states and craft treaties that would not radically threaten state sovereignty. The long delay underlined the painful difficulties inherent in relying on states to be the key movers in the formulation of human

rights standards. States saw—and still see—every additional human rights text as yet one more bite out of their sovereignty.

The UN Commission on Human Rights was always a beehive of activity, a location for high politics, intrigue, and great innovation. The massive work done by the commission belied the brevity of its sessions. So did the composition of the commission. Its members were all “political” actors, usually ambassadors or high-ranking bureaucrats from member states. The august human rights body, which met annually for six weeks in Geneva from the middle of March to late April, was usually a flurry of frenzied activity, virtually all of it related to the setting or the enforcement of standards. Consider the commission’s work in 1999. During its six-week session that year, the commission hosted some 3,240 persons: 587 being representatives of the fifty-three member states, 568 appearing for another ninety-one states, 217 for some twenty-nine UN agencies and other international organizations, and 1,824 representing a phalanx of 212 nongovernmental organizations.¹⁰ Without exception, all of these individuals and institutions sought to influence and affect one or more normative questions or standards in human rights. The annual meeting of the commission was the key battleground for advancing the human rights agenda, contesting the implementation of the human rights corpus, and expanding the voices of victims. It was the Mecca for everyone concerned with norm setting and the enforcement of human rights standards. Today, the UN Human Rights Council plays a similar role.

INTERNATIONAL AND REGIONAL STANDARD SETTING

In tandem with the UN, and in some cases before it, regional institutions—the Organization of American States, the African Union, and the Council of Europe—have been busy setting and implementing human rights standards. In some cases, the regional bodies have led in setting particular norms. In others, they have acted in synergy with the UN. But the truth is that regional human rights systems have been setting their own standards since the advent of the European human rights system in 1950. Only Asia has failed to create its own regional system. These regional systems in large part complement the universal UN system, although they at times have created completely new standards or tweaked existing ones to respond to the particularized political, legal, economic, historical, and cultural conditions of the regions. Some of the regional systems, like the African one, have stretched the normative scope of the human rights corpus. Take, for example, the African system’s innovation on the language of duties as part of the human rights discourse, or its focus on the community. This new thinking has increased the legitimacy of the human rights corpus because

it adds to the fund of existing understanding of the human condition. More importantly, the African system's intellectual contribution exposes the inherent "relativism" of the human rights corpus. It is an explicit rejection of the one-dimensional universalism of Eurocentrism. Thus, many actors today—from universalists to particularists—are able to lobby and campaign for the adoption of standards in the diverse fields of their interest, advocacy, and concern. This innovation shows that the human rights corpus need not be a suffocating straitjacket of liberalism. Importantly, it points to the dynamism of the human condition and the many ways in which human dignity can be safeguarded. One thing is clear: the multiplication of actors engaged in standard setting has opened up new possibilities for a more inclusive human rights corpus. But the diversity of the regional systems—which are further complicated by norms and practices at the national level—points to a further need for the multiculturalization of the human rights corpus. It makes a lie of the claim that ideas about human rights and human dignity are a gift of one civilization to the others or that some cultures are superior to others, and it validates the claim that human rights denizens must approach the business of standard setting with humility.

A closer study of the regional systems reveals the divergences and convergences among them. All three systems—the African, European, and the Inter-American—are in a dialogic relationship even when they seem to be ideologically apart. In turn, they are all attentive to the universal UN system. None of the systems really exists or functions in isolation. Bureaucrats, judges, and experts in all three systems are in constant interaction, either reviewing each other's works and actions, or building on precedent. The regional systems in Africa, Europe, and the Americas tend to expand, elaborate, translate, or adapt universal human rights to particularized historical, political, and cultural settings. Even the younger systems have been keen to learn from older ones. In other words, regional systems bring universal norms closer to the ground so that their implementation is more legitimate and less remote. Ultimately, each system seeks legitimacy and acceptance on the ground and with stakeholders in that particular region. Regional systems can break new ground and introduce novel ideas and norms in the language of the human rights movement. The African system, for example, has introduced conceptions of duty on individuals, a new dimension in human rights. It has also given the movement the concept of peoples' rights.¹¹ Africa's contributions have expanded the normative scope of the human rights corpus. Examples include the African Charter on the Rights and Welfare of the Child¹² and the Protocol to the African Charter on the Rights of Women in Africa.¹³ Some of these instruments simply mimic universal norms, while others make distinct contributions. These new African norms, which have been the subject of intense debate among intellectuals, have undoubtedly

grown the movement, but more study is required to show their impact, if any, on universal norm-making processes. In other cases—the European system is a good example—regional systems have given conceptual inspiration and the power of demonstration to the universal human rights regime and vice versa. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for example, mutually benefited from the 1984 UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴ Sometimes, one system leads the other.

The UN global system can look remote to stakeholders, especially victims. It is far away, and its mechanisms are either not well known or difficult to access because of cost. That is less true of regional systems, although some regional systems are clearly more developed than others. At the subregional, regional, and international levels, particular attention can sometimes be paid more effectively to violations of human rights in armed conflicts and to the plight of internally displaced persons and refugees and to the need for their protection. The maxim is that local solutions to local problems are a more legitimate response to human rights concerns. This is often true in Africa, where the long history of brutal colonialism left people wary of external intervention, or seemingly “European” solutions. African states are less likely to demagogue or distrust human rights norms that have been generated in Africa. For this reason, the bogeyman of colonialism, which was a favorite for violator states, cannot be an effective deflection of responsibility if the standards are homemade. That is why the regional systems of human rights must be seen as complementing the universal system and providing a more practical guide to which norms work, why they work, and how implementation can be more effective. In this respect, what happens at the regional level tells an important story about norm setting. Regions are one of the key crucibles in which standards are tried out even as they are being set and refined. Importantly, local civil societies are more able to participate in regional standard setting—in more culturally familiar environments—than faraway capitals in other continents.

Writing in 1979, Bertrand Ramcharan, then a senior UN human rights official, saw the role of regional institutions as supplementary to the international standard-setting mechanisms. Their function, in his view, was to help secure greater respect for the UDHR and to serve as agents to deal with local issues. If regional bodies were to produce their own standards they had to be “consistent with the purpose and principles of the United Nations.”¹⁵ He encouraged the establishment of such organizations although he worried about their ability to stick faithfully to the universal script.¹⁶ In 2002, Ramcharan perceived the future evolution of regional standards as emanating primarily from local judicial decisions on economic, social,

and cultural rights within a framework of the right to development.¹⁷ The resulting public interest jurisprudence would play its part in delivering social justice locally. In the final analysis, national systems for the protection of human rights could be tested against international norms and standards through the United Nations petition procedures, thus further developing the international case law of human rights protection. It speaks volumes about international human rights bureaucrats that Ramcharan was worried not about the arrogance of the UN human rights system, but about the vital and necessary contributions of the regional systems.

Ramcharan and other human rights universalists worry too much about the potential for deviation from universal norms by “natives.” Many treat regional, or local, human rights efforts as suspect and in need of policing by an all-knowing UN. But this is old thinking that is rooted in an imperialist view of human rights. The paternalism of most UN human rights bureaucrats is exactly what actors from the South mistrust. It is a mentality that sees human rights as a civilizing crusade for the benefit of benighted natives. The view that human rights will lift “lesser peoples” to the ranks of human civilization is rooted in the colonial project, the white man’s burden. The distrust from the South explains why human rights were so susceptible to attack by undemocratic regimes there and why some of the attacks found purchase. Nothing is more treasured by humans than their sense of dignity. People cannot be “saved” by being insulted. The human rights organizations in the North that specialize in jetting in and out of the South after a week’s mission were perhaps the worst example of paternalism. Ramcharan and his fellow universalists need to trust the wisdom of the stakeholders in the South. These unsung folks are the stakeholders that must legitimize human rights standards and norm making for the human rights project to succeed. But they will not be able to own human rights norms and embrace them unless they are actively and directly involved in their making and articulation. For that to happen, the human rights actors at the highest councils in intergovernmental organizations (IGOs) will have to undergo a normative transformation themselves, to shake off vestiges of colonialist attitudes. Taking the human rights project from the UN, the top, to the regional, the ground, is a task that can be achieved only with the participation—and leadership—of people at the grassroots level. The idea of human rights missionaries, who have led the Western-dominated human rights movement thus far, is antithetical to a true human rights project. That is because they take away the agency of people at the grassroots level to act for themselves and to shape and articulate their own liberation. There is no future for a lasting human rights movement in the South, or anywhere else, including Europe, unless it is homegrown. Regional human rights systems can play a leading role in facilitating a genuine local human rights culture.

That is why regional human rights instruments and national judicial forums in the global South should be taken more seriously by norm setters at the universal level. The universal must allow itself to be molded by the regional and the local for the greater legitimacy of human rights.

FOUR

THE ROLE OF NGOs IN THE CREATION OF NORMS

Apart from states, no other stakeholders have been as important as NGOs, particularly the large and well-resourced ones based in the West, in the business of standard setting in human rights. Initially a very small cadre, the number of civil society organizations has exploded over the last thirty years. The corridors of the high councils where norms are set and human rights implementation mechanisms are created teem with NGOs and their members. While the formal writing and adoption of human rights standards remain the exclusive functions of states and intergovernmental organizations, previously disenfranchised stakeholders cannot be ignored anymore. Governance, at the level of conceptualizing, and even text drafting, is now a shared exercise for virtually all new texts.

To their credit, most states have accommodated themselves to the new reality of sharing global governance with NGOs. Admittedly, many states are still skeptical, or even hostile to NGOs, particularly states with small or nonexistent civil societies, such as China and Myanmar, or states where autocratic regimes had stifled dissent, such as in North Africa and the Middle East before the mass uprisings of 2011. Additionally, Russia and several other former Soviet republics are still precarious terrain for NGOs. But elsewhere in Europe, including the formerly communist states of Eastern and Central Europe, political and market liberalization have opened the gates to increasingly vibrant, if nascent, civil societies. In much of sub-Saharan Africa, with the exception of repressive states such as Sudan, Rwanda, and Ethiopia—which in 2009 adopted the repressive Charities and Societies Proclamation Law that criminalized the activities of domestic NGOs and INGOs¹—civil societies have claimed political space and

entrenched themselves in public discourse since the collapse of one-party or military regimes in the last two decades.² In a number of dysfunctional African states, such as Somalia and the Democratic Republic of Congo, civil society exists in great peril, if at all. But the majority of African states have seen a phenomenal rise in the number and power of civil society organizations. These NGOs have become important players at the national, regional, and UN standard-setting forums.

NGOS AND THE HUMAN RIGHTS AGENDA

By their nature, human rights NGOs are the cartilage between the state and society. As the eyes of the people, they seek to police the actions of states at the national level. After all, since states are supposed to act with the consent and will of the people, NGOs become the bulwark between the state and the people to try and minimize the probability of a state acting in a manner contrary to the interests of the population. NGOs try to keep states from “going rogue.” They also work to influence processes and outcomes, and their work in standard setting goes back centuries. For instance, the Anti-Slavery Society and the International Committee of the Red Cross (ICRC) played important roles in the formulation, respectively, of standards against slavery and in humanitarian law.³ The British Anti-Slavery Society, formed in 1823 as an NGO, was responsible for pushing through the Slavery Abolition Act of 1833, which sought to outlaw slavery in British dominions throughout the world.⁴ The indefatigable work in international relations by the ICRC made international humanitarian law the force that it is today. NGOs actively influenced the drafting of the UDHR, and later, the International Covenant on Civil and Political Rights, ICCPR.⁵ Similarly, Rein Mullerson, formerly the Soviet member of the UN Human Rights Committee and a renowned legal scholar, noted with approval the growing influence of NGOs in lawmaking and in humanitarian law.⁶ NGO input was welcomed by many experts because it provided succinct advice and tested practices on the ground. Much of their advice was not guesswork but hard evidence of what was likely to be effective; in fact, NGOs often had more expertise than UN experts. NGOs found a welcoming group in some UN bodies, such as the Human Rights Committee, whose members are independent experts and do not represent a government. In effect, NGOs permeate the entire human rights movement, not just norm creation. Henry J. Steiner and Phillip Alston write of NGOs:

[T]hey also contribute to standard-setting as well as the promotion, implementation and enforcement of human rights norms. . . . Decentralized and diverse, they proceed with speed,

decisiveness and range of concerns impossible to imagine in relation to most of the work of bureaucratic and politically constrained intergovernmental organizations.⁷

NGOs represent a broad range of nonstate actors, many benign—such as the National Association for the Advancement of Colored People (NAACP), which is committed to fighting discrimination and advancing the welfare of persons of color in the United States—but others less so—for example, the American Ku Klux Klan (KKK), a white supremacist and violent hate group. The terminology employed to describe these groups includes “civil society,” “transnational advocacy networks,” or “social movements.” Unlike the KKK, the NAACP is a human rights group. Civil society describes nonstate, nongovernmental formations that are formally independent of the state, even if some are hate groups. Some may have operational relationships to the state or may have been formed with the inspiration and support of the government, but to qualify as NGOs they must be formally independent of the state. More recently, some NGOs or groups of NGOs have been collectively called the “global civil society,” a term that points to the growing coalition of groups that may participate in antiglobalization campaigns, that may advance transparent and inclusive global democratic governance, or that may promote human rights. Clearly, NGOs have become key players in international governance.

At its inception, the UN realized the important role that NGOs could play in international affairs, although it did not appreciate just how influential they would become with the passage of time. Nevertheless, the UN gave the Economic and Social Council (ECOSOC) the authority to confer consultative status on NGOs to enable them to participate in certain UN activities.⁸ Taking their cues from the UN, regional intergovernmental organizations (IGOs), such as the African Union, Council of Europe, and the Organization of American States, now confer on NGOs observer status and other participation rights. And the World Trade Organization has provided for NGO interventions in some of its decision-making organs.⁹ In most regional systems, participation is usually circumscribed, which is also true of the UN, where access is governed by strict rules. In the case of ECOSOC, the consultative status of NGOs applies only to UN organs that fall under ECOSOC, such as the UN Human Rights Council, and not the Security Council, the General Assembly, or the various UN human rights treaty bodies.¹⁰ More than two thousand groups now enjoy consultative status with the United Nations, which allows them to “request that items be placed on the agenda of the relevant body, attend meetings, submit written statements and make oral presentations in meetings.”¹¹ This increased access for NGOs is a vast change in regional and UN organs, and, as noted by Christine Chinkin,

NGOs are not merely consulted at the UN, as initially envisaged, but are now represented in many forums within that body. They are real players:

This rather unpromising starting point [Art. 71 provision on mere consultation] has allowed the relationship between NGOs and the UN to develop, a relationship that was originally defined in terms of consultation, not representation. Nevertheless, the concept of accreditation has allowed NGO admission to intergovernmental organizations (IGOs), and fuller participation therein than could have been envisaged by the drafters of Article 71.¹²

The pervasiveness of NGOs in the work of the United Nations and the regional organizations is felt more keenly than the formal rules suggest. The actual interaction between NGOs and states suggests a more fluid and mutually engaging process. Where there are no formal avenues for NGO participation—as is the case with a number of human rights treaty bodies, such as the UN Human Rights Committee, the CEDAW Committee, and the Committee on the Elimination of Racial Discrimination (CERD)—less formal methods for NGO involvement have been devised. Most committees now recognize the need for NGO involvement and have introduced a variety of methods—some formal, others less so—that allow them to tap into the wealth of talent, information, and expertise that NGOs possess. And more recent treaty bodies include formal roles for NGOs. More and more appointees to UN human rights committees are drawn from civil society, where they have deep roots, relationships, and connections to former colleagues. UN officials or experts provide easy and ready access to NGOs. They solicit advice and even “plot” with NGOs on the best strategies. What is clear, as Rachel Brett notes, is that NGOs are now an integral part of the fabric of norm making:

Over time, the importance of the NGO contribution has become recognized and has now been formalized, first with the adoption of the Convention on the Rights of the Child (1989) and subsequently when, in October 1992, the meeting of the Chairpersons of the Treaty Bodies urged both national and international NGOs to provide relevant information on a systematic and timely basis. The details continue to differ from committee to committee, but the envy of the other treaty bodies is the system established for the Convention on the Rights of the Child, because there is an NGO group for the Convention which has a full-time co-coordinator, one of whose functions is to organize the NGO input to the Committee.¹³

Norm-setting processes have become more open arenas of governance. With the transformation of NGOs' relationship with the UN and other norm-setting forums, treaty bodies now often plead for more involvement by NGOs.¹⁴ They recognize that a wider intellectual spectrum of thinkers is necessary to expand the scope of imagination, and NGOs can bring these valuable resources to bear. Often, NGOs can mobilize the academics who sit on their boards to provide first-rate research. This access, which is free to the UN body in question, is supported by the universities where academics teach and conduct research. The more enlightened UN bodies—and state officials on UN committees—know how priceless such support can be. The board of Human Rights Watch, based in New York City, for example, drew some of its advisers from universities.¹⁵ The Office of the High Commissioner for Human Rights engages academics from around the world on specific projects and country missions or as holders of special UN mandates. Even so, many of the mandate holders have tended to be mainstream, establishment human rights activists and thinkers. Be that as it may, treaty bodies increasingly view NGOs as partners, not adversaries. This broad inclusivity has enhanced the legitimacy of standards and opened the door to a wider consensus on human rights norms. It is recognition—long overdue—that as many interests as possible must be present and meaningfully participate when international institutions make decisions that affect the entire globe. With the formal inclusion of NGOs, such forums are able to receive and take into account a wider and more diverse range of views.

Ideologues and leading thinkers are indispensable for any movement because no movement should act without thinking. The nexus and intercourse between thought and action—known as praxis—is the foundation of all successful movements. Ideas must be practiced to be tested so that practice can inform ideas. That is why no barrier should exist between thinkers and activists. Activists are always thinking when they are acting, and thinkers are always acting, or watching others act, even as they think.

The leading actors and ideologues in the human rights movement are those individuals and entities that have exerted discernible influence on the movement's normative development, construction, and the enforcement of its norms. They include institutions such as the United Nations, regional IGOs, human rights NGOs, and tribunals. In academia, many of the early thinkers and conceptual writers for the human rights movement included such luminaries as Louis Henkin at Columbia, Shadrack Gutto of the University of South Africa, Thomas Buergenthal at American University, Virginia Leary of SUNY Buffalo Law School, Rosalyn Higgins formerly the president of the International Court of Justice, Louis B. Sohn of Harvard, Philip Alston of New York University, Abdullahi Ahmed An-Na'im at Emory, Issa Shivji of the University of Dar-es-Salaam in Tanzania, and

Yash Pal Ghai of the University of Hong Kong. These scholars, and scores of others in Europe, Africa, Asia, and Latin America, helped shape the discourse of human rights.

But of all these actors, none is more influential than INGOs—international NGOs—in setting the agenda of the human rights movement.¹⁶ They are the structures within the movement that provide the most sophisticated and well-resourced activism. They tap into deep reservoirs of knowledge, contacts, and money. They work closely with, and are allied to, some of the most influential academics and writers in the field. Some very important and notable exceptions aside, INGOs and Western academics generally share the same cultural, historical, philosophical, and ideological spectrums. The two groups have been the single most important bloc of human rights actors and thinkers. INGOs set the agenda of the human rights movement, mostly outside the corridors of the United Nations. Lobbying takes place at state capitals, intellectual legitimacy is carried out in the classroom at academic and professional conferences and meetings, and the UN corridor is where final negotiating is done. But for the most part, key strategies for the movement have been largely determined by a few NGOs in the richer countries of the world.

It is no surprise that the most influential INGOs are based in the West. They are able to use their first world assets—money, political power, proximity to global hegemony—to reproduce oppressive global hierarchies. Yet INGOs couch their dominance as noble or moral, claiming to work for human rights, which they characterize as a common goal between them and NGOs in the South. INGOs would, of course, say that they either provide leadership or work in partnership with NGOs from the South. For example, Global Rights, an INGO based in Washington, styles itself Global Rights: Partners for Justice. This could be misread as masking a hegemonic desire toward NGOs in the South, or it could be seen as a genuine attempt at overcoming the hegemonic character of INGOs. That power differential cannot be overcome without a transformation of underlying resources and locational dynamics. The relationships are partly attitudinal, but it would be a gross misunderstanding of global power dynamics to rest the matter there.

The location and power of INGOs make them conservative, cautious, and generally pro-establishment. INGOs, which I have referred to as conventional doctrinalists, and Western academics, the dominant conceptualizers of the human rights movement, share a broad belief in the type of society human rights standards ought to engender.¹⁷ INGOs' individual and philanthropic donors, including charities such as the Ford Foundation, share a core set of beliefs about the ideal vision for society.¹⁸ As successful professionals such as lawyers or investors in financial markets, their donors generally have a commitment to a free market society with an open political

system. The INGOs submit to the pressure from their donors by selective emphasis in the human rights arena. They monitor, collect, publicize, and seek the elimination of the violations of basic civil and political rights that their donors support. Nor will they support norm making on a matter with which donors are uncomfortable. Conceptualizers are, on the other hand, thinkers and systematizers of the human rights corpus. They are the movement's ideologues. They, too, share a vision of society with a largely convergent consensus and ideological camaraderie tied together by liberalism. For all three stakeholders—INGOs, academicians, and donors—the creation, enforcement, and application of human rights norms should lead to the type of legal-political system generally referred to as constitutionalism.

For human rights workers and thinkers in the West, liberalism—as expressed in the typology of political society they support—is a cultural, philosophical, and economic concern. It forms the type of society that they can imagine leading to the freedoms they expect. Its key tenets and values are ingrained in the Western mind from childhood. In technical terms, such a system must have the following five key features: popular sovereignty in which the power of the state to govern rises directly from the will of the people; the state must be popularly accountable through various processes such as genuine, periodic, and multiparty elections in which multiple parties are free to contest for power; the government must be controlled and limited through checks and balances and the separation of powers with no arm of the government sitting atop another; the judiciary must be independent since it is the guardian of the rule of law and the arbiter of legal disputes, even between the arms of government; and the formal declaration of individual, civil, and political rights must be an indispensable facet of the state. This bundle of attributes creates what is referred to in political science as a liberal political democracy. Captured in the UDHR, the ICCPR, and most universal human rights instruments, these attributes have evolved from the constitutional jurisprudence of the Western liberal state.¹⁹ To be sure, they can be expressed in law and practice in different forms, but their normative content is largely agreed upon. To INGOs and leading Western academics, the purpose of the human rights movement is to bring about this type of society. This is a testament of truth that INGOs have never quite openly accepted, but the totality of the rights they seek to implant in society without doubt gives birth to the political state sheathed in liberalism.

External institutions tend to mirror domestic institutions, and the origins of INGOs are no different. The human rights INGOs bear a strong resemblance to traditional civil rights organizations in the West. In theory and method, INGOs are the ideological copycats of traditional Western civil rights organizations, such as, in the United States, the American Civil Liberties Union (ACLU) and the National Association for the

Advancement of Colored People (NAACP). The genealogies of the two types of organizations are similar, and their mandates, at least at the outset, were virtually identical. They concentrated on a small, select core of basic rights. In the beginning, “First World” NGOs meant those committed to traditional Western values associated with the origins of the human rights movement. They were located in the major cultural and political capitals of the West, and many of them work exclusively within, and on, their home countries. The ACLU and the NAACP rarely addressed violations beyond the shores of the United States. But eventually the “first world” category also included most of the powerful international NGOs that investigate events primarily in the South. Most INGOs largely address human rights violations outside the United States or their European country of origin. Domestic civil rights lawyers and activists in the West founded all the major INGOs—Amnesty International, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights (now Human Rights First), and the International Human Rights Law Group (now Global Rights). Since World War II, at least a half-dozen INGOs have arisen with the express intent of promoting liberal values—referred to generically as human rights—throughout the world.²⁰ INGOs found the perfect partner in the United Nations, the postwar body based on the vision of a world governed by the liberal state. Sometimes, though not often, INGOs and NGOs work at both levels—nationally and internationally. The ACLU and Human Rights Watch are cases in point.

INGOs have historically shown a preference and bias for some rights over others. There are many reasons for this bias, but the most cogent one relates to the commitment of INGOs to the secular, rights-based, liberal democratic state. In that bias, INGOs avoid directly addressing, or endorsing, a particular economic theory, although the values they promote are consistent with a free market society, and as a result many of them avoid rights struggles that appear to contradict free market biases. As a general rule, INGOs have been reluctant to promote the adoption of standards in the field of economic, social, and cultural rights, even though the ICESCR seeks to protect such rights. But INGOs accept the ICESCR as a valid covenant, and affirmed the concept of the indivisibility and interrelatedness of rights at the Vienna World Conference on Human Rights in 1993. Nevertheless, INGOs have largely paid lip service to the notion without taking serious, concrete steps to promote the ICESCR. Only in the last decade have Human Rights Watch and Amnesty International broached the area of economic and social rights. There are promising signs that reluctance to embrace these rights is ending. Very few Western INGOs have focused exclusively on economic, social, and cultural rights; the most notable are the New York-based Center for Economic and Social Rights (CESR),²¹

the International Network of Economic, Social, and Cultural Rights in New York City,²² U.S.-based Physicians for Human Rights,²³ Boston-based Oxfam,²⁴ and the Heidelberg-based FIAN International,²⁵ which works on the right to food. Except for Oxfam, many of these groups are relatively young. It is telling that they were founded after the Cold War period, when social and economic rights started to lose some of their communist stigma. During the Cold War, INGOs largely treated economic and social rights with the same disdain that Western governments did.

Pressure has built over the years on INGOs to fully embrace economic, social, and cultural rights. Although much of that pressure emanated from the South, there were some strong voices from the West. The risk for INGOs was of becoming irrelevant in the South if they failed to advocate for economic and social rights. But pressure also came from leading thinkers, who pointed at the hypocrisy in INGOs, arguing that failure to support one set of rights would weaken the movement as a whole. In 1990 Philip Alston, a former chair of the UN Committee on Economic, Social and Cultural Rights, noted Amnesty International's narrow focus on a few civil and political rights.²⁶ A champion of the totality of the human rights corpus, Alston, an Australian, became one of the first prominent Westerners to put pressure on INGOs to act. He wrote prodigiously on the subject and used his bully pulpit as the chair of UN's CESR to ratchet up the pressure on INGOs. He argued that Amnesty International should not endorse, as it did, only a selective conception of rights, ones "which are closely associated with the Western liberal tradition."²⁷ His was a powerful critique from a fellow Westerner who could not be accused of rabid "third world" radicalism. Alston argued that Amnesty could endorse the totality of human rights while maintaining work on its core issues for "manageability, legal specificity and operational potential."²⁸ In effect, Alston was giving AI wiggle room in exchange for breathing space. If AI fully endorsed economic and social rights, it was more than likely that other INGOs would follow suit. The reason was simple—AI was regarded as the gold standard in human rights, and other human rights groups looked to it for leadership. He called on Amnesty to lead by embracing all human rights:

The principal retort to my objection is likely to be that Amnesty, like all other human rights NGOs, is entitled to be specific in its focus and that other groups can better fill the gaps that Amnesty leaves. But this argument overlooks the fact that Amnesty, whether it likes it or not, is the single dominant force in the field. It is bigger, richer, better organized, and more representative and more influential than most of the other groups put together. As a result, it is precluded from taking refuge in

a justification which, when proffered by smaller NGOs, must (reluctantly) be accepted. As the great powers themselves used to be reminded, with power and influence come responsibility. Much of that responsibility may be unwanted, but it cannot simply be shrugged off.²⁹

Even so, it was not until a decade later that AI would endorse economic and social rights and start to articulate poverty as one of its major concerns.

But the model of Amnesty International was the dominant one in the world. Unfortunately, many domestic human rights NGOs in the South replicated the AI model and mandate; many, especially the early ones, had lifted the AI script almost verbatim, such as the Nigerian Civil Liberties Organization.³⁰ Such was the power and example of AI. A large number of groups in the South still focus their work on civil and political rights, although in the last decade some have arisen specifically to address matters of economic, social, and cultural rights.³¹ The future environment for these groups—often created in reaction to the ravages of globalization—is still uncertain because they are not well connected or funded. They are still outstripped in resources by more traditional groups.

Some older NGOs are also revising their mandates to accommodate advocacy on a broader range of human rights. In fact, more success in addressing economic and social rights has come to groups that initially focused on civil and political rights but then broadened their mandate. The Kenya Human Rights Commission is a case in point. The leading Kenyan NGO expanded its mandate—and got funders to support it—because it had a track record of effectiveness and professionalism. Yet domestic NGOs in the South tend to be elitist and urban-based, oftentimes divorced from the people on whose behalf they advocate. Perhaps that elitism is perpetuated by the INGO model, where funding sources dictate mandates. Certainly these domestic, Southern NGOs receive funding from Western foundations and charities as well as the development agencies of traditional donor states, such as the United States Agency for International Development. These NGOs do not have significant local funding, so they are tightly tethered to their benefactors, whom Willy Mutunga, the former executive director of the Kenya Human Rights Commission, referred to as “our foreign masters.”³² Mutunga, a native of Kenya who became its chief justice in 2011, was the first Kenyan to head the Ford Foundation in Eastern Africa.³³ In that role, he pushed hard to fund projects on economic and social rights. In previous years, the position had been reserved for expatriates, usually Americans, who had limited knowledge about Africa. It stood to reason they would import their biases and support a narrow band of rights. But Mutunga knew the terrain and was able to shift the calculus. While the running of a foreign

philanthropy by a local person does not materially change the power dynamics between funder and fundee, it nevertheless has the potential to narrow the ideological gap between the two. Much depends on the ideological leanings of the local person. Generally such dependent relationships have assured that most NGOs in the South pursue donor interests that do not converge with the local human rights agenda—a fact that robs them of the freedom and desire to participate robustly in setting the agenda of the global human rights movement. While these trends are being challenged, and may be more acute in Africa than in Latin America or Asia, the funding for human rights groups throughout the world comes primarily from the West. As Chidi Anselm Odinkalu, an important African human rights thinker-activist, writes, this situation cannot be healthy, nor can it anchor the movement in the grassroots.

The current human rights movement in Africa—with the possible exception of the women's rights movement and faith-based social justice initiatives—appears almost by design to exclude the participation of the people whose welfare it purports to advance. Most human rights organizations are modeled after Northern watchdog organizations, located in urban areas, run by a core management without a membership base (unlike Amnesty International), and dependent solely on overseas funding. The most successful of these organizations only manage to achieve the equivalent status of a public policy think-tank, a research institute or a specialized publishing house. With media-driven visibility and a lifestyle to match, the leaders of these initiatives enjoy privilege and comfort, and grow distant progressively from a life of struggle.³⁴

Funding aside, NGOs in the South suffer other detriments, such as access to powerful states and their media. Access to the press, especially so-called international media such as the Associated Press, CNN, the BBC, the *New York Times*, and other leading news outlets, constitutes political and cultural capital on which INGOs thrive. The influence and clout that comes from press coverage translate into the ability to influence and gain access to officials in powerful states. With media access, they can affect policy in their home states or get their governments to press a state in the South to change behavior. NGOs in the South are far removed from this world of influence. Often, they cannot muster adequate resources required for sustained foreign travel and lobbying at the UN forums in New York and Geneva, where INGOs market their agenda for the human rights movement. Most of these problems are a replay of geopolitical power imbalances,

which are reflected in the world of civil society NGOs. What is required is genuine coalition building across borders between INGOs and NGOs to discard and disrupt this imbalance. Otherwise, INGOs will continue to enjoy disproportionate influence in determining the agenda of the human rights movement.

NGOS AND STANDARD SETTING

One of the primary purposes of the existence of a state is the preservation and consolidation of its power. States are deeply introverted and inherently selfish, and they tend, therefore, to dislike anything that encumbers their sovereignty. As creatures of power and violence, which sustain them, states are untrustworthy stewards of human welfare. They need humans for their existence, but their proclivity is to repress, not free, the individual. States are, in this respect, conservative institutions totally dedicated to their own survival, even at the expense of their own citizens.

Intergovernmental institutions or IGOs, such as the United Nations, create international standards and harmonize the rivalries among states. But IGOs have a duality. In reality, IGOs are at their core statist institutions whose purpose is to allow states to dialogue with each other; in this sense, they are state-friendly because they act as the superstate. But states are also their primary targets; that is, IGOs police and exercise oversight over states. Although states are inside the IGO, the IGO can be, and often is, free of any individual state. In effect, IGOs can, and do, act against a state. A clear example is when the UN or any of its key organs, such as the Security Council, authorize military action against a state. Fundamentally, therefore, IGOs exist to further the interests of states, even when they target a “deviant” state. In that case, the target state becomes an outsider, an “other.” But the IGO presumably takes a hostile action against a member state for the good of the order, that is, to preserve the integrity of the state system and the international order it creates.

NGOs, on the other hand, are not statist by definition, intent, or purpose. They exist to influence and bend the will of officialdom. They seek to tame, limit, and contain the power of the state for particular stated goals and purposes. They view their role in society as the conscience of the citizenry, the defender of the interests of civilian populations against impermissible encroachment by officialdom. NGOs cover the entire ideological spectrum from the extreme Left to the fundamentalist Right. They range from the selfless to the self-seeking.³⁵ Not all NGOs are morally righteous or supportive of human rights or other humanist discourses, but virtually all NGOs claim to work to advance some public good. Clearly, they enjoy the most unfettered existence in states that are liberal, secular, and democratic.

The less open a state, or the more opaque, the less freedom an NGO has to operate or even exist.

States and NGOs coexist in a mode of actual or potential friction. Although NGOs are granted legal identity by the state, their primary role is one of oversight, or pressure, on the state. Virtually all NGOs have an advocacy mission and most exist for that purpose. Their role is to reform or transform society, to be a change agent. They fight to create or influence standards and how they are implemented or enforced. They want to exert influence over rules, laws, and policies so that practice can be changed in a manner consistent with their vision. Although NGOs are most concerned about outcomes, they usually insist on a transparent, open, inclusive, and democratic process. Activist and consequentialist, NGOs do not necessarily see themselves as conceptualizers, but as doers and implementers (although the reality is far more complex). If they conceive of a norm, they want that norm implemented. For them, norms or standards should not be created without an anchor or path for enforcement; an unanchored standard or norm would constitute a pyrrhic, virtually empty, victory. It is this activist essence of NGOs that makes them potential leaders in society. They initiate change or dialogue for reform. Unfettered by the constraints of public power and largely unaccountable to the state or the public, NGOs can be quick, decisive, and innovative. Many operate in highly hierarchical modes of internal governance, which allows their senior officials to act nimbly without the waterlogging that slows down democratic decision making. This democratic deficit, which NGOs complain about bitterly in states and IGOs, is both a strength and weakness for them. It allows them to act with dispatch, as is usually necessary in human rights crises, but it also opens them to charges of preaching one thing and doing another.

To be fair, accountability and transparency may be present in NGOs without internal democracy. Businesses, such as corporations or law firms, are not democracies either, yet they can be accountable and transparent because of internal structures, procedures of governance, and requirements imposed on them by law. States and IGOs usually need either consensus or broad and prolonged consultations to arrive at a decision. They are subject to gridlock and bureaucratic and democratic constraints. These factors breed inertia and inability to act decisively and quickly, if at all. Shorn of these limitations—and unfettered by operational conservatism—NGOs have seized the initiative in standard setting in the field of human rights. Their contribution and input in standard setting have been evident within the African Commission on Human and Peoples' Rights,³⁶ the Council of Europe, the International Labor Organization, and the Organization of American States, among others.³⁷

A few important examples of the impact of NGOs on standard setting stand out. Although the development of standards to proscribe torture

and ill treatment of citizens owes its genesis and realization to a number of NGOs,³⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can be directly traced to one of them, Amnesty International. In 1972, Amnesty launched a yearlong campaign for the abolition of torture,³⁹ including the publication of a report on torture and an international conference. These events did much to create public awareness and to raise the international concern over the problem of torture. Torture is such a repulsive and morally repugnant practice that no state—even those that used torture as an instrument of repression—could defend it. No state admits to torture as part of its official policy. When torture is alleged, or uncovered, states usually blame the incident on “rogue” elements within the police or security agency. The discovery of brutal regimes in Latin America, Asia, and Africa practicing torture added momentum to the gathering cries for the development of standards for the prevention of torture.

In its 1975 report on torture, Amnesty International became the first organization to develop a definition of torture.⁴⁰ Surprisingly, this widespread practice did not have a commonly held definition. But it was unsurprising that an NGO—and not a state—crafted the definition. States—the actual practitioners of torture—did not take the lead in framing the standard; Why would they? In the same year, the UN adopted its first document on torture and a huge leap in the development of a binding standard, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴¹ The Declaration was followed by the adoption of the Code of Conduct of Law Enforcement Officials in 1979⁴² and the 1982 Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴³ These texts, which addressed various players and stakeholders with respect to torture, were essential in bringing a wide acceptance for the eventual prohibition of torture. They were the forerunners and the foundation to the breakthrough 1984 Torture Convention. The former UN Special Rapporteur on Torture, Theo van Boven, has acknowledged the central roles played by NGOs in developing these instruments and standards against torture:

Most of these instruments were the product of consistent and skillful efforts of governmental and non-governmental experts. On the governmental side, the contributions of countries like the Netherlands and Sweden were substantial. On the non-governmental side, credit should go to Amnesty International and the International Commission of Jurists for their lobbying and skillful drafting work, with the constant aim of enhancing the level of

protection. It is beyond the scope of this article to review in detail all of the non-governmental input into these instruments, which sometimes consists of proposals for entire documents, and in other instances of presentation of draft articles or amendments. The 1982 Principles of Medical Ethics were also entirely the product of non-governmental efforts. They received formal endorsement from the UN General Assembly.⁴⁴

Even after states have agreed upon or ratified standards, NGOs must remain vigilant because standards are dynamic and liable to evolution with changes in state behavior and civilizational values. For instance, public and international sentiment could change and seek a stricter standard that was not possible previously. Consequently, NGOs and other stakeholders seek opportunities to make standards more effective and less porous. An optional protocol that adds, revises, or tightens obligations is one device available to NGOs and IGOs. Amendments to an existing treaty are usually impossible to ratify, but optional protocols are commonplace. They create new obligations on the states and strengthen the mother instrument. For an example, NGOs were the key players in starting discussions on new standards to amend the Torture Convention and make it more effective. Since amending the Torture Convention seemed unrealistic, NGOs decided to push for an optional protocol.

Another example in which NGOs led the way in creating a new standard was in the campaign for the Declaration on Human Rights Defenders. A number of governments were not keen on this instrument, arguing correctly that it would only restate obligations that states had undertaken elsewhere in treaty and customary international law. Why take the trouble and expend energy to obstruct a text that states deemed “redundant”? They also maintained, paradoxically, that an instrument on human rights defenders was sensitive and intrusive.⁴⁵ These contradictory positions exposed the worry of states and revealed their anxiety. In point of fact, many states did not want human rights NGOs given protection in a single visible instrument with a mandate to hold them accountable. They believed that a singular instrument on human rights defenders would elevate their cause, give them more visibility, and create expectations that would curb the power and discretion of states to deal with them. Their resistance accounts for the inexplicably long period—twelve years—needed to agree to a restatement of existing obligations. In this endeavor, as in many others, NGO leadership alone would not have been enough. The NGO-state partnership was indispensable. NGOs worked closely with states, especially those deemed human rights-friendly, to overcome resistance and persuade others to support the mandate.

NGOs have also been critical in de-marginalizing obscure human rights causes, for example, in their role as the primary catalyst in advancing the rights of indigenous peoples. For decades, indigenous peoples had no voice or access to corridors of power at the international level, including the UN, a direct result of their disenfranchisement at home, where they also have no power or clout. Finally, in the early 1980s and after years of exclusion, the matter found its way to the global agenda. In 1982, the UN created a Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. This group would turn out to be the single most important development in the cause for indigenous peoples. The Working Group immediately started work on a draft declaration on the rights of indigenous peoples. A declaration was the smart choice for a human rights vehicle because no state would have countenanced a treaty. Indigenous peoples had been largely invisible to the UN until the late 1980s when José Martínez Cobo, the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, produced a report on their plight.⁴⁶ Up to that point, only two universal binding instruments addressed specifically indigenous peoples, and both were in labor rights.⁴⁷ No prospects for a binding document in the foreseeable future seemed possible.

The Sub-Commission Working Group became the focal point for the advocacy of standards on indigenous populations. An incredible 135 NGOs, the majority of them indigenous peoples' organizations, were represented in the Working Group,⁴⁸ a remarkable turnaround for a constituency that had been so marginalized. For the first time, indigenous peoples were not only visible, but they were represented in large numbers in the working group and in fact were the dominant group in the Working Group. In 1993 the Working Group produced the UN Draft Declaration on the Rights of Indigenous Peoples. In 1994 the UN Sub-Commission then adopted the Declaration and forwarded it to the UN Commission on Human Rights, where it languished for years. But the drafting of the Declaration was another instance where the beneficiaries of a human rights instrument—organized into NGOs—were able to determine and draft an instrument to promote and protect their own rights. It is important to note that the UN Sub-Commission, traditionally the UN body that had been most sympathetic to human rights because it is composed of independent experts rather than government representatives, immediately adopted the Draft Declaration from the Working Group. Many states, seeing the Draft Declaration as a threat to their sovereignty and a challenge to their authority, opposed it because it sought to give indigenous peoples a significant degree of cultural, economic, and political autonomy. One thing was clear: the Draft Declaration would not have been possible without the tireless efforts of indigenous people's NGOs.

This is one case where the victims developed the standards by which they wanted to be governed.

Rather than adopt the Draft Declaration on the Rights of Indigenous Peoples the Commission on Human Rights instead established another working group to study the terms of the Declaration. The key concerns of states were predictable—questioning provisions granting indigenous peoples the right to self-determination and granting them control over natural resources located on their traditional lands. The failure of the commission to adopt the Draft Declaration raised questions about the normative content of the instrument as well as the strategy employed by the indigenous peoples NGOs in crafting it. Did the NGOs fail to ally themselves and partner with key states? Were there no states willing to be drafted into this campaign? Was the Draft Declaration another victim—like the Declaration on the Right to Development—of powerful states and private interests that felt threatened by it? Was it fair to conclude that the international legal order was not yet ready to address the plight of indigenous peoples, one of the most vulnerable populations on earth, in a meaningful way? The Draft Declaration still had a long wait before it could see the light of day. As Henry J. Steiner and Philip Alston explain:

The UN Commission created an open-ended inter-sessional working group with the mission of elaborating a draft declaration. This working group has met several times to discuss the provisions of the 1994 draft. But the draft remains the last formulation of the entire draft declaration. The process continues of discussing and amending it in the Commission that, it is important to bear in mind, is a body of state representatives rather than independent experts. The underlying economic, political, and sovereignty issues will come to the surface the more clearly as the contending forces seek to work toward the law-like formulation of a Declaration to be approved by the General Assembly.⁴⁹

But not everything was lost. After a torturous eleven years in the Working Group, the refined Draft Declaration was finally approved by the forty-seven-member Human Rights Council, the successor to the Commission on Human Rights, on June 29, 2006.⁵⁰ The vote was thirty states in favor, two against, twelve abstentions, and three absentees.⁵¹ Although by no means unanimous, it was a strong vote by a clear majority of the Human Rights Council. Next was the long-awaited moment of truth, adoption by the General Assembly, which came on September 13, 2007, when the UN General Assembly voted to adopt the Declaration.⁵² The vote was overwhelmingly in favor with 143 for, 4 against, 11 abstentions, and 34

absentees.⁵³ Only the United States, Canada, Australia, and New Zealand voted against the Declaration.⁵⁴ It was instructive that the four are former British colonies, “settler states” dominated by European white populations, where original indigenous populations have been depleted through the years by violence, disease, exclusion, and marginalization. On a happy note, all four objectors have since endorsed the Declaration—Australia on April 3, 2009,⁵⁵ Canada on November 12, 2010,⁵⁶ and New Zealand on April 19, 2010.⁵⁷ President Obama declared on December 16, 2010, that the United States would sign the Declaration.⁵⁸ This was a stunning reversal of fortunes for a declaration that had either been derided or opposed for years by states. Its adoption by the United States—the last state opposed to it—would be a triumph of historic proportions.

NGOs have also been leaders in the campaign for women’s rights, one vexing area that continues to defy international scrutiny and progress. Though the last two decades have witnessed tremendous strides in the recognition by the international legal order of the rights of women, women’s rights have for long been a blind spot in the human rights movement. This was true at the UN, within regional institutions, and among leading NGOs, including INGOs. The dearth of action at all these levels—in spite of horrendous conditions visited on women in every state—can only be attributed to abusive cultures, traditions, and male-dominated systems and states. In contrast to its tenacity in addressing the problem of racial discrimination, the human rights movement’s relative silence on the violations visited on women by men, states, cultures, and societies speaks to an unacknowledged hierarchy of human rights. Hilary Charlesworth and Christine Chinkin have argued persuasively that *jus cogens*—a term that denotes a peremptory, universal, and superior legal norm that cannot be derogated from—has a male gender bias that is discriminatory of women in its human rights dimensions.⁵⁹ Thus, international law itself has been a victim of gender bias. Gender discrimination against women must rank among the most shared blights in every culture—whether traditional, modern, Western, African, Muslim, Asian, Hindu, Christian, or Latin American. That the human rights movement itself would fall prey to such an obvious and indefensible practice is a testament to the power of gender discrimination.

In the last several decades, however, NGOs have made women’s rights visible in the standard-setting agenda of the movement. It is no longer acceptable to leave out women’s rights concerns in any catalogue of human rights abuses. Apart from CEDAW, which is regarded as a breakthrough convention, several developments have brought women’s issues to the fore. So successful have women’s NGOs become that they are now seen as a model for how NGOs ought to intervene to elevate the issues for which they advocate. Perhaps the first of these significant developments was the

affirmation at the Vienna World Conference on Human Rights that the “human rights of women and of the girl-child are an inalienable, integral, and indivisible part of universal human rights.”⁶⁰ The recognition of women’s rights as human rights at this pivotal conference was a signal event.

More action followed swiftly at the United Nations, when, in the same year the General Assembly of the UN adopted by consensus the Declaration on the Elimination of Violence against Women.⁶¹ In 1994 ECOSOC decided to create the post of Special Rapporteur on violence against women, a position to which Radhika Coomarasawamy, the Sri Lankan human rights advocate, was the first appointee in 1994.⁶² Other gains included the explicit inclusion of sexual crimes against women in the statutes of the Yugoslav and Rwandan international criminal tribunals,⁶³ a significant development because sexual crimes, which are very common during conflicts, have never been the focus of international criminal law or international humanitarian law. The Rome Statute for the International Criminal Court, which created the first permanent international criminal tribunal in 1998, prominently includes sexual crimes in all the offenses under its jurisdiction.⁶⁴ Chinkin points out that these gains are attributable to the advocacy of women’s NGOs, which have perfected the art of networking at the local, national, and international levels.⁶⁵ It bears repeating that women have been their most ardent and committed advocates. Much like indigenous peoples or racial groups, women NGOs lead the international community into recognizing the abuses they suffer and in creating standards and mechanisms to safeguard their rights.

Whether in regard to torture, women’s rights, the campaign to ban landmines,⁶⁶ labor rights, or the rights of indigenous peoples, NGOs have become the animators of the international standard-setting bodies within the United Nations. With their success has come more sophistication. Years of learning, successes, and setbacks have taught NGOs valuable lessons about what works and what does not. Whether it is finding partners or networking across borders, they seem to have found the formula for favorable responses to their pressures on lawmaking processes. The human condition is a dynamic one, and powerlessness is redefined in every era. As more conditions of powerlessness come to light—and express themselves in claims that seek recognition as rights—more NGOs will play critical, if not leading, roles in setting standards for those rights.

NGO STRATEGIES AND METHODS IN STANDARD SETTING

By rationale and definition, NGOs are not opposed to the state. As noted by Chinkin, NGOs function best in countries with a strong but accountable, inclusive, and democratic state.⁶⁷ As part of civil society, NGOs do not

seek to capture state power but to influence its exercise. Although tension often exists between the two, and NGOs are generally independent from the state, the two are joined in an intrinsic but watchful, if oftentimes distrustful, partnership. Just as NGOs need the state at the national level, they also need intergovernmental institutions, such as the United Nations, at the international level. NGOs may not create the institutions that produce standards, but they make those institutions function more effectively and with integrity. Particularly because of the critical roles NGOs have come to play, the rush of universal standards set in the past sixty years would have been impossible, let alone enforced, without NGOs. A strong and effective system of international governance—in terms of norm formulation and enforcement—is essential for the emergent global civil society. Intergovernmental institutions have increasingly come to rely more on the work of NGOs and in fact have established a mutually beneficial—if parasitic—relationship with them. Taken in a broader historical view, a certain convergence of NGOs, IGOs, and states seems to be taking shape.

But the relationship between NGOs and states remains fraught with suspicion and difficulty. NGOs exhibit a love-hate relationship with states and intergovernmental institutions, depending on the effect on state sovereignty of the standard in question. But this complexity, or duality of emotion, is not unique; it leads NGOs to act as both partner and pressure group in their relationship with states and IGOs in standard-setting forums. In deploying these strategies, NGOs have frequently used a divide-and-conquer approach toward certain states. For instance, they often will target a friendly state and use it as the vehicle for the purveyance of their intentions. NGOs will also use the friendly state to gauge the intentions of an opposing, reluctant, or opaque state. Since states tend to listen more to each other than to NGOs, a state that is NGO-friendly will be used to win over a resisting state. This partnership approach worked well for NGOs in their campaign for the adoption of the Draft Optional Protocol to the Convention against Torture. The Swiss government, which worked with local NGOs and intellectuals on the idea of a draft protocol to CAT, was asked to draft Costa Rica into the campaign,⁶⁸ and they replicated this strategy many times over, using other states to lobby reluctant states on behalf of the draft protocol. They used the same partnership model in their campaign for the UN Declaration on Human Rights Defenders. Norway, which favored such a declaration, became the key partner state with NGOs and was instrumental in the success of the instrument.⁶⁹

The struggle for the Convention on the Rights of the Child (CRC) is an excellent example of how successful NGOs can be when they employ appropriate strategies. In this case, NGOs used an ingenious innovation of

the partnership model. Although the drafting of the CRC began in 1980, it was not until 1984 that it started in earnest. Not surprisingly, the entry of NGOs into the drafting process jump-started the exercise. Once the drafting started, the process became less political and more technical, a development that gave NGOs, largely the only actors with new ideas, an upper hand.⁷⁰ NGOs had long worked on the issue of children's rights and so were acutely aware of the plethora of critical issues, from child labor to sexual abuse and violence. In 1987, the United Nations Children's Fund (UNICEF) joined the campaign for the CRC by funding NGO meetings to come up with common approaches and strategies.⁷¹ The cooperation in standard setting between NGOs and UNICEF, a UN specialized agency, was innovative and critical to the success of the CRC. UNICEF was aware of the deep fund of knowledge and practice that NGOs possessed, but the group also knew that a children's convention would be tremendously helpful in its work. It lacked the magic instrument, such as a treaty, to anchor its work. The partnership between NGOs and UNICEF—and the unusually close relationship between NGOs and states in the drafting process and in the push for adoption of the CRC—attracted particular attention. As noted by one writer, it is “generally acknowledged in the international community that the NGOs had a direct and indirect impact on this Convention that is without parallel in the history of drafting international instruments.”⁷²

[T]he success of the NGOs' activities to promote support for the Convention was, for example, undoubtedly instrumental in getting many governments to take the drafting process more seriously, and in giving the Working Group a renewed sense of purpose. This was all the more so when, in 1987, the NGO Group joined with UNICEF in publicly promoting the objective of the Convention ready for adoption by the UN General Assembly in 1989. Furthermore, the Group's proposals were increasingly being presented by government delegates during the Working Group meetings, rather than directly by the NGOs themselves.⁷³

NGOs do not always work in harmony with states and IGOs. Sometimes the interests being contested are too entrenched to be easily set aside, especially when key strategic state interests are at stake, or when certain business concerns carry heavy political influence. Military weaponry is an excellent example of these interests. The campaign for the drafting and adoption of the Landmines Convention—known formerly as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction—saw NGOs display an array

of strategies against states and IGOs, ranging from negative publicity, pressure, lobbying, and eventually partnership. But NGOs had to first wear states down through shaming them and focusing attention on the destruction that landmines wreak on children, women, and the unsuspecting and innocent rural poor. The campaign, which was initially launched by the International Committee of the Red Cross, was quickly taken over by a coalition of Western INGOs: Human Rights Watch, Physicians for Human Rights, and the Vietnam Veterans Associations of America (United States); Handicap International (France); Medico International (Germany); and Mines Awareness Group (United Kingdom). These INGOs formed the core of the International Campaign to Ban Landmines and were later joined by some 1,200 NGOs from sixty states.⁷⁴ The expansion of lobbying groups of NGOs was a masterstroke—it showed the overwhelming international support for the convention. Faced with such a group, states had to reconsider their positions.

The recalibration by states was inevitable. Although most states were initially either uninterested or opposed to the idea of a ban on landmines, the sophisticated deployment of pressure, persuasion, lobbying, and publicity about the terrible havoc wreaked by landmines led sympathetic and like-minded states to spearhead the ban.⁷⁵ Of course, this position was an easy one to take for states that are not usually in international conflicts. But the crumbling of any unified position by states was a huge window of opportunity for NGOs. The lesson here was that NGOs would use the entire arsenal of strategies at their disposal to force the adoption of a standard. It was also clear to INGOs that a wide coalition of NGOs was essential for the pressure and public relations campaign to work. They even found that domestic NGOs could mobilize pressure on their home governments to force them to reconsider their positions. The achievement of the Landmines Convention is ample proof that NGOs can prevail over reluctant and recalcitrant states to adopt what many of them regarded initially as a “pie in the sky” treaty.⁷⁶ Even with its deep pockets and extensive connections to powerful arms of governments, the defense industry could not resist the stampede of NGOs against landmines. What is remarkable is the world’s reliance on a group of private, nongovernmental volunteers organized as civil society to act as a check against one of the most powerful industries known to man.

The partnership and lobby model, where NGOs target states, has been most successful when the NGOs themselves form one united front and campaign as a unit with common proposals. This strategy requires discipline and the suppression of inter-NGO rivalries; to use it successfully, NGOs first must forge unity among themselves before confronting or reaching out to states or IGOs. They realize that in unity, diversity,

and numbers, there is strength and credibility. In a diverse world, success also requires the inclusion of NGOs from areas most affected by the standard being sought. The testimony of those who are directly affected—and burdened firsthand by the problem—adds credibility and urgency to the quest. In short, *coalition building among NGOs—creation of the broadest possible networks among them—is the main reason behind the recent successes of the human rights movement.* A strong coalition was clearly the reason for success in the drafting and adoption of the CRC. Large, Western INGOs were intent on presenting a united front to states so that they could sell common proposals to them. States then took over most of these proposals and presented them at the IGO level as theirs. These coalitions of NGOs and states were so active and powerful that even those states that had been originally reluctant came on board. The broad inclusion of various actors allowed many groups to claim ownership and led to the spectacular success of the CRC.⁷⁷ Furthermore, once united, NGOs do not have to stay united. Some may come together to fight for a particular standard, but not another. Unity is determined by their mandates, resources, constituencies, and, most importantly, the standard in question.

The most visible demonstration of the success of coalition building and networking has been in the impressive strides made in setting standards on women's rights. Women's groups had been frustrated within UN forums since the 1970s because they were excluded from standard-setting bodies. Between the 1985 Third World Conference on Women held in 1985 in Nairobi and the 1995 Fourth World Conference on Women in Beijing, women learned how to organize themselves. They greatly improved their lobbying techniques in the intervening decade; they built coalitions through caucuses, participated in strategy-making preparatory meetings before UN conferences, and increased contacts with the media and national delegations.⁷⁸ Barely a subject of international conversation several decades ago, women's rights today dominates virtually every effort in international affairs. No longer are women's concerns whispered about or ignored—they sit front and center in every major international human rights undertaking. This is the power that organizing by NGOs can bring to bear even on one of the most stubborn problems of this age. As Christine Chinkin writes:

Women's NGOs have developed ways of maximizing their impact upon diplomatic negotiations, either directly or indirectly through the inclusion of their representatives in State delegations or indirectly through consciousness-raising activities, intensive and careful work on draft texts, campaigning at the national, regional and international levels and the formation of caucuses and international coalitions.⁷⁹

NGOS AND STATES PLAY HIDE-AND-SEEK

Managing NGO-state relations has always been a balancing act for both parties, whether the relationship is between a domestic NGO and the home state, or an NGO and an external state. Neither party individually can accomplish much in the area of human rights standard setting or enforcement, and nor is either party under any illusion about the intent of the other. But both parties have to recognize their mutual dependence on each other. That said, the reliance and dependence of states on NGOs does not mean that the two antagonists share a common vision, nor does it point to a common vision. States remain the repositories of sovereignty and the key actors in IGOs. They see themselves as the key actors domestically and in international law; they are the instrumentalities of their citizenry, with the express and legal mandate and obligation to act in the best interests of the people under their jurisdiction. A state that cannot or is unwilling to provide for the security and governance of the people and the territory under its control may cede the right of statehood. Thus, it is states—not NGOs—who formally make international human rights law. IGOs are the conduits for the collective will of states. They represent states and choose which nonstate actors can be given access to them. States set the rules and conditions under which IGOs can participate in global governance. Nonstate actors are therefore included in the deliberations of IGOs, though with the consent of states. As a formal matter, NGOs are only allowed access to IGO deliberations by permission or as a matter of right under the treaty in question. States hold the upper hand in the relationship between state and nonstate actors within IGOs. What is not in doubt, however, is the fact that NGOs have achieved unprecedented *access* and *influence* in UN human rights standard-setting forums. In spite of these achievements, however, a careful analysis of the relationship between IGOs and NGOs reveals a more complex picture—one that suggests an *unsettled* and *uneasy coexistence* between them. What emerges is the image of two civil opponents circling each other distrustfully—like a cat and a mouse—while at the same time finding areas of accommodation and agreement.

NGOs do not have direct or steady access to states, which can turn off the access without warning. In this respect, as the actor with a mandate of governance from the people, the state holds most of the cards. NGOs are neither the elected representatives of the people nor the key actors in international law. In fact, they rely on the state for the grant of legal personhood. Even in cases of the most benign relationships, states do not willingly accept NGOs' advances. Fundamentally, states regard NGOs as intruders whom they welcome ruefully and reluctantly. They see NGOs as naive players who do not comprehend the complexity of governing and the

hard and competing choices that must be made. States also see NGOs as single-issue obsessives—that is, NGOs pursue a single issue without regard to other competing issues. This nearsightedness of NGOs is viewed by states as a limitation and why states will often refuse an NGO demand or request. But sovereignty is always in the background of a state's decision-making process, so they rarely accede to NGOs standards that are truly costly to their sovereignty. They instead find a loophole or catch, where they may either seek cover under a weak enforcement regime or obtain relief through reservations. Even in situations where it is agreed that a certain treaty or standard is defective normatively and institutionally—such as with the Torture Convention—states may agree to an optional protocol instead of revising the treaty itself.⁸⁰ Nevertheless, states are wary of NGOs and will not hesitate to retreat behind the veil of sovereignty and their control of IGOs to limit the influence of NGOs and to resist the most biting of norms. The relationship between NGOs and states or IGOs expands and contracts according to the issue. It is a pendulum that can swing wildly, or not at all, based on the cost of the standard or norm being considered.

States retain the exclusive power to decide the type of normative instrument that may be adopted by an IGO. Where states feel threatened by a proposed standard, they may allow its adoption but alter the instrument from a treaty to a declaration. In effect, they give in to NGO demands for a standard but consign it to the soft-law status of a declaration, resolution, or a platform of action, as was the case with 1995 Beijing Fourth World Conference on Women. The Declaration on Human Rights Defenders and the Declaration on the Right to Development were most likely agreed to by states because of their soft-law status. Soft-law norms generally lack clear performance targets, compliance dates, and a commitment by the state to expend resources. These two factors—constraints on sovereignty and resources—determine a state's attitude toward a norm. States know that treaty ratification is tantamount to a noose around their neck. Compliance will be required thereafter, and serious states do not undertake treaty obligations they do not intend to keep. These strictures explain why legislatures, executives, or bureaucrats responsible for ratification often engage in protracted debates about the wisdom of accepting treaty obligations.

NGOs, too, face many challenges before presenting a united front to states on a particular standard. Divisions in the NGO community, especially regional or geopolitical ones, could spell doom for a standard. Sometimes they cannot obtain a high degree of unanimity, but no standard can successfully go forward when vocal opposition from an important or even significant minority of NGOs exists. INGOs and local NGOs know this well and usually work out their differences. But the ugly specter of NGOs from the North taking charge of a coalition is ever present. This threat existed

at the Beijing Conference on women, but the most divisive fissures were averted⁸¹ by the euphoric and celebratory nature of the historic event.⁸² Imagine a disagreement, for example, on the Declaration on Human Rights Defenders. That instrument required almost complete unanimity by NGOs because reluctant states would have exploited any divisions within the NGO community to derail the standard. It is important to note that inclusion of NGOs within the civil society cabal cannot simply be for the sake of appearance. NGOs—from all areas who are concerned about a particular standard—seek real, not token, participation. Admittedly, NGO access in the drafting of a treaty does not guarantee that the final product will reflect the wishes of the entire global civil society because in such large groups it is not always possible to accommodate every wish. But the key is that each group feels that it is not taken for granted, that its voice was heard. NGO participation in the process of negotiating and drafting the Rome Statute of the International Criminal Court offers important lessons. NGOs were largely happy with their role, but even so, states ended up backing out on some important provisions. The presence of two hundred NGOs in Rome did not prevent states from striking a compromise over the final text of the Statute of the International Criminal Court.⁸³ The lesson here was that even when NGOs come together, states can still water down the final product. First, NGOs finally gave in because they were largely satisfied with the outcome and did not want to delay adoption any longer. Second, NGOs gave concessions in the hope that states reluctant to join would drop their opposition. In the end, although the United States extracted the most concessions, it refused to ratify the Rome Statute.⁸⁴

NGOs have a lot of work to do to increase their space and access to IGOs. States can play any variety of tricks or games to limit or suppress NGO participation in standard setting. These range from failing to include NGO items on the agenda, denying NGOs access to certain conference sessions, as happened in the Fourth World Conference on Women in Beijing, refusing NGO representatives accreditation at UN meetings, allocating NGO participants little, if any, speaking time, and failing to facilitate visa and other travel arrangements to meetings. Because states control IGO space, they can resort to various tactics to stifle or discourage NGO participation. Even when IGOs grant NGO participation, they may belittle them in a number of ways. The IGO can seat NGOs in marginal places in the meeting room or grant them passes that clearly identify them as outsiders. More recently, NGOs have been able to raise many of these concerns publicly, although it remains to be seen whether states will change their behavior. Many of these actions may look petty, but they can frustrate NGOs and result in their failure to carry out an effective campaign to advance a standard or adopt an important instrument. Yet NGOs must also resist the

temptation of power, making sure that access is not used to capture and co-opt more radical and transformative agendas.⁸⁵ Thankfully, a number of states within any UN meeting are usually willing to counter the obstructionist agendas of other states. *The larger and more inclusive the NGO coalition, the better the chances of gaining access.* Successful coalition building for NGOs comes from an unusual circumstance: globalization. Despite the ravages that it has wreaked on many communities, particularly in the South, globalization has increased the capacity of NGOs to communicate instantaneously, to strategize, and to form large and diverse coalitions. Try as hard as they might, it is unlikely that states and IGOs can reverse this rising tide of NGO influence in standard setting in human rights.

FIVE

THE QUESTION OF DEFICITS

The human rights movement is ubiquitous today. It has spread horizontally—across regions—and vertically—from the smallest unit in society to the loftiest international forum. It is present in the boardrooms of the mightiest corporations and in the most desperate inner city or rural hamlet. Newspapers' front pages are awash with human rights news. Global and regional conflicts are reported through a human rights lens. There is virtually no issue without a human rights dimension or angle. There is no modern language that is as captivating, and alluring, as the language of human rights. Even old languages—such as business and culture—are being reconstructed to either accommodate or show recognition for human rights.¹ Where does this irresistible power of human rights come from? Virtually every cause about human powerlessness can be articulated in human rights terms. At the same time, human rights constitute a work in progress, for human dignity is an indeterminate and evolutionary concept. Still, norms—standards—are arguably the most important component of the human rights movement, because institutions and processes flow from them. Because of the primacy of norms in the human rights project, the manner of their construction is a matter of the utmost significance. Who participates and how? How do they participate, who is left out, and why?

A particular and persistent problem of norm setting—one that still haunts the human rights movement—is the question of deficits, the shortcomings and gaps that result in illegitimacy, incompleteness, ineffectiveness, and exclusion. The two most important deficits in human rights standard setting are in participation and democracy. Is participation broad and inclusive? What is possible in a practical sense in crafting a theory of legitimate participation? While not everyone can participate, the question is one of the accessibility of the standard-setting forums. What is the nature of the participants, and are they representative of the widest diversity of interests,

views, and traditions? Is the process of participation transparent and democratic? Do all states have an equal voice, and if not, why? How can the gap be narrowed to legitimate levels? Do all nonstate actors have access and opportunity for democratic participation? In particular, what mechanisms are there to make sure that the smallest, most marginalized, and least powerful voices are present and can be heard? How does the movement address barriers of modernity, language, and professional training formalities to permit non-Westernized, grassroots stakeholders access and effective participation?

THE DEFICIT OF PARTICIPANTS

The start of the human rights movement was marked by exclusion, not inclusion. The birth of the UN human rights movement was not unlike the drafting of the U.S. Constitution. In the latter case, an exclusive cabal of white men, many of them “owners” of enslaved Africans, wrote the most celebrated document in American history. Amended twenty-seven times to cure grave omissions or make substantive revisions, the U.S. Constitution has stood the test of time for more than two centuries, and those amendments gave lasting legitimacy to the U.S. Constitution. The “constitution” of the human rights movement, the Universal Declaration of Human Rights, was equally exclusive in its origin. Similarly, it is the succeeding covenants, treaties, and declarations—based on the rationale of the UN Charter and the UDHR—that have given iconic status to the UDHR. In both cases, the legitimacy of the founding document was secured by additional supplementary “legislation” by more stakeholders. In the case of the UDHR, Africa was virtually absent from participation because almost the entire continent was held in colonial bondage by several European states. This deficit of numbers has been steadily lowered over the years, and the crafting of successive UN human rights documents has been opened, at least formally, to all member states of the United Nations. Yet numbers address only the numerical deficit, and not the gaps in substantive participation and democracy.

The deficit of numbers with respect to nonstate actors is not the acute problem it was at the launch of the human rights movement. The so-called third wave of political liberalization—starting in the late 1970s and lasting until the close of the twentieth century—unleashed untold citizen energy both among the elite classes and at the grassroots level.² The result was an explosive growth of civil society in states where the label had been previously ignored or even criminalized. In states as diverse as the Democratic Republic of Congo and the Czech Republic, civil society became the new watchword. Under the tutelage of their more experienced counterparts, newer NGOs brought a new vibrancy and legitimacy to the emerging “global civil society.” Some of the newer NGOs became quite sophisticated in their advocacy and lobbying work. A number have developed working

relationships with consumer and social justice movements in the South and the North.³ The increase in the numbers of NGOs in the South, however, does not necessarily translate directly into additional and effective voices within the United Nations. International lobbying and networking requires enormous resources for organization, travel, and communication, which most NGOs in the South either barely muster or simply cannot afford. Even when they travel to Geneva, New York, or other norm-making locations, these NGOs remain cultural outsiders, partly because UN offices are located in far away in the North.

The civil society movement in most of the South is still young, poor, and not well connected to influential media outlets in the West or key actors in international forums such as the UN. Even when an NGO from the South is well resourced, questions arise about how representative it is of its country. Is it an elite, urban-based NGO that has little to do with the rural and urban poor but is supported by donors because, for instance, it has agreed to expand sexual orientation rights, a favored issue that attracts funders from the West? NGOs from the South are increasingly becoming adept at lobbying within UN corridors, but their voices remain muted—not so much because they lack ideas, but because they need to master the culture of the lobbyist, the influence peddler. As more NGOs from the South become stronger, their voices will carry more weight. Indian NGOs, for example, have become more adept at participating in international forums, as have groups from South Africa, Kenya, Brazil, and other more open states in the South.

A lag in representative NGO voices remains in more closed societies; imagine, for instance, how the UN human rights forums would be affected by new voices if China would permit the formation and free rein for NGOs. In spite of recent setbacks to popular movements, the Arab Spring unleashed a potentially transformative potential in the Arab world,⁴ and the Middle East and North Africa could still see the growth of civil society in the next several years. Long dormant, or nonexistent, civil societies in the Arab world may multiply as they did in Africa after the end of the Cold War in the 1990s unleashed a wave of regime change.⁵ The Muslim NGO—and more specifically Arab—voice has been missing from international human rights forums because repressive Arab governments have clogged the stage for Arabs and Muslims. But they did so perversely, as obstructionist, unimaginative, and retrogressive.

THE DEFICIT OF VOICE

Numerically, the South dominates the UN General Assembly but its voice is less effective and could be exercised more meaningfully in standard setting. The North-South divide is an economic one that separates industrialized

from less-industrialized countries. But because more than three-quarters of the world's population lives in the global South, it should have a larger democratic voice in global governance than the North. Yet states from the North still dominate the UN human rights norm-making bodies and most other indices of international relations as well. The first and perhaps most important reason for this imbalance is that donor or capital-exporting states have a disproportionate voice in international organizations. For example, states in the North—and particularly the United States and Europe—control the World Bank, the International Monetary Fund, and the World Trade Organization. Not a single major world body is controlled by the South or states from the South. The South does dominate in the UN General Assembly, but that body does not have the power to make critical decisions; it only has moral authority and provides a bully pulpit for states from the South. Instead, the exclusive UN Security Council wields power on a global stage—with its veto-enabled permanent members, the United States, France, United Kingdom, Russia, and China. The Security Council can make binding decisions and can authorize military action against other states. Generally, its first three members (U.S., UK, and France) have historically held sway at the Security Council; rarely do China and Russia rally the Security Council to act proactively. The UK, the United States, and France generally use the council to advance their own foreign policy interests, but their influence and power over institutions of global governance are not limited to the Security Council. The sense that the North “owns” the organs of international governance pervades the organizations themselves. The domination of the UN Security Council by the United States and the United Kingdom over the wars against Iraq in 1991 and 2002 were the most glaring example.⁶ And in 2011, when the Security Council adopted a resolution ostensibly to protect civilians from Libyan government forces, Russia and China went along, only to see the mandate of the resolution interpreted by France, UK, and the United States as a fiat to seek regime change.⁷ They acted as though the resolution permitted them to arm rebels and target Muammar Gaddafi and his senior aides.

States with an imperial history, such as France, the UK, and the United States, have no hesitation using the cover of the UN to police the world. This domination by just three states diminishes the UN's credibility and erodes its moral standing. The United States wields its power in part because it remains the largest financial contributor to the UN. Dues are assessed according to a state's GDP, and, since the U.S. GDP is greatest, it pays the highest dues; that clout gives the United States unspoken power. Taken in totality, this asymmetry of power allows states from the North to exert their will over IGOs.⁸ The Optional Protocol to the Torture Convention is a good illustration of this fact. It was natural that many states from

the South would oppose the Optional Protocol since it was mainly targeted at them. The Protocol was adopted, however, over U.S. opposition, but only because a powerful coalition of European and Latin American states supported it.⁹ The Optional Protocol would have been dead without European support. The Declaration on Human Rights Defenders, too, owes its success to the leadership of Norway and heavy support from most of Europe.

The South suffers from other complex, but related, influence problems. The delegations of most states in the South lack adequate expertise in human rights, international law, and related fields. Their ineptitude is systemic and a direct result of their poor economies; but it is also a function of bad governance and an absence of coherent foreign policies, among other factors. Legacies of colonial exploitation and a scandalous international economic order still hold countries back. The combination of these factors leads to ill-prepared delegations, unable or unwilling to advocate effectively for their positions.¹⁰ Instead, most delegations from the South engage in high but empty rhetoric, devoid of serious analysis and development of the issues into law-like formulations.¹¹ Moreover, many states in the South are suspicious of human rights NGOs and do not always have cordial relations with them, unlike their counterparts in the North. This hostility extends to both domestic NGOs and INGOs. Their attacks on groups like Amnesty International or Human Rights Watch are usually vacuous and unbelievable, suggesting hypocrisy and ill-intent. Nor do states in the South often consult human rights scholars for advice.¹² Consequently, states in the South do not benefit from the valuable help and expertise that NGOs can offer, placing them at a considerable disadvantage to states in the North, whose skilled technocrats normally accord NGOs more open access in order to tap into their expertise and advice. Delegations from the North are also adept at using academics and think tanks, which keep them abreast of innovative thinking, as we saw in the Swiss government's model demonstration of how a government, intellectuals, and NGOs can successfully harness and pool their resources and skills to advance an agenda, in that case its efforts in support of the Optional Protocol to CAT.¹³

The deficit in the participation of state actors from the South is a result of both structural and self-inflicted disadvantages. While there is little these states can do in the short term to transform the deep, entrenched geopolitical distortions of the international order, they can take some steps to become more effective players in international institutions. They can rewrite their internal legal, political, and social orders to create more accountable states so that they can release the creative potential of their societies. This includes the creation of free spaces and an enabling environment for civil society to grow and function more effectively. A recent example of this forward thinking comes from Africa. Where Uganda continues to suppress human

rights groups, across the border in Kenya the state has been more open to civil society.¹⁴ For example, in August 2010, Kenyans voted in a historic referendum to adopt a new constitution. The struggle for the constitution, which took two decades, was inspired, waged, and led by civil society.¹⁵ Civil society organizations led the campaigns against corruption and for the creation of a truth commission to investigate historical injustices. Even the historically corrupt and ineffective judiciary has fallen into the hands of civil society. Willy Mutunga, a founding member and former executive director of the Kenya Human Rights Commission, regarded as a father of the human rights movement in Kenya, beat out experienced judges to be appointed Chief Justice and President of the Supreme Court,¹⁶ where he has initiated far-reaching reforms in the judiciary. As more reforms take hold, NGOs will play a more active role domestically and help states in the South address the deficit of participation.

In order to develop and cultivate democratic, transparent, and inclusive approaches to governance, states in the South should involve local NGOs and academics in advising the state and its institutions. Rather than appoint cronies with no experience or expertise to these forums, every effort should be made to tap into the intelligentsia. Some states in the South, such as Costa Rica and Senegal, have long reached into their civil societies and universities to staff and revamp their efforts in international affairs.¹⁷ Not surprisingly, the two states have been effective international players; over the years, their nationals have been appointed to a number of key UN and other IGO positions, including UNESCO, the International Criminal Tribunal for Rwanda, and the Human Rights Committee, among others.

INGOs are adept at lobbying for human rights standards and their implementation. Amnesty International and Human Rights Watch in particular have been key leaders in the work of standard setting within IGOs. Virtually no effort at creating a new standard is likely to gain credibility in a relatively short time if Amnesty International and Human Rights are lukewarm about the issue or oppose it. No NGO from the South has such high standing, but that may change, as more NGO executives from the South who have worked with leading INGOs—such as Irene Khan, the former secretary general of Amnesty International—may want to establish INGOs based in the South. This scenario will become more likely as global economic power shifts to the South.¹⁸ Although NGOs from the South have become increasingly active in IGO circles, they remain outsiders because of an unhealthy division of labor between regional and domestic NGOs and INGOs, in which the latter engage in international human rights work—initiating and leading NGO efforts within IGOs—while the former focus on human rights problems in their native lands or act as funnels for information to IGOs. This dichotomy perpetuates the weaknesses of NGOs in the South

while at the same time entrenching the privileged position of the INGOs. Larry Cox, the American human rights advocate, decried this lopsided relationship between Southern NGOs and Western INGOs. He noted that

the problem is that . . . [i]nternational work is still for the most part the domain of groups located in the North. Groups in the South are still seen largely as domestic partners or as “human rights defenders” who are protected by those doing international work. The possibility for groups outside Western Europe and the United States either to set the agenda for human rights or even to influence, as equal partners, the strategies set by international groups for their countries is very limited. To change this would take a much deeper commitment than currently exists on the part of either donors or NGOs to invest in travel, discussions and the alteration of old patterns.¹⁹

A new dynamic between INGOs and NGOs has been developing in the last decade. As local NGOs in the South have become increasingly sophisticated—and realized their own value as independent actors—INGOs have started to recalibrate their position. Some donors and philanthropists in the North, such as the New York-based Ford Foundation, have started to put pressure on INGOs to collaborate with local NGOs. An example of such pressure is some reluctance on the part of philanthropies to fund INGOs to do solo work in the South where a local NGO has the capacity to get the job done. This may hurt INGOs that are more reliant on large donors, such as Human Rights Watch. But it may have little effect on INGOs, such as Amnesty International, that rely heavily on the contributions of individual members. For these and other reasons, INGOs have more recently increased their efforts at coalition building and networking with NGOs in the South, believing that such coalitions lend more legitimacy to their work. These coalitions have been developed in the campaigns for standards on questions related to globalization, landmines, and women’s rights.²⁰ The coalitions’ inclusivity was not intended to empower NGOs from the South but to strengthen the NGO voice. As noted by a critic, the “forming of such coalitions may allow for a single, and therefore more forceful, NGO voice, but this also conceals deep divisions among those within the coalition.”²¹ Such differences may be muted because of the coalition’s goal, or the dissenting views of NGOs from the South may be suppressed so as to give the appearance of a united global civil society, a problem in the struggles for women’s rights. NGOs from the South have pointed to the reluctance of their counterparts from the North—who dominate international standard-setting forums in the field—to address issues pertinent to

them,²² resulting in the universalization of the priorities of women in the North and the concomitant downgrading of the problems women in the South face. This division is not unlike the split in the women's movement in the North. In the United States, for example, women of color have long complained that their particular concerns tend to be overlooked—or submerged in the mainstream women's rights movement, which has traditionally been dominated by white women. A study of INGO-NGO relations revealed precisely such a chasm in North-South relations:

This viewpoint emerged in a survey of NGO attitudes in which seventy per cent of those questioned expressed their concerns about the domination by larger, white, English-language NGOs. One survey concluded that “prejudices of racism, sexism and colonialism still endure” despite the apparently more open texture of civil society. . . . Increased representation is justified in terms of the potential empowerment of those previously lacking power, but great care must be taken in identifying who in fact is benefiting from the process.²³

Apart from states, INGOs, and NGOs, other actors in the world of human rights standard setting include individuals and institutions from the world of academia such as renowned academics and jurists, policy think tanks, and the media. Again, academics and the media in the South lack a strong voice. Universities in the South have traditionally been stressed by problems with resources, government constraints, and brain drain to the North. Individual thinkers and writers have been influential players in the process, but the most visible thinkers are located in the North, even when they write from a perspective of the South. Few media houses in the South have the global reach of their counterparts in the North. Reporting on the South, therefore, is heavily tainted by the pathologies of media from the North. The typical story reported on Africa by the white media in the West, for example, focuses on catastrophe and despair. Rarely is there sophisticated or nuanced reporting on complex problems in the South. Rather, Western media have a simplistic narrative about Africa—which they portray as savage, uncivilized, undemocratic, brutal, tragic, and hopeless.²⁴ These images completely omit the larger and more common stories of vitality and triumph, such as the recent wave of democratization or the enormous economic growth since 2000.²⁵ Unwittingly or not, the Western reporting disempowers the South and robs it of the potential for effective participation in norm setting and implementation forums. Although the media is not a direct participant in the norm-setting process, the exposure that a particular issue receives may make it a priority. Consequently, the

media from the South, largely invisible, have been unable to effectively help set global agendas and encourage more inclusive participation. A case in point was the media coverage of the Yugoslav and Rwanda genocides in the early to mid-1990s, a spotlight that shamed powerful states and pushed them to establish war crimes tribunals. Even though the media in both cases was crucial in mobilizing international rage and action, Rwanda was treated as a horrible occurrence, but one that was inevitable because of African “tribal” animosities. In contrast, the Yugoslav atrocities were addressed more expeditiously because such barbarity was unconscionable in the “heart of Europe.” Most resources went to the International Criminal Tribunal for the Former Yugoslavia while the International Criminal Tribunal for Rwanda was treated as an afterthought and relegated to the status of the “other tribunal.” In spite of unequal treatment, both cases broke the inertia over the development of a permanent international criminal tribunal.

THE DEFICIT OF DEMOCRACY

The deficit of participation is closely linked to the deficit of democracy in the world of IGOs, particularly within the United Nations. The post-World War II order promised, in the words of the UN Charter, 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.”²⁶ But the Charter equivocated on the principle of sovereign equality when it made the Security Council, the key and most powerful organ of the UN, the exclusive club of the five major powers of the day.²⁷ The World War II order was without a doubt premised on the interests of the victors over the vanquished. But even more important, it renewed the European project of global domination, only this time under the leadership of the United States. With Europe devastated by war, the United States emerged as the leading global power. The UN, though a more democratic global body than any previous international organization, was still the handmaiden of the United States and Western Europe. This Anglo-American global order would eventually overcome its only viable challenger, Soviet-led communism, in 1991. But as a signal to the power of the Allies, the General Assembly, the most representative and democratic of UN organs, was given only recommending powers, in effect reducing it to a talking shop and rubber stamp.²⁸ In this way, democracy, the noble ideal on which the UN was ostensibly founded, was also, paradoxically, its first casualty. How the founders of the UN reconciled the obvious contradiction between the juridical equality of states and the emasculation of the General Assembly by the granting of actual power to the exclusive Security Council—the veto power of only five members—is one of the most blatant hypocrisies of the modern era. The structure of

the United Nations, which is today regarded as obsolete, has come under increasing attack.²⁹ As Jose Alvarez has written, there is pressure for a radical restructuring of the United Nations to address the deficit of democracy within it.³⁰ But so far, no fundamental reform of the UN has taken place, despite a number of reports and recommendations.

Russia and China are less powerful even within the Security Council, which is dominated by the United States, the UK, and France, the key three Western states.³¹ The effectual powers of states in UN negotiations are graduated according to their wealth, military power, size, and geographic location. These factors determine the influence and clout that states possess and can deploy to advance their interests within the United Nations. Thus, the United States and the European Union countries dominate the UN, although large and emergent powers like China, India, South Africa, and Brazil have sought, and sometimes gained, more influence. But rather than seek a radical transformation of this antiquated pecking order, more recent proposals seek only to grant the veto powers to new global powers with an eye to more geographic representation. According to some proposals, the Security Council would not be abolished but expanded—to include India, Germany, Brazil, Japan, and one or two countries from Africa chosen among South Africa, Nigeria, or Egypt. These new entrants would be chosen based on their strategic importance. The argument is that such an expansion would re-legitimize the Security Council. However, this logic simply reifies the inequality of states within the UN system and pegs decision-making power not on democratic principles, but on economic might, military power, and global influence. It is a rationale that runs roughshod over democracy and abrogates basic principles of international law.³²

Many African, Middle Eastern, and Asian states have traditionally been viewed as either unenthusiastic or opposed to intrusive human rights standards and mechanisms. Their voices in standard-setting bodies—especially in the area of civil and political rights—are regarded generally as unhelpful or obstructionist. Although the stereotype persists, this image of the South is changing. Many states in the South, such as Costa Rica, Senegal, South Africa, states in the Caribbean, and virtually all of Central and South America, are today more inclined to support or initiate new human rights standards. So are a growing number of states from sub-Saharan Africa. This shift is a direct result of growing openness and the introduction of political democracy in many of these countries. In Africa, for example, South Africa has taken a leadership role as a champion of human rights norms. No example is more poignant than its leadership of the Human Rights Council's decision to adopt a gay rights resolution in June 2011 prohibiting discrimination and violence against individuals due to their sexual orientation. It is one of the first countries in the world to protect sexual

orientation, doing so in its 1996 constitution, and it is the only state in Africa to legalize same-sex marriage, through the Civil Union Act of 2006. *Minister of Home Affairs and Another v. Fourier and Another*,³³ decided by the Constitutional Court of South Africa in 2005, gave the legislature one year to legalize same-sex marriage. But there are reversals as well. For example, in 2013 Uganda's parliament passed the Anti-Homosexuality Bill. The bill, first introduced in 2009, sought to broaden the criminalization of homosexuality, including life imprisonment for same-sex acts.³⁴

Structural divides, however, are difficult to bridge. Coalitions of the North and South states have their limits. They suffer from the constraints of ideology and pathologies of history. States from the South seem to have more democratic space in IGOs only when they support or initiate human rights standards that fall in line with the national interests and legal traditions of the North. That may explain why South Africa was widely hailed in the North when it led on the issue of sexual orientation. Standards directed at the economic inequities of the global order have not seen the same success. Efforts such as the New International Economic Order faltered because of stiff opposition from the North. Similarly, the Doha Round of WTO negotiations started in 2001 has stalled because the North perceives it as taking away its economic advantages in global commerce. The sticking points have included the insistence by developed countries on agricultural subsidies. States in the South have not helped themselves, either. Some are still undemocratic and unrepresentative of their own societies and cannot, as such, advance or convey the democratic aspirations of their peoples in the IGO world. This compounds the deficit of democracy and makes it all the more difficult for traditionally marginalized states from the South to become more effective players within intergovernmental organizations. In an era of democracy, states that do not yield to the popular will of their people have a diminished clout internationally.

Nonstate actors, especially NGOs, are also mired in problems related to the deficit of democracy in the context of their work within IGOs. The nature of NGOs is at the center of this question because NGO participation in IGO standard setting does not necessarily answer the democratic challenge, or enhance transparent, democratic, and representative decision making. NGOs can often subvert democracy, and deliberately so, since, by nature, NGOs are not generally representative. They are self-appointed, and run by an individual or a small elitist group that solely determines the agenda and the priorities for the organization. Similarly, they are usually not elected, nor do they normally practice internal or institutional democracy or transparency.³⁵ Even seemingly membership-based NGOs, such as Amnesty International, are quite undemocratic. They suffer from opacity because their structures of internal governance favor states with large memberships, like

the United States and a number of European states. AI's top decision-making organs—the International Council and the International Executive Committee—are dominated by the large country sections—namely the United States, UK, the Netherlands, Canada, France, Germany, and several other European states. Voting rights in AI are allotted according to the size of the section membership. Needless to say, the countries with the wealthiest populations have the largest paid memberships and hence control voting power. In effect, AI is not democratically governed—as it claims—because the vote is pegged to wealth. This state of affairs is unlikely to change any time soon because it is the same sections from the North that would have to change the system. Human Rights Watch is not democratically governed but does not purport to be. Its board of directors—who are chosen for their expertise and giving potential—is largely compliant to the commands of the executive director and cannot exercise any meaningful oversight. Thus, HRW is largely self-policing, limited only by the influence of its large donors and its presumed fidelity to the human rights corpus.

This problem is not limited to INGOs. Domestic NGOs often present themselves as the voice of the people at the national level.³⁶ The righteous fervor with which they speak belies a total lack of democratic legitimacy because virtually all domestic NGOs have no claim to genuine representation. The sole basis of their claim for legitimacy lies in their self-professed pronouncements, missions, and goals. Not even their written mandates and bylaws make any pretense of democratic representation. Additionally, many NGOs are single-person affairs; others are literally family owned. Yet others are fronts for state or other powerful interests. Yet NGOs present themselves as the conscience of the people. In many cases, especially where the state's warrant is paper thin and cannot provide essential services or protection, NGOs are popularly embraced because they fill a vacuum. NGOs are therefore necessary in states that are unable or unwilling to perform the functions of statehood. In these cases, NGOs are not so much advocacy organizations as service providers. The services provided could be in economic and social rights or civil rights empowerment. States and IGOs have ceded ground to NGOs, lending credence to their claim of legitimacy on the implausible argument that they are the voices of the people. Like domestic NGOs, INGOs also fill the vacuum left by states that are unable, or unwilling, to effectively participate in standard setting and norm implementation. Even as states retain supremacy in the norm creation forums, they have in effect conferred legitimacy on NGOs by treating them as partners in international governance. A Canadian official confirmed this view when he noted during negotiations on the Landmines Convention that INGOs “have been the voice saying that government belongs to the people, and must respond to

the people's hopes, demands and ideals."³⁷ His comment was an acknowledgment that NGOs are necessary to remind and push states to fulfill their obligations to citizens.

A few INGOs dominating the IGO scene are more than happy to wear the label of "international civil society" or "global civil society," terms that connote the image of the more representative, diverse, and grassroots-oriented domestic NGOs. As misleading as these labels are, this kind of misdirection is their stock in trade. They would rather no one focus on their own deficiencies but instead on the failures of the state. The accusing finger never points back at them, only and always at states and IGOs. But the so-called international civil society is an unfortunate term as applied to INGOs because they are, as Kenneth Anderson states, "a vehicle for international elites to talk to other international elites about the things—frequently of undeniably critical importance—that international elites care about."³⁸ It is a conversation that is horizontal, not vertical. Anderson notes emphatically that this horizontal dialogue, a kind of romance between INGOs and IGOs, has a "worthwhile, essential function in making the world—sometimes at least—a better place, but it does not reduce the democratic deficit."³⁹ Is this too cynical? Not if one realizes how narrow and selective the truly powerful INGOs are compared to the enormous power they wield. "International civil society" has arguably the same hollow ring as "international community." The latter tends to be a euphemism for the most powerful states in the North—led by the United States—dictating what is important at any given point in time. It is often a ruse for legitimizing the interests of the West under the guise of the "international community." Like the states, INGOs play the same game, under the rubric of "international civil society." AI and HRW, in particular, like to present themselves as embodying international civil society. The bottom line is that INGOs are effective pressure groups that lack democratic legitimacy. This limitation does not detract from the importance, or even legitimacy, of the work that INGOs do, but the legitimacy of the work does not necessarily confer legitimacy on the organizations. Anderson has noted further this deficit of legitimacy:

[T]he far more typical international NGO of the kind whose favor and approval international organizations [IGOs] seek is much closer to the model of Human Rights Watch—a relatively small, highly professional, entirely elite organization funded by foundations and wealthy individuals in the Western democracies, and having no discernable base outside international elites. This is not to denigrate Human Rights Watch or the vital work it does, but it would be the first to declare that its legitimacy

is not based on democratic roots among the masses but on its fidelity to its own conception of the meaning of international human rights.⁴⁰

What kind of legitimacy can be derived from fidelity to a text? Who is to say with authority that an INGO such as Human Rights Watch is truly faithful to the human rights corpus? If anything, such a claim is already contested because of HRW's reluctance to fully embrace economic and social rights. Does its selective advocacy of human rights take away its fidelity to the human rights corpus and somehow diminish its legitimacy? Why are INGOs afraid to subject themselves to more democracy? This reluctance is especially significant because they have such a large impact on the lives of people in the South. Is it acceptable that they can "do good" without any accountability, especially from their "beneficiaries"? In other words, is it enough for INGOs such as Human Rights Watch to be accountable only to themselves and their wealthy donors in the North? Is modern-day abolitionism acceptable, particularly when so many democratic devices exist that could remedy the deficit? Or would obsession with democracy compromise their effectiveness? AI has similar problems to HRW. Its "membership comes mostly from wealthy countries, and its membership even in those countries tends to be educated and at least middle class."⁴¹ INGOs favor INGOs like Human Rights Watch—the rich, expert-laden, highly professional, and powerful ones—over the poorer and relatively unsophisticated domestic Southern NGOs. Yet the latter are more likely to be connected to the people.

LANGUAGE: STYLE, CONTENT, AND IMPLEMENTATION

Standards—their formulation and implementation—are all about language. The law, an expression of the highest forms of binding rules in society, pivots on the choice and meaning of words. Negotiations over human rights standards, therefore, are contests of legal meaning. Once a human rights norm is formally adopted, its stakeholders know that options for noncompliance have dwindled considerably and revisions are not contemplated, or usually possible, past that point. This dramatic cutoff explains the widespread fervor for binding norms in human rights.⁴² Unlike municipal law, in which legislatures regularly amend, repeal, or supplement legislation ad nauseam, international human rights texts are almost always cast in stone once adopted. The ideal has been to strive for an instrument that is acceptable to states, one that they will feel obligated to implement, yet one that also will exact the lowest cost on their sovereignty. Negotiations over texts are high wire acts because the cost is usually high for NGOs, states, victims, and other stakeholders.

The contest over the language of standards is fierce because of the moral power of the idea of human rights. In fact, it is so great that opposition by states to standards is usually couched in terms that appear legitimate. For example, states may plead inadequate resources to carry out a human rights standard, or they may claim that domestic law already addresses the concern. Sometimes, states will directly raise sovereignty challenges and argue that a certain text may be harmful because of its intrusiveness. But it is easy to predict which states will raise certain objections. The sovereignty excuse, for example, is a favorite of China.⁴³ U.S. objections are usually technical and based on the “complexity” of its federal and constitutional system. However, it is easy to see through some of the excuses. No one was fooled by the United States when it offered cost as the pretext for its opposition to the Draft Optional Protocol to CAT. If the United States, the wealthiest nation in the world, could not muster enough resources to implement the Optional Protocol to CAT, who could? When it became politically incorrect to openly reject human rights standards, many undemocratic, authoritarian, but poor states took cover behind a plea of the scarcity of resources and lack of trained personnel to carry out implementation. States and IGOs, on the one hand, and NGOs, on the other, have generally worked at cross-purposes. The former are more likely to accept soft law, less binding instruments, whereas the latter want to maximize the impact of human rights standards through the adoption of concise, binding, and effective instruments. NGOs want more accountability, states less.

The power of language, and the different ways it can be used to elevate, or diminish, a norm, was in full display over the fight on the right to development. Its fate underscores the reluctance by states and IGOs to work for a definitive, powerful, and clear language of obligatory norms. Nothing concrete in the UN Charter or the UDHR gives specificity or direction on the right to development, although there are references to the need for international solidarity to economic and social problems.⁴⁴ The UDHR refers to an international order in which the rights in it can be realized.⁴⁵ Proponents of the right to development rely on these general provisions as its moral and legal basis. Perhaps one way to make the case is to argue that the totality of the rights in the UDHR, the provisions of the UN Charter, including its Preamble, and the human rights instruments subsequent to the UDHR, imply a “right to development.” How else, absent such a right, would the lofty and humane goals of these instruments become reality? A world of privation in which squalor, pestilence, and ignorance—an absence of development—are prevalent makes a mockery of the UN Charter and the human rights texts adopted since. Since 1977, when the UN Commission on Human Rights recognized the right to development, many powerful states, IGOs, international financial institutions, academics, and even many human

rights activists, have challenged it. The failure to develop convincing, credible, and clear language to talk about the right has marginalized discourse on it.⁴⁶ Despite many reports by IGOs, there is no agreement on the meaning of the right or what the practical consequences of its recognition might mean. Those drawbacks notwithstanding, in 1986 the UN did adopt the Declaration of the Right to Development, which was affirmed in 1993 at the Vienna World Conference on Human Rights. Nevertheless, the Declaration is written in a high-sounding, rhetorical, and vague language, and this formulation has not been helpful to advocates who want to translate the right to reality. *Norms cannot be effective unless they are unpacked into clear components, spelling out obligations and rights, and identifying the path to their implementation at the national level.* It is these factors, among others, that have conspired to make the right to development impotent.⁴⁷ The lack of concise legal language to capture the right to development is not a failure of the intellect; rather, it is a failure of political will by states to accept far-reaching obligations.

Language can be an ally to the standard setter, provided it is used carefully so that states do not see it as creating new obligations or establishing new law. The success of the Guiding Principles on Internal Displacement illustrates this delicacy of language. That states and IGOs have rushed to embrace the Guiding Principles suggests that they were crafted in a language that was acceptable to them. It bears restating that the Guiding Principles, which are not a declaration or a resolution, do not technically constitute soft law—although they may now have acquired such status because they are widely accepted by virtually all stakeholders—largely because they were neither negotiated by states nor produced by an IGO and therefore lack the authority that comes from the resultant consensus or adoption.⁴⁸ Nevertheless, such authority can be acquired *ex post facto* due to a convergence of circumstances. In a sense, the Guiding Principles are redundant, and for that reason do not really threaten states. Some see them as merely providing guidelines for the application of existing law.⁴⁹ Walter Kälin expresses ambivalence regarding the form of the instrument, and is more interested in whether the Guiding Principles are effective. He thinks it is not the form of the instrument—given the specific circumstances of its creation—that matters, but whether it advances the goals of the human rights movement and reduces privation. As we have seen, his is a result-oriented, or consequentialist, view of human rights texts. The key question is, Does the instrument ultimately make a difference? It does not matter to Kälin whether an instrument uses the language of the law, takes the legal form, or is sheathed in another format:

Whether or not a normative framework for the treatment of internally displaced persons is or becomes a reality, is much

more dependent on the actual acceptance and use of the Guiding Principles than on their legal form. To the extent that the Principles achieve that level of authority, they become hard standards even if they are still not hard law.⁵⁰

Language can create difficulties in the negotiations and drafting of a treaty, as it was for the Declaration on Human Rights Defenders. For beleaguered states in the South under attack from Western leaders in Washington, London, and other powerful capitals, the declaration was seen as yet one more weapon to diminish their sovereignty. The language of the Declaration suggested that human rights defenders—defined as individuals and NGOs of whatever national origin—would not be limited by territorial borders or other state barriers. Like all human rights instruments, the Declaration had universalistic ambitions, but, as some in the South saw it, imperial designs. Some states saw the Declaration as giving human rights activists *carte blanche* to intrude anywhere, anytime, and to associate with anyone or any organization, so long as they were “promoting” or “protecting” human rights. Some of these concerns may sound hollow, especially if they are advanced by corrupt and abusive states. Yet fears of neocolonial control and the violation of the sovereignty of states in the South by the West are not imaginary.

It is not difficult to see why the Declaration raised such fear in some states. In the last hundred years, states have been in retreat from forces beyond their control. Some of these forces emanate from quarters that directly benefit—but shrink—the power of the state. Two important examples stand out. The first is the instrument of the intergovernmental organization. IGOs are a recent development in international law, with the UN as the most iconic of them all. Yet some IGOs have become even more powerful. The European Union, which has dramatically encroached on the sovereignty of European states over the last several decades, has taken away large areas of discretion from them. Even some domestic legal processes in Europe are now subject to oversight, or reversal, by pan-European institutions such as the European Court of Human Rights. No member state of the Council for Europe, for instance, may impose the death penalty. The World Trade Organization, a more recent IGO, has perhaps become the most influential body in the world. Through its rules advancing a single global market governed by free market competition, the WTO has vastly diminished the sovereignty of states in managing their economies. Instead, the WTO has opened up every state to global capital. Private business exercises enormous influence on states. It can demand favorable treatment in exchange for investment, which states badly need. This leverage often leads to states conceding, or compromising, aspects of their sovereignty to

large multinational corporations. Perhaps this is the context in which resistance to intrusive human rights norms, such as the Declaration on Human Rights Defenders, should be viewed. Whereas states believe there is a direct benefit when they exchange a chunk of their sovereignty for commerce, they cannot readily see a corresponding benefit to allowing NGOs to intrude in areas that states have traditionally reserved for themselves. The difference, to states, is that NGOs do not create wealth or grow the economy. On the contrary, states associate local NGOs, and especially INGOs like Amnesty International and Human Rights Watch, with negative publicity. To them, negative attention from an NGO or INGO will drive investments away and paint the country as a global pariah.

The drafting of the Optional Protocol to the Torture Convention illustrates the resistance of states to language that imposes new obligations and creates intrusive and highly supervisory mechanisms. At the outset the Optional Protocol was needed to close loopholes left by the CAT and respond to problems that the CAT had not anticipated when it was adopted, specifically to tighten obligations. The protocol's precision of language relating to the obligations of states to take clear, unequivocal, and verifiable steps to prevent torture was viewed as unavoidable. It was adopted by the General Assembly in 2002 and entered into force in 2006. Although the instrument is optional, it had been signed as of February 22, 2013, by seventy-two states and ratified by sixty-seven.⁵¹ The large number of states that have either signed or ratified it suggests that many states believe that they can comply with it, in spite of its intrusiveness. The length of time it took to negotiate, the failure to adopt it by consensus, and the large number of states that abstained or voted against it, however, may indicate that the language of the Optional Protocol was an issue for some states.

The language of an instrument is the best evidence of what states intend to do. An analysis of the use of language in standard setting shows a link between language and the modes of implementation or enforcement of an instrument, even if the instrument in question enjoys strong support from states and IGOs. No state is ambivalent about the nature of language, no matter the subject of the instrument. The typical example is CEDAW and its committee, in which an ambitious instrument was coupled with a weak treaty body. As a treaty, CEDAW is generally viewed as a potentially transformative instrument that directly confronts the deep-seated taboos, traditions, and practices that have been used to discriminate against women, keep them marginalized, and exclude them from the public square. According to CEDAW, no justification for inequality between the genders exists. Its charge to states and society is simple—take all measures necessary to eradicate the unequal treatment of women. In this exercise, CEDAW does not spare the private sphere. Every institution in society—whether public or

private—is under a requirement to eliminate misogyny and discrimination against women. The convention seeks both a normative and programmatic cure to the deficits of gender equality. This strong treaty, however, is not coupled with a strong oversight body. Either the states were afraid of the domestic cultural and political implications of such a radical transformation of deeply embedded abuses against women, or they were hypocritical in supporting a good treaty but crippling it with a weak committee. But they had other options. Relatively or potentially strong functions in treaty bodies may be made optional to avoid the deep penetration of the state. The only clear exception to this rule is the Convention on the Rights of the Child (CRC), where an effective, innovative, aggressive, and open committee oversees a strong instrument.⁵² This doubly strong pairing of committee and instrument is why the CRC has succeeded beyond the wildest expectations of its sponsors.⁵³ Perhaps it was such a departure from the norm because it is the only human rights instrument that was almost entirely the product of NGOs. Perhaps it was because children do not pose serious threats to states beyond the outlay of expenses for education, nutrition, and health care. Otherwise, left to their own devices, states will almost always opt for vacuous, highly rhetorical human rights instruments with little teeth.

UNDERSTANDING UN INSTITUTIONS AND NORM SETTING

A pervasive belief in academic and activist circles holds that UN institutions charged with the monitoring and enforcement of human rights standards are largely ineffective, if not impotent,⁵⁴ a charge also commonly heard from victims and their advocates. In fact, some thinkers discount the effectiveness of international law almost completely.⁵⁵ Understandably, victims seek justice, and to the villager, peasant, or beleaguered human rights advocate in an abusive state, the UN might as well not even exist. Many of these victims have no way of directly accessing or engaging UN mechanisms. It helps little when they do try because of the procedural hurdles and interminable delays.

Yet despite these disappointments, the world has a solid framework for advancing human rights today. The visibility of human rights standards and the UN bodies that anchor them was unthinkable just sixty years ago. Today we cannot imagine the normative human rights regime without its institutionalization in the UN Charter and the various treaty bodies. The absence of these institutions would leave national governments to police themselves and to decide how to enforce human rights standards. In theory, one might argue that states could rise to the challenge, but in reality, chances are that states would renege on their promises and backtrack on enforcement.⁵⁶ Therefore, civil society and domestic NGOs, at the national level, and IGOs

and INGOs at the international level, are necessary to pressure, monitor, cajole, and encourage states to honor their human rights obligations. In short, *human rights norms make sense only when anchored in institutions*. In law, norms are applied to facts in an institutional setting such as a court or tribunal; this application of norms to facts establishes culpability or liability in domestic courts. UN human rights institutions have attempted to reproduce the same relationships between norms and facts. These institutions can be deliberative, judicial, or quasi-judicial. But because the UN deals with the entire globe, its human rights bodies could not possibly hear every human rights claim. Rather, they are meant to develop jurisprudence and to guide states. It is these obvious limitations that frustrate victims.

The intrinsic relationship between norms and institutions means that the design of UN institutions in which human rights norms are anchored is inherently part of standard setting. Standards are not set in the abstract without thought being given to how they will be implemented, enforced, and realized. In a way similar to their counterparts who write domestic laws, human rights norm drafters consider the institutions of interpretation and enforcement. The challenges for universal standard setters are more complicated because they have to think through how diverse states, legal traditions, and cultures will interpret a norm and then enforce it. Obviously, universal human rights standards must be viewed at the national level, where they will ultimately make a difference. The investigation of the processes of standard setting must adopt a legal-realist approach and relate what is produced to how it is implemented; otherwise it is impossible to gauge the effectiveness of norms.⁵⁷ It is at this intersection—where norms and institutions meet—that most of the contestation over the scope, depth, and authority of the human rights regime has taken place, and that means negotiations by a multitude of stakeholders with many different views are necessary to address these nuances. These differing views help flesh out the norms and expose hidden fears and excuses. They can also result in the construction of norms that are sensitive to local particularisms.

Two types of institutions at the United Nations pose different questions for the setting of standards and their implementation. UN Charter bodies claim every state and have authority over all member states. They are universal in the sense that their writ runs directly from the particular UN Charter body to every member state, with no exceptions. Treaty bodies, on the other hand, have no legal writ over member states who are not parties to the treaty. UN Charter-based bodies, such as the UN Commission on Human Rights, and treaty bodies, such as the CEDAW Committee and the UN Human Rights Committee, face different challenges. Both types either set or develop norms and then oversee their implementation or enforcement. Thus, a treaty body is not simply a silent overseer of implementation; it

makes law by interpreting the treaty. Some bodies, such as the Committee on Economic, Social, and Cultural Rights (CESCR), have been more “judicially activist” because of the vagueness and vacuousness of the ICESCR treaty itself, and the sense of obligation by states has evolved since the ICESCR was adopted in 1966. The resistance of states to the ICESCR when it was being drafted was so stiff that, unlike the ICCPR, it did not have an oversight committee. Only later—in 1987—did ICESCR states establish the Committee on Economic, Social and Cultural Rights to oversee the treaty. Alternatively, Charter-based organs such as the Human Rights Council are the quintessential IGO in the sense that its constitution is a politically charged process in which each of its forty-seven member states is elected through bloc negotiation and horse trading. In the era of the UN Commission on Human Rights, the membership election was a dirtier process, and blatant violators were frequently elected. Fidelity to human rights ought to be taken more seriously, yet even under the Human Rights Council, some states with terrible human rights records still manage to get elected.

The composition of the membership of UN Charter bodies is restricted to states and tends to be ambivalent, if not less friendly, to human rights. The Human Rights Council, like the commission before it, is composed of government representatives who are generally career diplomats and not human rights experts. It is not an independent body, and, in that sense, not much has changed from the commission to the council. One argument in favor of this arrangement is that states would be unlikely to agree to norms and their implementation if they were excluded from making them. This would likely be the case even if the council was made up of individual independent experts, much like the treaty bodies. But treaty bodies have a narrower charge than the sweeping mandate of the council, including periodic review of member states. As the apex of the UN human rights regime, the council is by word and deed the most watched human rights institution. Even though it works closely with the UN Office of the High Commissioner for Human Rights, the council is not a professional secretariat. It belongs to the states, and it is they who run it. The council is such a critical institution that, arguably, the seriousness of the UN human rights regime can be measured by its effectiveness. Alternatively, treaty bodies are composed of independent human rights experts who do not—and are not supposed to—represent their states of origin. For these reasons, treaty bodies tend to be more sympathetic to human rights than Charter-based organs.

Charter-based organs are the guardians of state interests in the UN. Through them, states and IGOs exert their influence over the nature of human rights standards and the mode of their enforcement. In formal terms, standard setting is carried out within IGOs, not the treaty bodies, although the reality is more complex. Through their interpretive powers, treaty bodies

have made significant contributions to human rights. Since many treaties tend to be either broad or vague, it has fallen to treaty bodies to elaborate, clarify, and elucidate standards by more clearly defining their meaning and the scope of the obligations of states. Without a doubt, these are not merely interpretive duties. They are in effect standard-setting functions. But a lot depends on the expertise and ambitions of the members of a treaty body. Here, leadership is crucial, as is the era in which the treaty body operates. During the Cold War, for example, the UN Human Rights Committee showed less courage and freedom to interpret the ICCPR than it has since the collapse of the Soviet bloc. The committee's "independent experts" often seemed less independent, perhaps because many were former officials or bureaucrats of their states of origin during an era of ideological rigidity in the world. Most of them were pro-establishment figures—individuals who had spent careers in state employ or as academics in state-controlled universities. In other cases, members from particular states, especially the more repressive or authoritarian ones, dared not express views in the committee that would have been contrary to the official policies of their states.

Several texts did not immediately create an implementation body. For example, the Guiding Principles on IDPs did not suggest a specific instrument for their implementation, and not until 2004 did the UN Commission on Human Rights create the mandate for the Special Rapporteur on the Human Rights of Internally Displaced Persons. The Declaration on Human Rights Defenders also neglected to create a structure for its realization or oversight, although a later resolution did. Generally, norms contemplate a vehicle of implementation. Otherwise, it looks like empty rhetoric when states establish norms while denying an instrument for oversight. The Optional Protocol to CAT is hooked to the Committee Against Torture. The ICC, the CRC, and a host of other norm-setting instruments have enforcement organs. One way of gauging the seriousness of states is to examine whether an oversight body exists, and if so, its powers. Lack of an enforcement mechanism for a norm would virtually defeat its entire purpose. That is what states had signaled early when they failed to provide a committee for the ICESCR.

STANDARD SETTING AND IMPLEMENTATION IN PRACTICE

The first United Nations human rights instrument, the UDHR, was a declaration without an enforcement mechanism. Its power has been that of inspiration and the translation or evolution of many of its norms into binding treaty or customary obligations. The UDHR was thought to be the document that would precede the more detailed elaboration of the human rights obligations of states in a binding treaty. The UN Commission on

Human Rights knew right away that it could not get states to accept the UDHR as a treaty, but it believed that there was a good chance of persuading states to agree on a later treaty instrument that would translate many of the rights and aspirations in the UDHR. They were wrong. What followed were arduous, prolonged, and deeply contested negotiations over the nature, extent, and content of an international bill of rights. The difficulties occurred no doubt because this kind of negotiation was uncharted territory for states. Cold War conflicts and intrigues between the United States and the West, on one side, and, on the other, the Soviet Union and the socialist bloc, brought these noble expectations to a screeching halt. The commission became the focal point for the contest between the ideologies of free market capitalism and centrally planned socialism. Disagreements about models of political society and economic philosophies, as well as sovereignty concerns, endangered the commitment of the major powers to the human rights project. Grandstanding was common, but so was the fear on both sides that the resulting document would intellectually weaken one or the other camp. In fact, this bifurcation of global politics would not end until the collapse of the Soviet bloc in the late 1980s.

The business of standard setting would henceforth be a struggle over ideology, philosophy, culture, and sovereignty. The first casualty of these disagreements was the push for a single human rights treaty, a project that started in 1949 but was abandoned in 1951 when it became clear that the Western-dominated Commission on Human Rights would agree only to two separate treaties, one on civil and political rights and the other on economic, social, and cultural rights.⁵⁸ This impasse signaled a defeat for those who wanted to “depoliticize” the human rights project. It put the standard-setting process—so soon after the spectacular success of the UDHR—in the grip of ideology. The nature of the norms and their implementation measures were two critical issues facing the commission as it sat to draft the two covenants. The West argued that civil and political rights, which are the staple of its liberal state, were enforceable, justiciable, and of an absolute character, and were therefore immediately applicable.⁵⁹ The West believed that civil and political rights were individual claims against the state, a prohibition of unlawful actions against the state, for which it was not required to take any positive action. These “negative rights” would, according to the West, require few, if any, resources to implement. But because of the liberal tradition of the state, the West could not countenance the possibility of mandating social and economic rights. It contended that economic, social, and cultural rights were claims on the state that could only be implemented progressively, requiring positive action by the state.⁶⁰ The West did not believe that economic, social, and cultural rights could be implemented without massive outlays of state capital, which, in turn, would require the

expansion of the role of the state, suppression of individual freedom and choice, and substantial redistribution of wealth.

This dichotomous view—which, regrettably, has been an enduring legacy of the human rights corpus—masked the fear in the West that human rights standards and obligations would be deployed against free market economic structures and policies. The ICCPR provided for the Human Rights Committee, regarded as one of the more credible treaty bodies, to oversee its implementation. While the West was uncomfortable with a strong treaty body for the ICCPR, it considered the treaty body a lesser evil. Even so, the United States did not ratify the ICCPR until 1992—twenty-six years after it was adopted. But it would not countenance a treaty body for the ICESCR, which was left without one; instead it provided only for a largely meaningless oversight function—the submission of periodic reports to the UN Secretary General and ECOSOC. The ICESCR finally got a committee—the CESCR—in 1987.⁶¹ NGOs from the South had pressed over the years for a treaty body for the ICESCR, and the initial fears linking economic and social rights to a socialist takeover of the world had dissipated with the dismal performance and eventual implosion of Soviet bloc and other socialist economies. As demonstrated by the CESCR, the fears of wild reallocations of wealth and the ravaging of capitalism by the ICESCR were greatly exaggerated. The work of the CESCR has sought to clarify the obligations of states and has focused on minimum standards of decency for several rights such as housing, education, and the contested matter of justiciability.

The differences in the implementation and oversight of the two covenants are made all the more stark by the normative distinctions between them. The documents are written in language that strives to emphasize the markedly different nature of obligations envisaged for the state. In the ICCPR they are generally definitive, unambiguous, and clear. Its provisions read like a liberal constitution and are recognizable to anyone with a passing knowledge of liberal theory. The due process protections common to liberal jurisprudence, and the singular emphasis on individual rights, are classic. They have formed the core of legal and political systems in the West since the advent of the liberal state. The ICESCR, on the other hand, is laden with broad and sometimes hortatory language, a deliberate drafting technique that left the covenant vague and unclear on the nature of its obligations on the state. For example, the language of the ICCPR specifically grants individuals rights against the state; it uses the language “no one shall be” or “anyone who.” That language sharply contrasts with the ICESCR, in which obligations are placed on states with terms such as “states parties recognize the rights of everyone to” or “states parties to the present covenant undertake to.” This distinction is what traditional legal scholars describe as “positive” and “negative” rights. Another key difference between the cov-

enants is the permissive language of equivocation in the ICESCR, language that is evasive and slippery. The ICESCR obligations are open-ended and lack performance targets. In the ICESCR, a state is required to fulfill its obligations only “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”⁶² As worded, it is highly doubtful that many states could be found in violation. This vacuous language has thus far undermined genuine progress in the achievement of economic, social, and cultural rights.

The human rights community has expressed more interest and activity to realize the potential of the ICCPR, but that has not been the case with the ICESCR. Even though the UN Human Rights Council in 2008 created the mandate of the Independent Expert on the Effects of Foreign Debt and other related International Financial Obligations of States on the full Enjoyment of Human Rights, particularly Economic, Social and Cultural Rights,⁶³ the mandate came amid global pressure to relieve the debt burdens of the most impoverished states. In addition, the UN also created the mandate of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.⁶⁴ These soft law measures underscore the need to observe economic and social rights. Last, the addition and adoption of optional protocols for each covenant explain the lag in acceptance of the ICESCR. The ICCPR has two optional protocols—the first provides for an individual complaints procedure and the second aims at the abolition of the death penalty—both of which have come into force. The Second Optional Protocol to the ICCPR was adopted by the General Assembly on December 15, 1989, and entered into force on July 11, 1991, and as of February 22, 2013, had seventy-five ratifications.⁶⁵ In contrast, the Optional Protocol for the Covenant on Economic, Social and Cultural Rights—which, like the first optional protocol to the ICCPR, permits victims to lodge a complaint at the CESCR—was adopted by the General Assembly as late as December 10, 2008.⁶⁶ As of February 22, 2013, it had been signed by only forty-two states and ratified by ten.⁶⁷

Even though the covenants were split by the competing ideologies of the East and the West, the two sides were closer than at first meets the eye. The watered-down language of the ICESCR served both political blocs. Without doubt, the West would not have agreed to strict, obligatory language—with a strong oversight body—that would have required a fundamental reorganization of the economy. Furthermore, the language of redistribution, which would have been almost unavoidable in a serious text that addressed economic and social rights, would have required a new philosophical rationale for capitalist societies. These would almost certainly have included higher revenues in tax receipts from the wealthier members

of society and large businesses. At the very least, a strong ICESCR would have called for more thicker social programs and a robust welfare state to support the most marginalized members of society. In the United States, such a document would never have been acceptable. The Republican Party, which represents big business interests and many of the wealthiest Americans, would have blocked it because it would expand social programs for the poor. Nor is it clear that the Democratic Party, which has historically advocated for a stronger welfare state and state investment in workers, the poor, and other vulnerable groups—usually funded through taxes on business and the wealthy—would have supported a strong ICESCR either.⁶⁸ For the Soviet bloc and its socialist allies elsewhere, a stringent economic and social rights covenant would not have been preferable either because of the outlays of capital required. Thus, the language of “progressive realization” and “available resources” in the ICESCR gave states an excuse for noncompliance and made the covenant more palatable to both political blocs. Finally, the failure to establish an oversight committee was another welcome compromise that gave states a reason to join because their “obligations” would be greatly minimized without a path to implementation.

The ICCPR, a normatively strong document, was, with the International Convention on the Elimination of all Forms of Racial Discrimination, among the first human rights instruments with a general scope to create a treaty body to oversee its implementation. Its provision to create the Human Rights Committee was a remarkable achievement at the time and a leap of faith. States had never before authorized such a body to supervise them in the implementation of international human rights standards. One reason it was palatable to states was that they gave it minimal power. The covenant gave the Human Rights Committee the power to consider reports of compliance from states and to issue legal interpretations of the covenant. Thus, the Human Rights Committee was charged with two basic functions: (1) reviewing performance by examining state reports and (2) issuing general comments and thus developing an interpretive jurisprudence of the ICCPR.⁶⁹ The Optional Protocol to the ICCPR, which was also adopted in 1966 but did not enter into force until 1976, added a third, and arguably one of the most important, functions to the Human Rights Committee. It authorized the committee to receive and issue opinions, known as “views,” on the petitions of individual victims.⁷⁰ Although not really a quasi-judicial process, the individual complaints procedure gave victims access to a sort of international adjudication forum against their states. It elevated the individual and gave natural persons standing before an IGO for one of the first times in history. But states parties denied the committee the power to make binding rulings, judgments, or decisions against states. The “views,” an innocuous term, suggests an “opinion,” not in the legal sense but as an “observation” that has

no judicial heft. Although a comparative survey shows that the Human Rights Committee remains one of the most active committees among the ten treaty bodies,⁷¹ its structure and powers indicate that states did not want to couple a normatively strong instrument with an intrusive enforcement body. By creating a treaty body, states allowed members of the Human Rights Committee to be independent experts, but they denied the organ a quasi-judicial character and made the individual petition procedure entirely optional, leaving it with only one compulsory role—that of studying and commenting generally on state reports.⁷² Although 167 states have ratified the ICCPR, only 114 have ratified the Optional Protocol, a ratio that shows reluctance by states to subject themselves to the Human Rights Committee's individual complaints procedure, even though it is largely harmless.

Standards on most human rights concerns have been set since 1966, when the first two human rights covenants were adopted, creating in the last fifty years a frenzy of standard setting in most areas of human vulnerability. But the process of standard setting was then—and remains today—*contentious, lengthy, and laborious*. This is without question the age of rights, and state sovereignty is certainly no longer what it once was, but human rights standard setting is still an uphill task. There are indications that over the last decade it has become even more difficult to push for new standards, at least in treaty form. State and IGO concerns over sovereignty, culture, ideology, and power continue to be present today, although perhaps not in the same blatantly naked way they were before 1966. Since then, drafting of human rights instruments has generally followed the script of the drafting of the ICCPR and ICESCR, with minor variations, because states and NGOs felt that they had exhausted all concerns in the drafting of and negotiations over those two covenants. Those tough negotiations have remained a sort of blueprint for future processes, but their negative legacy persists to this day, when states and IGOs continue to play with language to blunt, soften, or evade effective human rights standards.

SIX

NEW AND EMERGING STANDARDS

Though it is almost impossible to imagine a world without the vocabulary of human rights, such language has not always been part of governmental or civilian rhetoric. Human rights discourse burst on the world scene about sixty years ago, although the norms and philosophies on which it is based are as old as humanity itself. IGOs, NGOs, and states have spent most of that time establishing a normative framework—most of it legal—for the human rights movement. That normative framework has defined the content and scope of human rights and created processes and institutions for their promotion and protection. Human rights are supposed to be the new language of power for the powerless, but stakeholders who speak the language of human rights most effectively are not the powerless. In other words, the language is not in the hands of those who need it the most. Even so, for most of its life, the language of human rights has not been owned by the victims, nor have they defined it. Early in its life, it was a language spoken by states whose history contradicted its very ideals. The postwar period may have been rid of Nazism and some of the crudest official expressions of racial superiority, but in the most powerful postwar nation—the United States, home of the Statue of Liberty—citizens of African descent were still excluded from society, in many cases by law. In substance, American apartheid was not different from its South African counterpart. Other Western states, the “fathers” of human rights—in particular, France and Britain—oversaw brutal, exploitative, and inhumane policies in their colonies in Africa, Asia, and the Pacific. It is ironic that these states claimed to be the “initial owners” of the rights language, yet the oppressed have, over the past sixty years, steadily moved to wrest control of the human rights language from their oppressors, the concept referred to in this book as “human rights from below.” Subalterns and communities in the global South and their

marginalized counterparts in the North have increasingly become agents of their fates. In this process, many have claimed the language of rights as theirs. They have sought to transform the language of rights by infusing it with other discourses. One such discourse is human dignity, which views human powerlessness in a more holistic view than simply human rights. Human dignity, unlike human rights, is not just a language of legal rights, but a concept that encompasses empathy, hospitality, and the inner worth of human beings. It is akin to the philosophy of *ubuntu*, a term from the Bantu languages of Africa which refers to human-ness.¹ In this context, new social movements for new and emerging rights have arisen. But some Western rights scholars, such as Samuel Moyn, still insist on a dichotomized view of human rights and deny the long genealogy of the human rights movement that goes back to antislavery campaigns and anticolonialism.² In other words, human rights have a longer history that reaches beyond WWII. Many struggles in the global South preceded the official launch of the human rights movement by the United Nations in 1948. But it is such views by Western scholars that have arrested the development of a more complete human rights corpus which goes beyond the individualism that even universally respected Western scholars such as Moyn elevate above other competing narratives and visions.

New and traditional human rights advocates still believe that the state must be held accountable. They view the state as the central instrument that more than any other institution has the greatest effect on the lives of humans today. Human rights norms, processes, and institutions are so ingrained in the public consciousness that they have become an essential part of global civilization. Governments and states can no longer mistreat and neglect their populations without international scrutiny and, increasingly, accountability. Civil society, IGOs, and NGOs have made the conduct of the state their business. Increasingly, states are reaching out to these sectors for assistance and cooperation in understanding and addressing human rights violations, and, as a consequence, the allure and power of the language of rights continues to attract more causes. Even though a large consensus of scholars agrees that most human rights standards have been set, more norms are being sought and negotiated. This phenomenon is partly the dynamism of the human condition and the emergence of more vistas of human powerlessness.

WHAT IS THE FUTURE OF STANDARD SETTING IN HUMAN RIGHTS?

Even given the many historic, conceptual, and institutional breakthroughs in the human rights movement, much work remains to be done to secure

human dignity, primarily in two main areas. The first is a normative lacuna, and the second is in the areas of enforcement, oversight, and implementation. No serious thinker believes that either of these two deficits is a minor problem. Although human rights standards have been set in virtually all areas that touch on human dignity, normative gaps and weaknesses still exist in many areas. New normative frameworks are needed in some areas, and in others they must be elaborated and strengthened. Standard setting is a dynamic process that must respond to rapidly changing world events and to challenges that come with the emergence of new problems and conditions. Some critics argue that setting more norms in the idiom of the language of rights simply inflates the categories of rights and diminishes the power of the language of rights.³ That view, however, could be impugned as elitist, one that is removed from the privations of people who need protection. As society learns more about previously “unknown” or “unreported” human conditions, there is bound to be a clamor for additional norms.

The setting of human rights standards is not a static or frozen process. The conditions of humanity, which human rights standards seek to safeguard and promote, are evolving phenomena. New conditions of oppression and powerlessness are forever being discovered, and new challenges are constantly emerging. The gay rights movement, for example, was unthinkable just a few decades ago. The campaign for the rights of people with disabilities was a long-forgotten issue—both domestically and internationally—yet that is one of the latest human conditions to be protected. Additionally, the American “war on terror” initiated by George Bush after the Al Qaeda attacks on the United States has thrown up new obstacles to established norms. Novel arguments to circumvent violations such as torture and to deny due process protections have called for a rethinking of the human rights corpus. These and other charged issues require a normative response. Broad norms and standards must be unpacked, broken down, elucidated, revised, or even rejected and replaced by new and different standards. The scope, reach, and content of norms must be comprehensible to their beneficiaries as well as to those who bear the responsibility for their implementation. Vacuous, rhetorical, and vague standards accomplish little. The quest going forward is not one of setting vague norms just to respond to a pressing condition. Instead, future efforts must be smarter and pursue a human rights agenda that will respond in a meaningful way to violations.

Standards must have a clear path for their implementation and enforcement to be effective, an area of great weakness in the past. The dilemma for NGOs and other stakeholders has been in convincing states to accept strong instruments together with effective oversight institutions. And, although international law—in the form of rules and institutions—could not, and is not intended to displace states or municipal law, institutions responsible for

the promotion and protection of human rights standards—states and IGOs—are largely perceived by NGOs as reluctant, unwilling, unable, or ineffectual actors. International oversight is necessary, but alone cannot accomplish much. The question is how to get states to buy into, and largely internalize, the standards that have been set. How do stakeholders get states and IGOs to fully embrace human rights? Today, these two key actors are seen as interested mostly in blunting the bite of human rights to safeguard state sovereignty. Since human rights must be translated at the national level, municipal institutions that safeguard basic rights are critical to enforcement. Domesticating standards at the national level is the ultimate antidote against violations. The executive arm of government has a primary responsibility to play in this process. Judiciaries, national human rights institutions, bar associations, NGOs, police and security apparatuses, and legislatures must work in the front lines to entrench, deepen, promote, and protect human rights. Among these institutions, however, only human rights NGOs can be relied on to advance the human rights agenda with vigor and honesty. Human rights standards succeed best when the contradictions and tensions between universal institutions and municipal players and processes at the state level are alleviated or eliminated. Good examples are states—such as Costa Rica, Japan, South Africa, Botswana, the Netherlands—where antagonism between the local and the universal has been minimized. In these states no official hostility toward human rights norms exists, but a healthy and sometimes robust dialogue about how the domestic system accommodates universal values and even improves upon them in the context of implementation helps to minimize friction and increase acceptance.

The relationship between universal norms and IGOs, on the one hand, and national norms and institutions of enforcement, on the other, must be streamlined and harmonized to enhance their interpenetration. This vertical relationship between international and national processes is critical for the domestic internalization of human rights norms, without which states cannot cultivate a human rights culture. The experience in enforcement allows national institutions, NGOs, IGOs, and states to identify normative gaps that need to be addressed and institutional weaknesses that must be corrected. Often, several UN offices, particularly the High Commissioner for Human Rights, provide technical assistance to states on training, capacity building, and the utilization of universal systems. In other words, the national space is the anvil on which human rights norms are shaped, where NGOs should educate the public, lobby official institutions, and press the state. National NGOs have an obligation to cultivate, inspire, and support the rise of small-scale NGOs at the village and town levels to focus on particularized and highly localized concerns. This is one way in which human rights can become the people's zeitgeist. The most humble forums

are the crucibles in which a lasting human rights culture can be grown. The lessons gained from this interpenetration—of the local, national, and universal—must inform the future of standard setting and the work of rectifying institutional weaknesses in implementation.

THE QUEST TO CLARIFY ECONOMIC AND SOCIAL RIGHTS

The call for new standards in human rights has been opposed by some influential academics and large INGOs, unless such standards were consistent with the mandates of these INGOs. These individuals and groups oppose what they see as a proliferation of claims using the language of rights. They have historically been skeptical of so-called second- and third-generation rights—economic, social, and cultural rights and group and people's rights, such as the right to development—which they think inflate the category of rights and, by so doing, deflate the power of the human rights language and dilute the potency of the human rights movement. To them, the human rights movement should focus on a narrow mandate, usually in civil and political rights. But their view is a bias of ideology, culture, and expertise. For one thing, lawyers have traditionally dominated INGOs, partly because the expression of the human rights movement is the language of rights and the law and because the genesis of the human rights movement was in traditional domestic civil rights organizations in the West. Furthermore, the initial burst of the movement focused on containing the tyranny of the state, and, in so doing, the movement equated the containment of political despotism with the respect for human rights. The Cold War no doubt complicated the movement's traditional proclivities and entrenched a blind spot regarding economic and social rights problems because of the imbalance of power and influence that favored Western states. For these reasons, the human rights movement—especially in the West—has had difficulty giving adequate attention to problems of poverty, social dislocation, and economic privation.

The mandates and work of Amnesty International and Human Rights Watch, the two largest INGOs, have traditionally reflected this worldview, although that is slowly changing.⁴ In 1996, Human Rights Watch adopted a policy of addressing economic, social, and cultural rights, but only if their violation was related to its central mandate, that of protecting civil and political rights.⁵ This concession by Human Rights Watch to expand marginally its mandate came only after relentless criticism from the South threatened its credibility and effectiveness. The initial decision by HRW to include work on economic and social rights was defensive and sounded coerced. Nevertheless, the policy was viewed as a positive change from years past, when Aryeh Neier, the former executive director of the group, had

declared that economic and social rights should not be viewed as “rights” at all, but as concerns for which other groups in society should advocate. He did not see a role for human rights in advancing economic and social rights.⁶ But under Ken Roth, his successor, Human Rights Watch inched forward and now actively engages in advocacy over a range of economic, social, and cultural rights. Its work, which is still dominated by civil and political rights, includes advocacy in the area of business and human rights, the environment, economic, social, and cultural rights proper, and health. Human Rights Watch has produced a number of reports on these rights, although it is likely to work on economic, social, and cultural rights where there is a nexus with its traditional civil and political rights mandate. Even so, Human Rights Watch must be commended for abandoning the Cold War, outdated, ideologically Western, and reflexive bias against economic, social, and cultural rights. Given HRW’s standing in the human rights movement, this departure should positively influence the normative development of economic, social, and cultural rights. But no one should make the mistake of assuming that HRW is about to make economic and social rights a part of its core mandate. Roth has argued forcefully that the core mission of HRW is civil and political rights, not social and economic rights. In an important debate, Roth tangled with Leonard Rubenstein, the executive director of Physicians for Human Rights, and doggedly stuck to the antiquated view that the expertise of human rights INGOs such as HRW did not lie in defending and promoting economic and social rights.⁷ Two key human rights voices—Mary Robinson, former president of Ireland and also the former UN High Commissioner for Human Rights from 1997–2002, and Katarina Tomasevski, the former UN Special Rapporteur on the Right to Education—took Rubenstein’s side in the debate and strongly supported economic, social and cultural rights.⁸

Like Human Rights Watch, Amnesty International’s work in economic, social, and cultural rights was nonexistent until recently. Amnesty’s lack of interest in economic and social rights grew out of its deep roots in political and civil rights work, and in particular its very narrow mandate. Because of its size, reach, legitimacy, and influence, no other organization did more to delegitimize economic and social rights than Amnesty. Had it embraced these rights early on, the landscape of human rights would have been substantially different. But its virtual ambivalence and neglect toward work on these rights, combined with that of Human Rights Watch, did not augur well for the ICESCR. Pressure to change its policy would slowly build on Amnesty International, however, and it came primarily from the South, but also from a growing international consensus that leaving out economic, social, and cultural rights was hypocritical and no longer intellectually justifiable. Amnesty International would start to loosen its rigid opposition

to economic, social, and cultural rights in 1992, when Pierre Sane, a Senegalese, became secretary general of AI and its first non-European leader. Amnesty International publicly acknowledged its own role in the historical rejection of economic and social rights by the West:

Amnesty International, with a mandate geared primarily to civil and political rights, has been part of this imbalance. The very success of the organization in building a worldwide membership and raising concerns among a wide public has been a factor in focusing attention on civil and political rights. Amnesty International is now engaging in broader human rights debates and seeks to promote the full spectrum of human rights in its campaigning and human rights education activities. . . . Decisions taken by the 1997 International Council Meeting affirmed the need to explore ways of raising awareness of the full range of human rights, to provide more economic and social context in Amnesty International's reporting, and to make greater efforts to promote international standards and mechanisms protecting economic and social rights.⁹

Under Irene Khan, the Bangladeshi human rights campaigner who in 2001 succeeded Sane as Amnesty International's secretary general, the organization got more involved in economic, social, and cultural rights work.¹⁰ Khan, attuned to the plight of the poor in her native Bangladesh, made no secret of her belief that economic and social rights were as important as civil and political rights, and that bifurcating the two sets of rights had badly hurt Amnesty International in the South. She sought to expand Amnesty International's mandate to cover more rights issues, although she encountered opposition from sections of the organization's membership and its board leadership—both of which are dominated by Westerners. In 2009, she launched the Demand Dignity Campaign, one of her boldest initiatives at Amnesty International, to fight human rights abuses that impoverish people and keep them poor.¹¹ Khan's successor, Salil Shetty, himself a native of India, the world's largest democracy, a complex country that grapples with huge inequalities, was expected to intensify AI's work in economic, social, and cultural rights.¹²

Today, Amnesty International acknowledges that economic and social rights cannot be divorced from other human rights, because of the consequences of globalization. It notes that the protection of economic and social rights by NGOs is important particularly because of the failure of governments to protect citizens from the negative consequences of globalization,¹³ and it launched a high-profile campaign for the ratification of the Optional

Protocol for the International Covenant on Economic, Social and Cultural Rights. While these are very important developments from influential actors in the human rights movement, they cannot wash away the neglect of the ICESCR that still pervades the world today. Both Amnesty International and Human Rights Watch need to do more—to speak out more forcefully and to carry out more high profile advocacy work in economic, social, and cultural rights—to reverse their legacy of neglect for economic and social rights. One cannot underestimate the fact that Amnesty International and Human Rights Watch are the two most powerful nonstate actors in the field of human rights. Their embrace of economic and social rights is important and should not be halfhearted if it is to be meaningful.

For the foreseeable future, the hierarchy of human rights will remain. Civil and political rights will continue to enjoy a normative superiority that is the envy of the advocates of economic and social rights. Most states provide little domestic jurisprudence, obligatory policies, or mandatory practices on economic and social rights. A few states, with South Africa perhaps one of the leaders, have in the recent past been slowly establishing jurisprudence in economic and social rights. The South African Constitutional Court has issued a number of precedent-setting opinions on economic and social rights to tackle the most complex questions raised by these rights. What is the scope of the state's obligations? How can resource constraints be addressed and factored into a defensible judicial philosophy to enforce economic and social rights? South Africa and several other states see the development and implementation of these rights as a national obligation, yet many more states and IGOs see them as desirable goals, not rights. Even when states see them as obligations or rights, they relegate them to other, lower-status concerns and overlook them. In 1993, the ICESCR Committee noted that “states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights” and attributed this neglect to “a reluctance to characterize the problem that exists as gross and massive denials of economic, social and cultural rights.”¹⁴ It is inconceivable, for example, that the massive violations of economic, social, and cultural rights—mass starvation and famine, widespread disease, lack of shelter, and denials of education—would not raise a hue and cry were they in civil and political rights. Imagine genocides, the torture of millions, or the incarceration of millions for years without due process: such violations would attract instant condemnation, calls for action, or outright intervention. This acceptance and neglect is a political as well as an ideological problem, part of which can be attributed to the ICESCR itself, which is unclear on the nature of the obligations on states. Although the Committee on the ICESCR has attempted to clarify, unpack, define, and give guidance to the covenant's provisions and the obligations of states, its work has gone

largely unnoticed and has failed to spark INGO activism and insightful commentary from influential academics.

NGO, and particularly INGO, activism and focus on economic and social rights are necessary for their normative development and clarification. The negative consequences of globalization give these rights an urgency that must not be compromised by pretexts and excuses. NGOs must approach economic and social rights with the same zeal that drives them in their advocacy for civil and political rights. Substantial normative victory for the latter can now be declared, and NGOs can easily transfer some of their energy, resources, and skills to advocacy of the former. The vitality of NGOs will reverse IGO inertia in these rights because the role of NGOs in the South will be pivotal in advancing the normative elaboration and clarification of economic, social, and cultural rights. But how should they begin the work? Should NGOs work within the text of the ICESCR, with all its normative porousness, or should they seek another instrument that would be more precise? Would another optional protocol be necessary and helpful? How do NGOs tighten the normative noose around the neck of states? Part of the problem lies in the CESC. For example, the CESC considers complaints in secret—the language of the protocol is “closed meetings.” The committee then issues its “views” and transmits them to the state party. The state “shall give due consideration” to the views of the committee and “shall submit” within six months any information or action taken to respond to the “views.” But there is no effective mechanism to make sure that the state complies with the committee’s “views.” These gaps in norms and institutional enforcement can be addressed only through additional standards and oversight bodies.¹⁵

Without further elaboration of standards in the field of economic and social rights, there is little hope that the Declaration on the Right to Development, or the ICESCR itself, will come to life. Effecting the change to strengthen this norm is a complex problem. Jurisprudential and normative elements pertinent to economic and social rights are embedded in questions and challenges of globalization, markets, and economic underdevelopment. For these reasons, the ICESCR and the Declaration should be read as sister instruments, and work on their elaboration and implementation seen as intrinsically related. The central questions that the Declaration on the Right to Development sought to address—economic powerlessness, underdevelopment, and exploitation—can be addressed in tandem with the ICESCR.

THE NORMATIVE FRAMEWORK ON DISABILITIES

All human rights instruments are based on the principles of equal protection and nondiscrimination, the preeminent norms of the human rights

movement. The existence of general scope human rights documents, in which everyone is protected, such as the ICCPR, for example, does not obviate the need for a specific instrument targeted at a particular class of people or problem. That is why women, who are guaranteed all the rights in the ICCPR, still needed their own specific normative framework to address the particular problems and conditions that attach to them by virtue of their difference. The argument was that the ICCPR as a general scope treaty could not address the complex and wide-ranging violations that are specific to women and girls as a result of their gender. Whereas there is unity in all groups because they are human, there is dissonance between and among them because of their particular social locations and identities. Groups therefore exist in multidimensions and in several intersections so that a uniform treaty such as the ICCPR could not anticipate the other dimensions that a group, or individuals in that group, may carry.

This multidimensionality is true for racial groups, minorities, indigenous peoples, workers, children, and other classes, categories, or groups with shared historical, ethnic, religious, social, linguistic, cultural, or other characteristics. Only by recognizing these differences and specifically addressing them can society ensure the individuals and groups equal protection or redress. Following this reasoning, disabled persons have long sought a normative framework to address their condition, and, oftentimes, plight.¹⁶ The push for the protection of the rights of persons with disabilities is a recent development in most societies. For millennia, people with disabilities suffered the most demonic of treatments, including murder, banishment, exclusion, and discrimination. In many societies, people with disabilities are treated with shame and contempt. Disabled children are hidden from public view and denied the benefits of society. Parents sometimes abandon or disown their disabled children. Usually, no specific and targeted laws or policies against the abuse of persons with disabilities exist, and most societies either feel sorry for, or are repulsed by, people with disabilities.¹⁷ In 1990, the United States enacted a law specific to persons with disabilities.¹⁸ South Africa entrenched the protection of persons with disabilities in its 1996 constitution.¹⁹ Additionally, NGOs working on nondiscrimination for persons with disabilities have sprung up in most states. These actions hint at a growing international awareness that states and institutions ought to pass laws and create policies to protect persons with disabilities.

In the last several decades, the United Nations took a number of modest steps to make the cause of persons with disabilities more visible. These steps were halting at first until the UN declared 1981 the International Year of Disabled Persons.²⁰ In 1982, the UN adopted the World Program of Action Concerning Disabled Persons.²¹ These steps were not only a call to action, but also the first concrete manifestation that the UN would seek

standards on disabilities. Five years later a meeting of experts declared these steps inadequate and recommended that the UN adopt a treaty on the subject. The problem was so glaring, and the plight of persons with disabilities so pervasive and deep, that the experts could not think of anything short of a treaty as an adequate response. Shortly thereafter, the UN General Assembly adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities,²² and a year later the UN appointed Bengt Lindqvist, a former Swedish cabinet minister, Special Rapporteur on Disability. In September 2001 President Vicente Fox of Mexico gave official voice to calls by disability INGOs when he proposed that the United Nations elaborate and adopt a convention on disabilities.²³ Fox's action was of tremendous importance to the disability rights movement because, as the leader of a state not ordinarily associated with a stellar record in human rights, he was throwing his weight behind the push for disability rights. Opposition to a treaty on disabilities would most likely come from poorer states, which, like Mexico, would be resource-challenged to comply with many requirements of such a convention. But in response to Fox's leadership on the matter, the UN General Assembly established an ad hoc committee to work on the question of a convention. In June 2002, the Mexican government hosted, with UN assistance, an interregional expert group meeting to discuss the elaboration of a disabilities convention. This meeting established without question Mexico's political commitment to a treaty on disabilities.

Advocates for disability rights, including Mexico, were convinced that only a binding convention would be an effective method for protecting the rights of persons with disabilities. They argued, correctly, that the soft law measures taken by the UN, including the appointment of a special rapporteur, had borne little fruit, beyond raising the visibility of disability concerns. Lindqvist, who served as the special rapporteur until December 2002, wanted the proposed convention based on existing human rights instruments and the principles spelled out by the ICESCR Committee in 1994.²⁴ His may not have been the most strategic approach, given the weaknesses associated with the ICESCR, although it could conceivably strengthen the CDESCR. In October 2002, the special rapporteur applauded the initiative and leadership of Mexico in the drive for a convention, but he warned of the resistance and opposition from a large number of states.²⁵ He outlined three reasons that should be used to bring reluctant states on board. The first was that existing human rights instruments did not address the plight of persons with disabilities, which the proposed convention would. This strategy was important because many states would have liked to duck under existing treaty obligations as a pretext to derail a specific disability treaty. Second, a special convention would give status and visibility to disability rights, something that other thematic treaties had done. Without a stand-alone

treaty, disability would be viewed as a second-class problem that would be denied the elevation that it deserved. Finally, only a special convention would provide an effective mechanism to monitor the implementation of disability rights.²⁶ Given the importance of treaty bodies, even where they have been impotent or only partially effective, it would have been foolhardy not to push for an oversight body. Even if a standing body does nothing else, it forces states and the international community to concentrate on the problem. And it is a basic foundation on which advocates can build in the future in order to create more effective oversight machinery.

The momentum for a convention on disabilities could not be stopped.²⁷ Domestic NGOs, INGOs, and the International Disability Alliance (IDA)—a coalition of nonstate actors—worked together to fast-track a disability convention.²⁸ The determined leadership of Mexico was instrumental in blunting reluctance or opposition to the convention from poorer states who lacked resources to address meaningfully the plight of persons with disabilities. Within a few years, the Draft Convention²⁹ on the Rights of Persons with Disabilities was completed, and it was adopted by the United Nations General Assembly on December 13, 2006,³⁰ and opened for signature on March 30, 2007. The Convention on Disabilities came into force on May 3, 2008,³¹ and as of February 2013, it had been signed by 155 states and ratified by 129.³²

The Optional Protocol to the Convention on Disabilities creates the Committee on the Rights of Persons with Disabilities, the treaty's oversight body.³³ The optional protocol requires states to submit periodic reports to the committee on progress made and problems encountered in their implementation of the Convention on Disabilities. Like the Human Rights Committee, or similar treaty bodies, the Committee on the Rights of Persons with Disabilities has the authority to receive and examine individual complaints of noncompliance by states from individuals whose rights have been abridged. The Optional Protocol to the Convention on the Rights of Persons with Disabilities was adopted on December 13, 2006, and entered into force on May 3, 2008; as of February 2013, it had been signed by ninety-one states and ratified by seventy-six.³⁴

The Convention adopted a wide definition of disability, going beyond the physical attributes usually associated with disability, and including a wide range of protections. It requires nondiscrimination and equal protection, emphasizes and requires equal opportunity and accessibility, and provides for equal protection of both genders. It protects children with disabilities and provides for their right to be respected and to keep their identities. It calls for the respect of differences among people and for respect for people with disabilities as a part of human diversity and humanity. It requires the inclu-

sion of people with disabilities and their full and effective participation in society. In short, the Convention clearly affirms that people with disabilities are entitled to individual autonomy, inherent dignity, independence, and the freedom to make individual choices. The Convention on Disabilities is the last major human rights treaty adopted by the international community.

SEXUAL ORIENTATION

A major emerging issue for which international standards are urgently required is the question of sexual orientation. Patriarchy and heterosexism are the dominant biases of all major legal, religious, social, political, economic, and cultural traditions. The national state and the international legal orders are based on them. Discrimination, exclusion, neglect, and abuse of gays and lesbians are common to most societies, and antihomosexual attitudes and practices have historically been given expression in the laws of virtually all states. In the past several decades, however, gay rights movements seeking equal protection and nondiscrimination have cropped up at the national and international levels. A number of states have either repealed antigay laws or passed new laws to protect gay persons from discrimination.³⁵ In the last decade, some national, regional, and international organizations seem willing to consider a form of protection for gay rights. More than any other region, Europe has been willing to protect gay rights. A number of cases at the European Court of Human Rights have ruled that discrimination against homosexuals is prohibited by the European Convention on Human Rights.³⁶ In an opinion, known as a view, the UN Human Rights Committee has said that the reference to “sex” and “other status” in Articles 2(1) and 26 of the ICCPR, respectively, must be taken to include the prohibition of discrimination based on sexual orientation.³⁷ This interpretation by the Human Rights Committee has important legal value but it does not settle the status of gay rights in human rights and international law because gay rights have not crystallized in international human rights law. Yet political and normative trends around the world suggest that there is a gathering momentum in favor of gay rights, despite powerful constituencies such as wealthy fundamentalist conservative Christian groups affiliated with the Republican Party in the United States, who are opposed to the recognition of sexual orientation as a human right. In 1994 gay rights received a major boost when Amnesty International decided to adopt as prisoners of conscience those persons imprisoned solely for their homosexuality.³⁸ Gay rights gained a huge victory when the 1996 Constitution of South Africa explicitly protected the right to sexual orientation in its bill of rights.³⁹ In 2012, President Barack Obama of the United States declared his support

for gay rights, including marriage equality,⁴⁰ and the U.S. Supreme Court ruled in 2013 that the Defense of Marriage Act—which permitted states to prohibit gay marriage—was unconstitutional.⁴¹

The subject of sexual orientation, as understood in all its complexity, is extremely charged because of the deeply socially conservative political landscape around the globe and its domination by Christianity and Islam, the two prevalent messianic faiths. As I have argued elsewhere, “homophobia is not necessarily home-grown” even in Africa because “much of the revulsion of homosexuality can be traced to Christianity and Islam, the two religious traditions that express homophobia in their doctrinal teachings.”⁴² That is why it is paradoxical when African Christians and Muslims attack homosexuality as “alien” to Africa while embracing the two “foreign” faiths. No matter its origin, however, homophobia is deeply embedded in the social fabric of most societies around the world. The question is how to understand the resilience of homophobia, stoke public debate on the subject, and agitate for the recognition and protection of sexual orientation as a basic human right, a challenge that will require thoughtful analyses, courageous advocacy, and fundamental reforms. The normative obligation of civil society, and human rights groups in particular, is to lead such a struggle, but the starting point must be to acknowledge that homophobia is an irrational fear that is used to deny basic rights, a fear that society has an obligation to overcome.

At the core of the human rights project, in spite of the author’s critique of the cultural and normative biases in human rights,⁴³ is the humanist impulse to reaffirm faith in the common humanity of mankind both as individuals and also as members of the many groups to which individuals belong.⁴⁴ The process of de-marginalization of certain rights claims speaks to the growing acceptance of the complexity of the human condition. Even so, rights claims based on certain identities still meet with stubborn resistance; in some cases, they face outright rejection. In no other identity issue is this truer than in the issue of sexual orientation. In a sense, sexual orientation claims may be one of the last impenetrable frontiers.

Any discussion of sexual orientation, therefore, must acknowledge the resilience of homophobia and the taboos that surround the subject. But those taboos cannot be a reason for passivity or the acceptance of bigotry. If anything, they must be the impetus for action. While it is true that a conversation about sexual orientation is not an easy one in most social contexts, it must take place nevertheless. It is a discussion that every society must have because it touches on the most fundamental of all human values. How the issue is debated, and the manner in which the disputants treat each other, says a lot about what a society is and what it thinks it ought to become. Can the conversation, for example, be held in an atmosphere of civility, or do the contending sides exhibit only contempt, disdain, and

intolerance toward one another? In most places, the debate on gay rights has at times been acrimonious and rancorous, reflecting the fear by some of the unknown, but also reflecting naked bigotry.

Sexual orientation refers to the state and practice of emotional, sexual, and romantic attraction to men, women, both genders, or no gender. Sexual orientation is a human condition and is a matter of personal and social identity.⁴⁵ The three main categories of sexual orientation are heterosexual, homosexual, and bisexual—all of which exist in a continuum that ranges from exclusive heterosexual to exclusive homosexual with many variations of bisexuality in between. But this is a simplification of sexual identities because it leaves out those who are asexual, which is also a form of sexual orientation. It is important to note that none of these sexual orientations are normal or abnormal, because they are existential conditions.

There is no one “natural” sexual orientation because whatever orientation one has is natural to that person. Nor should there be a socially preferred sexual orientation because the preference is individualized to the person. It makes little sense to ask Catholic priests, for example, what their sexual orientation is; the question has virtually no practical relevance because their faith requires them to refrain from all sexual activity. Nor is the question relevant to those who are chaste, impotent, or unable to engage in sexual relations for other reasons. The point is that when one thinks of sexual orientation, one should not automatically imagine one form of sexual orientation, whether heterosexual, gay, or bisexual. The dominant social view privileges heterosexuality as the “natural” sexual orientation, yet we must imagine a plethora of possibilities without privileging any one orientation over the others.

The law has traditionally protected and privileged heterosexuality and heterosexism in its entrenchment of the traditional Western or European conception of the family. In many societies, this is the “idyllic” image of a nuclear family, an “ideal” that has been constitutionalized in many societies. The question is whether the law should protect other forms of sexual orientation apart from heterosexuality. The debate on sexual orientation is critical everywhere, including in new battlegrounds like Kenya and Uganda where in the former the new constitution was almost defeated because of fears that it could be used to protect the rights of gays and lesbians,⁴⁶ while in the latter the highly controversial Anti-homosexuality Bill was under consideration.⁴⁷ The Ugandan bill, also known as the Bahati Bill, for David Bahati, the Member of Parliament for Dorwa who presented it on October 14, 2009, raised an international firestorm.⁴⁸ The bill provided for the death penalty against gays,⁴⁹ causing U.S. President Barack Obama, among others, to condemn the bill as “odious” and ask that it be withdrawn.⁵⁰ The harsh bill was eventually passed in December 2013, but without the death

penalty provision.⁵¹ In August 2014, Uganda's Constitutional Court struck down the law on technical, not substantive, grounds.⁵² The punitive law had strained relations between the West and President Museveni, a staunch ally. It remains to be seen whether the law will be reintroduced in the legislature, and whether Museveni will support such a course of action.

Although internal reaction to the Anti-Homosexual Bill in Uganda was mixed, its condemnation at the international level was unmistakable, partly because international sensibilities are moving in the direction of more, not less, recognition of sexual orientation as a human right. International human rights bodies and treaties now tend to protect gay rights, and they certainly prohibit discrimination based on sexual orientation. For instance, the United Nations Human Rights Committee, the treaty body that interprets the International Covenant on Civil and Political Rights, a premier human rights instrument, ruled against an antigay law in the Australian state of Tasmania which criminalized homosexuality.⁵³ In several cases, including *Norris v. Ireland*, the European Court of Human Rights struck down Irish laws that criminalized homosexuality.⁵⁴

At the municipal level, states are increasingly moving to protect gay rights, with some extending the right to marry and found a family to gay people. On the African continent South Africa has again taken the lead. The 1996 post-apartheid South African Constitution includes the right to privacy and the right to dignity. It explicitly states that "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation."⁵⁵ This equal protection clause is one of the first in the world to guarantee gay rights. The Constitutional Court of South Africa subsequently declared the common law that mandates punishment for sodomy between males and similar statutory crimes to be unconstitutional.⁵⁶ This approach by South Africa has not been replicated elsewhere in Africa, although the gay rights movement is emerging there against great odds.⁵⁷ In May 2010, a Malawi court convicted two gay men for "unnatural acts and gross indecency" for holding an engagement ceremony.⁵⁸ But the universal denunciation of Uganda's Anti-Homosexuality Bill suggests that the most draconian antigay laws cannot expect smooth sailing in the future.⁵⁹

Important voices in the support of gay rights belong to the clergy. Reversing the Vatican's hostility to gay rights, Pope Francis has stunned the world with his open embrace of gay people.⁶⁰ In South Africa, progressive sections of the Anglican Church, of which Archbishop Desmond Tutu is the most prominent member, have come out strongly in favor of gay rights. Gay ministers and priests have been ordained in a number of countries around the globe. As of January 2015, thirty-six states and the District of Columbia in the United States, where more than 70 percent of the population lives,

had legalized gay marriage.⁶¹ The story of Pastor Martin Niemoeller, who supported Hitler, stood by as Nazis persecuted those who were unpopular, and then was disillusioned when Hitler went after the Church, should serve as warning to the silent majority who fail to speak up against the persecution of gays and lesbians.⁶²

To understand how to combat homophobia, we must understand its origins. Homophobia is best defined as a range of feelings and prejudices against homosexuality. These negative feelings could be apathy, contempt, prejudice, irrational fear, or aversion, and they may sometimes manifest themselves in discrimination, violence, or even murderous rage. The first and most enduring reason for the hatred of gays is based on religious interpretations of the Abrahamic faiths—Christianity, Islam, and Judaism. The interpretation of religious doctrine has been used to advance bigotry and prejudice based on the description of same-sex relationships as sinful. History provides numerous examples of religion being used as a basis for irrational hatred. The Dutch Reformed Church tried to justify apartheid by using the Bible to depict Ham as the forefather of blacks. The Old Testament, the Torah, and the Quran contain passages that advocate homophobia. The question is how to interpret these passages in view of history and how to separate religious doctrine from the cultures in which that doctrine was incubated. The other question is whether these texts should be interpreted literally with the advances in human knowledge and science today. Even if the texts are taken literally, should they be the basis for legislating against a significant minority? Why should secular states take their dictates from religious law? At the same time, it is important to realize that there is no unanimity among religions about homosexuality. Not all religions believe that God hates gays. Some Native American traditions venerated homosexuality.⁶³ In the United Kingdom, the Hindu Council has taken the view that it does not condemn homosexuality.⁶⁴ The point is that although religion is a major contributor to homophobia, not all religions and traditions adopt the view that homosexuality is a sin.

In several cases, opposition to homosexuality has been racialized. The statement that it is un-African to be gay is said effortlessly by many an African.⁶⁵ But empirical evidence suggests the exact opposite. This claim is not only historically false, it seems un-African itself to claim that there were no gays in Africa because gays have always been part of the social fabric.⁶⁶ Evidence suggests that in precolonial Africa, the matter of sexual orientation was not generally contentious. In fact, the hatred of gay people and homophobia that are exhibited today has virtually no basis in African culture. In Uganda, as in many other African states, homosexuality and related sexual practices were criminalized for the first time by the colonial state. There is no abundance of epithets in African languages for gays.

Where such epithets exist, as in Kiswahili, they are mostly likely derived from the Arabic. It seems that in precolonial, pre-Christian, pre-Islamic Africa something akin to a policy of “don’t ask don’t tell” may have prevailed. This author remembers wondering as a kid why two male neighbors who lived together near his home in Kenya did not have children. His mother told him that they “have no kids because they have no kids.”⁶⁷ Only later when he was grown up did he realize that was her way of telling him that the two men were gay.⁶⁸

Homophobes in Africa display a good deal of duplicity and inconsistency.⁶⁹ They paradoxically attack homosexuality as alien and embrace Christianity as authentic. When President Robert Mugabe of Zimbabwe attacked gays as sinners, he did not say gays had sinned against the “African God.” He meant that they had sinned against the “Christian God” who was imposed on Africa as part of the colonial project.⁷⁰ That particular God came to Africa to pave the way for colonialists and to pacify Africans for domination by European colonial powers. One must wonder how consistent Mugabe was when he used a foreign religion (Christianity) while speaking a foreign language (English) to claim that it was un-African to be gay.

Homophobes attack homosexuality by claiming that it is a threat to the institution of the family. There is neither empirical evidence nor sound reasoning for this hateful statement.⁵⁹ Even so, homophobes have blamed everything from natural catastrophes to man-made disasters on homosexuality. The reality is that the institution of the family is imperiled not by gays, but by government policies and corrupt practices that fail to invest in education, job creation, public works, and crime control.⁷¹ Families are imperiled by the institution of the patriarchy, or rule by men who are cruel and routinely engage in domestic violence against their spouses and children. Poverty is a key problem for families, not gay people. But scapegoating is easier than addressing deeply embedded social legacies and distortions that stand at the root of human powerlessness. Homophobes seek to restrict marriage to the union between a man and a woman. What they forget is that in many societies, including Africa, same-sex marriages took place in countries as diverse as Kenya, Tanzania, Nigeria, and Sudan.⁷² Historical evidence suggests that in Uganda, the site of one of the most intense antigay drives on the continent, some members of the Kabaka royalty, the rulers of Buganda, were gay.⁷³ In any case, since marriage can take many forms—monogamous, polygamous, polyandrous, and heterosexual—there seems to be no justification for excluding two homosexuals who wish to join together in a consensual relationship.

Any successful fight and struggle against the powerlessness that victimizes gays and other vulnerable groups must be carried out through the prism of three concepts—intersectionality, multidimensionality, and anti-

subordination. Intersectionality means that discrimination is both vertical and horizontal and takes place at multiple levels among various identities. Thus, racists are likely to be homophobes and sexists. Multidimensionality suggests that oppression takes place in multiple dimensions. One can be oppressed as a woman but also as a woman who is gay. Antisubordination is the notion that it is futile and hypocritical to fight one form of oppression or discrimination while supporting another form of oppression. Thus, it is hypocritical to fight sexism while supporting homophobia. Genuine liberation requires that all oppressions be fought on all fronts at the same time, a normative obligation that those who believe in human rights and human dignity must accept. Finally, societies are judged by how they treat their most vulnerable populations and their minorities, not how they treat the strong, the wealthy, and the powerful. It is intellectually dishonest to exclude gay rights from legal protection or to propose the barbaric idea of putting gay people to death. The death penalty has no place in any civilized society.

At the municipal and international levels, a growing body of evidence suggests that sexual orientation—in particular homosexuality—should be treated as a human right.⁷⁴ Major INGOs and domestic NGOs have moved in recent years to protect homosexuals from discrimination and abuse. More and more countries are recognizing gay rights, including the right to marry. International treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, have interpreted human rights law as protecting homosexuality. General Comment Number 20 of the CESCR explicitly states that “other status” in article 2(2) of the Covenant includes sexual orientation. It protects gender identity, including the rights of LGBTI (lesbian, gay, bisexual, transgender, and intersex) people. The pertinent language states that “gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”⁷⁵ General Recommendation 28 of the CEDAW Committee prohibits discrimination based on sexual orientation.⁷⁶ The European Union displays signs of growing protection of gays. The Treaty of Lisbon, which entered into force in 2009 and is dubbed EU’s “new constitution,” prohibits discrimination on the grounds of sexual orientation.⁷⁷ The Charter of the Fundamental Rights of the European Union, which entered into force in 2009, forbids discrimination on the basis of sexual orientation.⁷⁸

General Comment 20 of the CESCR cited the Yogyakarta Principles on the Application of Human Rights Law to Sexual Orientation and Gender Identity,⁷⁹ the closest thing to universal standards on sexual orientation. They were intended to be a comprehensive and coherent identification of the obligation of states to recognize and protect the rights of all persons

regardless of their gender and sexual orientation. The authors noted that at least seven countries had the death penalty for consensual same-sex practices and that more than eighty states criminalized homosexuality. The good news is that the Yogyakarta Principles are being increasingly recognized by states, by IGOs like the UN, and by civil society. The significance of the reference to the Yogyakarta Principles in the CESC—creating the jurisprudence of the ICESC—cannot be underestimated. The question is whether civil society and other stakeholders will advocate for a universal text—such as a binding treaty or declaration—to establish sexual orientation as a human right.

Some sections of the gay rights movement had not traditionally framed their struggle for equality and nondiscrimination in human rights terms. Many advocates of gay rights initially used the domestic American discourse of civil rights—not human rights—because they believed that struggles for racial and gender equality have been recognized without appealing to the language of human rights, which may be “foreign” to the American ear.⁸⁰ But this is changing. Today, the largest gay rights organization in the United States is called the Human Rights Campaign Fund, a name that suggests the centrality of human rights discourse in its work.⁸¹ But the trend elsewhere is to appeal to the language of human rights, and to use United Nations bodies, to advance gay rights. The adoption of the resolution on Human Rights, Sexual Orientation, and Gender Identity by the UN Human Rights Council in June 2011 prohibiting discrimination and violence on the basis of sexual orientation may be a harbinger for universal—perhaps binding—human rights standards on sexual orientation.⁸²

POSSIBILITIES FOR MORE STANDARDS

New norms and standards are certain to be set in the future, but it is difficult to predict with precision what new human rights standards will be needed. What is beyond question, however, is that the quest for new standards or for the expansion, redefinition, and elucidation of existing standards will not end. Nor will fresh campaigns to improve existing standards through monitoring, implementation, and enforcement mechanisms and processes. The impetus will come from many quarters, including regional and universal institutions.⁸³ The only questions that remain open are the areas in which those standards will be set and the nature of the normative framework they will adopt. Still, any new standards will raise the same set of political, normative, and cultural questions: Who is seeking them, and why? How will they be negotiated, and who will own them? How will the new standards make the human rights movement more inclusive and legitimate in cultures

across the globe? Will the pathologies of the past that have distorted norm setting still haunt the future?

One area in which existing standards and enforcement mechanisms require additional attention relates to women's rights. Although much has been done on women's rights, more remains to be done. Many gaps remain in terms of both norms and oversight institutions. Only in the last two decades has the human rights movement lifted the veil over women's rights, and only in the last decade have many societies started to recognize and address the stubborn and deeply embedded laws, practices, beliefs, customs, and structures that are the instruments for the victimization of women. The doctrines and practices of all religions—both major and small—largely buttress negative views and practices against women, and it is here that the human rights movement, including the women's rights movement, falters and struggles mightily to find effective and acceptable approaches for change. CEDAW, the key women's instrument, its committee, the UN Special Rapporteur on Violence Against Women, and the 1995 Beijing Platform for Action are significant normative and institutional achievements in the struggle for women's dignity and development—but they are just a beginning. The human rights of women remain of serious concern in virtually all spheres of life in many countries.⁸⁴

A number of universal and regional measures have been undertaken to advance women's rights. In addition to the Optional Protocol to CEDAW, which allows individual petitions by victims,⁸⁵ the UN has created several mandates on women: the Special Rapporteur on Violence Against Women, its Causes and Consequences,⁸⁶ the Special Rapporteur on Trafficking in Persons, Especially Women and Children,⁸⁷ and the Working Group on the Issue of Discrimination Against Women in Law and in Practice.⁸⁸ At the regional level, the African human rights system, anchored in the African Charter on Human and People's Rights,⁸⁹ adopted a protocol on the rights of women: the African Commission on Human and People's Rights on the Rights of Women in Africa was adopted by the African Union in 2003 and entered into force in 2005.⁹⁰ Earlier, in May 1999, the African Commission, which is the implementing body of the African Charter, mandated a Special Rapporteur on the Rights of Women in Africa,⁹¹ appointing the first rapporteur that year, effective retroactively to 1998.⁹² In Europe, in May 2011, the Council of Europe adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence,⁹³ which protects women against all forms of violence, including violence based on sexual orientation.⁹⁴ A much earlier regional example came in 1928, when the Organization of American States established the Inter-American Commission on Women. In 1994 the Inter-American Commission on Human

Rights created an Office of the Rapporteur on the Rights of Women.⁹⁵ While these measures buttress standards on women, the plight of women and girls continues to be grave.

Existing standards on women's rights—and the corresponding duties on states—have to be clarified further and more guided performance targets established in order for them to be realized. More resources and energy must be applied to the translation of these standards at the regional level within nations. Universal monitoring and enforcement bodies, such as the CEDAW Committee, may have to be reformed to make them more effective.⁹⁶ At the normative level, the vexed relationship between religious doctrine and practice and women's rights must be sorted out and resolved. The Abrahamic faiths, especially Islam and Christianity, must be held accountable for their doctrinally based discrimination against women. Religious doctrines stoke violence and discrimination against women in popular culture. Religions either teach or imply that women are not equal to men, and that the former should be subservient to the latter. Universal human rights institutions and stakeholders must take the battle to established religions and demand an end to doctrines, teachings, and practices that are misogynistic, hateful, and discriminatory against women, including the prohibition of women from serving as priests, popes, or imams. States, in particular, should deny legal status and tax breaks to religious institutions that discriminate on the basis of gender identity and sexual orientation. The work of Abdullahi An-Na'im, the scholar of Islam and human rights, in which he pursues the normative reinterpretation of holy text and Sharia to promote and protect the rights of women, will be indispensable in setting new or reforming existing human rights standards.⁹⁷ This and similar scholarship should be the basis for more informed NGO normative activism within IGOs and states. Translating the normative and institutional gains of the last several decades, including the Beijing Platform for Action, will require the refinement of standards or the creation of new ones to get at entrenched problems and more effective receptivity and enforcement by individual states.

Terrorism is another old, but recently renewed, international problem that has exerted pressure on human rights. The space and standing of the human rights standard-setting universe appears to have contracted somewhat after the September 11, 2001, suicide attacks and the American response to them. In the aftermath of the attacks, and particularly because of the violent American response to them under George W. Bush, there were suggestions that the human rights era may be over.⁹⁸ Popular and scholarly commentary suggested that concerns about security and terrorism had pushed human rights farther down the ladder of international concerns.⁹⁹ Aggressive actions by a number of governments suggested they were using terror and

security as a pretext to violate human rights or sharply qualify their official support for them.¹⁰⁰ States have an obligation to protect those within their borders from violent attacks, and the so-called war against terror must not be used as a pretext to trample on human rights. But that is precisely what several states seemed to do, especially illiberal or repressive regimes such as Egypt or Zimbabwe, or occupying states such as Israel. They and others took advantage of America's militaristic response to terror—at home and abroad—to crush opponents in the name of security.

The abduction and torture of terror suspects under Bush was a most blatant violation of human rights standards. His administration condoned and sanctioned “extraordinary rendition,” also known as “irregular rendition,” in which terror suspects were extrajudicially transferred to countries known to practice torture.¹⁰¹ The “rendered” suspects would be “tortured by proxy” for the United States to extract confessions.¹⁰² More than three thousand people were transferred in the rendition program run by the American CIA with the cooperation of EU member states where suspects were abducted, held in secret detention facilities, known as “black sites,” and transferred to states that practice torture. A Council of Europe Parliament investigation reported that the CIA had flown more than 1,245 flights for renditions.¹⁰³ In 2009, the new American president, Barack Obama, issued Executive Orders 13491-93 to ensure lawful interrogation of detainees, review detention policy options, and review cases of individual detainees at Guantanamo and its possible closure.¹⁰⁴ The orders revoked Bush's Executive Order 13,440, limiting Article 3 of the Geneva Convention. Yet Obama's Executive Orders did not prohibit extraordinary renditions.¹⁰⁵ The United States routinely tortured suspects, including “waterboarding” them, in various places, most prominently at Guantanamo, Iraq, and Afghanistan.¹⁰⁶

Concerns about terror and violence cannot be the reason to suspend or abrogate constitutional guarantees, due process protections, and established human rights standards. Nor can they be the excuse to resort to the same tactics used by nonstate actors who would inflict terror on society. The proper balance between human rights and security concerns must be found, and a collective group—of states, IGOs, human rights NGOs, and think tanks—must lead the efforts to establish a normative and policy relationship between human rights and the duty of states to protect civilians from violent attacks without compromising human rights.¹⁰⁷ Existing UN instruments on terror and related questions were designed to prevent and punish terror, and their provision cannot address the relationship between terror and human rights.¹⁰⁸ NGOs and IGOs should take a fresh look at this complex dilemma and suggest a normative framework to address it. The mandate of the UN Special Rapporteur on the Promotion and Protection of Human

Rights While Countering Terrorism should be invigorated and enabled.¹⁰⁹ It seems clear that new standards will have to be set to unravel the conflict between these two critical but apparently conflicting questions.¹¹⁰

IS THERE A NEED FOR NEW STRATEGIES?

The drafters of the UDHR could not have imagined the enormous success of the human rights movement. Even so, more work is ahead: actors in the world of standard setting need to pursue more collaborative, consultative, and participatory approaches to standard setting. These approaches must include states, INGOs, local NGOs, the South, the North, and other actors from across social divides. The suspicions and exclusions of the past should be discarded so that all the key actors work in unison. NGOs will have a central role to play in this process because they have the energy, interest, expertise, and credibility to push for new standards. The same approaches will be relevant whether one seeks to protect existing standards, revise them, or even push for entirely new ones. But standard setters need to think outside the box, that is, beyond the treaty as the only preferable method for norm setting. The Guiding Principles on IDPs demonstrated the need for such flexibility. But extending the reach and depth of the human rights corpus—and its attendant institutions and processes—is not simply a matter of embellishing the status quo. Human rights norms that advance hegemonies must be upset and replaced. The entire edifice of human rights needs to be reviewed and reconstructed. The discourse of human rights itself must change to become multicultural, inclusive, and multidimensional.

The human rights project should no longer be insular, especially as a labor of the mind. It should open up to new scholarly trends from the South, such as *Third World Approaches to International Law*. TWAIL, as I have discussed elsewhere, seeks to understand and reconstruct the world in a nonhegemonic way.¹¹¹ As an idea, the roots of TWAIL stretch back to the movement for decolonization—in Africa, Asia, and Latin America—after World War II. The method confronts the imperial hegemony of the West, and perhaps now of the East, with China and India increasingly expressing imperial aspirations. It is a response to the conditions and vagaries of domination and exploitation by ravenous political and economic systems, and it uses international law—in all its iterations—to respond to the unjust global order. As I outline elsewhere:

TWAIL is driven by three basic, interrelated, and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms

and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.¹¹²

The project of TWAIL is necessary for the redemption of the human rights project. In this exercise, investment in standard setting remains a critical question. Since there are many emergent needs, it seems that clear substantial investments are still required, including more work in the areas of disabilities, sexual orientation, globalization, indebtedness, economic and social rights, and women's rights. The need for more resources for implementation does not preclude the abandonment of standard setting; if that were the case, the International Criminal Court would never have come into being. But even the ICC itself must not turn justice into a tool of the West against the South, and especially Africa. The human rights movement's failures have been in creating counterhegemonic norms, implementation, and just enforcement. The good news is that the human rights movement is now an integral part of the human conscience. The bad news is that both new standards and the clarification of existing ones tend to be areas of great controversy and complexity.¹¹³ Standards in the area of civil and political rights are highly developed and sophisticated yet progress in other fields—for example, economic rights—has been slow, if not static at times.

All group or collective rights face particularly acute challenges. Standards on terrorism and human rights, sexual orientation, wartime and rape victims, the rural poor, peasant farmers, urban migrants, dispossessed workers, farmworkers, and women's rights provide different challenges. NGOs, the engines that drive the standard-setting processes within IGOs, must learn the lessons of past campaigns, both failures and successes, to craft effective approaches for each of these target areas. The most stubborn of these areas is economic and social rights, and by extension, the right to development. Reluctance characterizes the response of many states, IGOs, and NGOs, particularly INGOs, to standard setting in these rights. Courage, innovative approaches, and new sponsors are needed to overcome fatigue and disinterest.

Although existing gaps in some standards may need to be addressed with new strategies, the lessons of history suggest that large coalitions of INGOs and NGOs should form the nucleus of future campaigns. Additionally, sympathetic states and UN specialized agencies can become important allies and catalysts—and sometimes leaders—of campaigns. Mexico and disability rights, Costa Rica on the Optional Protocol to the Torture Convention, and Norway with the Declaration on Human Rights Defenders are

classic examples of states that sought leadership in the setting of particular standards. More states from the South should lead campaigns, as South Africa has done with sexual orientation and gender rights. The Landmines Convention and the Convention on the Rights of the Child are models of such cooperation. Advocates for human rights should cultivate this formula and these levels of commitment in order to address the normative lacunae in the human rights corpus. Otherwise, those lacunae will undermine the success and authority of the human rights movement and threaten its gains. The movement must conquer new frontiers to remain relevant and to protect its achievements. But in doing so, it must deepen its commitment to a reorientation of the human rights movement—its corpus and discourse—which has been captive to ideas of the market, to liberal theory and philosophy, and to Eurocentrism.

SEVEN

A NORMATIVE CRITIQUE OF HUMAN RIGHTS

To the transformational human rights thinker and advocate, the official human rights project—anchored in the United Nations—can be a paradox. The official, traditional human rights thinking, which is steeped in liberalism, appears designed to protect the status quo and, as such, hardly acts as a medium of liberation. In its global order states sit at the center of global governance, and the elites who control them ultimately decide what standards are set and how they will be enforced. At the pinnacle of this order are intergovernmental organizations (IGOs) controlled by the most powerful states and hewing to international liberalism. Leading the charge are the United States and its strongest allies in the West—the United Kingdom, France, and Germany. Russia, a counterweight to the West, has since its annexation of Crimea and invasion of Ukraine dashed any hopes for political liberalization and become a menace to global order.¹ China, the largest emergent power, faces an uncertain future as its population modernizes. Whether China can resist a popular political revolution by its growing middle and wealthy classes or whether it breaks apart, or becomes a liberal state, is an open question. The leading IGOs are the UN, the Bretton Woods institutions, and the World Trade Organization. These IGOs are committed to preserving—in one way or another—the underlying political and economic tenets of the post–World War II order. Human rights doctrine was the moral anchor of that postwar order, which pivoted on philosophies of free markets and political pluralism under the tutelage of the West. All other counterhegemonic blocs and philosophies have either imploded or been delegitimized. The looming question is whether the transformational human rights thinker and advocate must accept human rights as the only

possible medium for change. If so, how do transformative human rights thinkers reconstruct the human rights movement so that it is not simply a guarantor of free markets and global liberal political hegemonies?

In the past, counterhegemonic political activists and thinkers gravitated toward different iterations of Marxism, only to be deeply disappointed by the obsolescence of the states that embraced it. Third world thinkers tried other philosophies—which borrowed heavily from Marxism—such as dependency theory.² While insightful, and reconstructive in their outlook, such philosophies have not given the third world a clear path and blueprint for casting off poverty and the hegemony of the West. In the more recent past, more progressive thinkers have retreated to human rights as a medium for advancing the liberation project. They have done so because of the power of the idea of human rights and the potential for its reconstruction using emancipatory third world and other progressive discourses in the West. The works of Boaventura Santos, the Portuguese transformational thinker, attempt this synthesis.³ Many of these scholars realize that perhaps no other moral idea has exerted more influence over the internal character of the state than human rights in the last sixty years. Are they succeeding in reworking the human rights discourse? Louis Henkin seems to concur: “Ours is the age of rights,”⁴ he writes, and to emphasize the point, he states without qualification that “human rights is the idea of our time, the only political-moral idea that has received universal acceptance.”⁵ Such categorical statements from one of the most respected voices in the academy must be taken seriously. The idea of human rights has proven seductive to many societies and traditions in the last half century, although Henkin’s unequivocal statements appear to be aimed at critics of universalism. But whether cultures across the globe have given the idea “universal acceptance,”⁶ as Henkin calls it, is a different matter. Distinction must be made between the ratification of human rights treaties by states and the internalization of the norms of the human rights corpus by the cultures on which those states stand. Even if one were to concede the point, the tension does not resolve the question about the politics of human rights. Nor does it do away with the vexed process of standard setting and the fight over the ideological content of its normative canon.

It is the contention of this chapter that the birth of the modern human rights movement during the Cold War irrevocably distorted the identity of the human rights corpus. Certainly, mainstream human rights scholars and activists, especially those from the West and their close allies in the South, have been reluctant to ask uncomfortable questions about the philosophy and political purposes of the human rights movement. Such questions are taken as a mark of disloyalty to the movement or an attempt to provide cover and comfort to those states that would violate its norms.

Unfortunately, only a handful of critical thinkers have seriously engaged this debate. The result is a paucity of good critiques about one of the most powerful ideologies of modern times. At the very least, it is irresponsible for thinkers to avoid such conversations precisely because human rights norms have become a blunt instrument in the hands of imperial states.⁷ Of all the branches of international law, human rights scholarship appears to have suffered the most from zealous advocacy as opposed to critical analysis. In their role as thinkers, which ought to be protected from proselytism, scholars have become unabashed advocates who blur the line between thought and action. Leading human rights thinkers such as Philip Alston and the late Louis Henkin defended human rights as academics and advocates of the project without distinguishing between the two.

This chapter argues that the failure of critical analysis is not accidental. It is a deeply held belief in what many thinkers and human rights activists see as the redeeming power of the human rights corpus. While not conspiratorial, such a posture is historical, strategic, and the unavoidable result of the internal logic of the human rights corpus. The founders of the human rights movement—most principally the drafters of the Universal Declaration of Human Rights⁸—succeeded only by presenting the human rights idea as universal, nonpartisan, acultural, ahistorical, and nonideological.⁹ Mary Ann Glendon shows that the founders struggled with the idea of universality, but in the end concluded that “the principles underlying the draft Declaration [UDHR] were present in many cultural and religious traditions, though not always expressed in terms of rights.”¹⁰ This is universal legitimation through the back door, especially because many of the cultures on whose behalf the “founders” of human rights spoke were excluded from the drafting. Nevertheless, the fact that they decided to cast the text in the Western idiom of the rights language—the one that best speaks to a political democracy—is telling. Surprisingly, they did not discuss the political nature of the society that the UDHR would produce, and no controversy arose from this omission; perhaps it was the incontrovertible evidence of their bias. Nor do extended philosophical postulates or ideological justifications exist in the UDHR, or in any of the two principal human rights covenants, about the character of the society they would produce,¹¹ an especially confusing absence, given the ideological chasm posed by the West-East, capitalist-socialist dichotomy at the time. These are glaring omissions, especially for the launch of a universal creed. Whether it was simply Western triumphalism over the new global order is a question for historians.

Although the reasons for the failure to explicitly identify the human rights corpus with a particular political ideology, typology of government, or economic philosophy are complicated, the silence does not mean that such identification is absent. A critical study of the corpus places it squarely in

the liberal tradition and firmly in the state genre of a political democracy. But within this iteration, where a bare political democracy is the minimum, a maximalist political society is a mature welfare state. In other words, a political democracy passes the human rights test for meeting the basic normative and institutional requirements for that typology of government. At their most rudimentary, these can be characterized by bare republicanism, as would be the case, for example, in some of the new democracies of Eastern Europe and Africa and, more recently, in emerging orders in North Africa and the Arab world following the 2011 Arab Spring. At its most sophisticated, political democracy is complimented by social democracy, or a *thick welfare state*,¹² as has been the case in most Scandinavian countries. In contrast, a political democracy could also be a *thin welfare state*,¹³ such as the United States, in which marginalization is largely seen as an individual moral failing. In any case, both the thin and thick welfare states exceed the minimum normative standard set by the human rights corpus.

Wittingly or not, the framers of human rights doctrine sought to vindicate values and norms that incubate political democracy, a not very surprising fact, given the identities of the conceptual framers of the UDHR. Virtually all were either drawn from, or steeped in, the liberal tradition.¹⁴ Even though Glendon has pointed to a significant contribution by Latin America to the UDHR, she is not referring to the input of native Latin American or non-European actors.¹⁵ In the late 1940s, when the UDHR was being formulated, the Latin American officials at the table were decidedly Eurocentric. But even Antonio Cassese, one of the most influential Western scholars and practitioners of human rights, flatly admitted that the West was able to “impose” its philosophy of human rights on the rest of the world because it formulated the post-1945 international order and dominated the United Nations.¹⁶ Later human rights texts, particularly after decolonization in the 1960s, were more participatory because of the entry into the United Nations of states from the global South. It would be a mistake, however, to conflate inclusivity with a radical normative shift in the basic character of the human rights corpus because subsequent texts built on the normative script of the founders.

Oddly enough, the founding documents of the human rights movement studiously avoided—did not mention even once—the most politically important words and terms of the past several hundred years. They still do not. Is it not curious that neither the UDHR, the ICCPR, nor the ICESCR use the terms *capital*, *market*, *colonize*, *imperial*, *political democracy*, *liberalism*, or any of their derivatives? The exception is the oblique and dubious reference to “democracy” in the UDHR.¹⁷ The UDHR appears to sanction political democracy as the presumptive choice of the human rights corpus, although it does not explicitly say so or explain why. A similarly intriguing

reference to “democracy” is made by the ICCPR.¹⁸ A possible explanation for these omissions and obfuscations is the reluctance to identify the human rights movement with a particular normative tradition, philosophy, or ideology, but the lack of extended theories and philosophical justifications for the human rights corpus has left the doctrine vulnerable to attack. Importantly, it has mystified and obfuscated the normative and cultural gaps in the corpus.

This chapter contends that the human rights corpus is a moral project of political democracy, and that the failure of the framers to openly base the doctrine on this irrefutable premise has done more damage than good. First, it falsely portrays human rights discourse as a project with no basis in historical, cultural, and ideological choices. This abstraction is either debilitating, if you are a critic, or empowering, if you are a true believer. As a critic, one starts from the disadvantage of disproving a negative. But as a believer, all one has to do is affirm the negative. Second, the distortion of the true identity of the corpus masks its deficits and makes it difficult to debate them in the open. It is an exercise akin to shadow boxing. The target is elusive, and the energy expended is not productively applied. Third, because of the absence of linkage between political democracy and human rights, a critique of the former is not necessarily the unveiling of the latter. Soon, however, the problem becomes obvious: the human rights corpus has a mercury-like quality, elusive and slippery. The argument here is that identifying—*equating*—political democracy with human rights would provide thinkers with a solid foundation for debating, articulating, and formulating an ideology that can better respond to powerlessness, human indignity, and the challenges of markets and globalization.

POLITICAL DEMOCRACY AND HUMAN RIGHTS

Political democracy—no matter its iteration—is the most critical realization of the liberal tradition, and perhaps the most foundational articulation of liberalism and politics lies in John Locke’s seminal works.¹⁹ Formal autonomy and abstract equality, its twin pillars, underlie the notion of the bare republican state, popular sovereignty, and ultimately a limited constitutional government.²⁰ Even though Locke thinks of the individual as living in society, he nevertheless is the center of the moral universe.²¹ This emphasis on the individual as an atomized artifact framed the development of political society in the West and forged a normative project that produced the human rights corpus. As argued elsewhere, in the “historical continuum, therefore, liberalism gave birth to democracy, which, in turn, now seeks to present itself internationally as the ideology of human rights.”²² The theory and practice of political democracy are not static, nor can they be. Even so, both rise on two fundamental principles and assumptions. First,

the individual, for whom the system ostensibly exists, is endowed with certain abstract, inviolable—sometimes called unalienable—rights, which are historically constructed from culture, religion, tradition, citizenship, and economic modes of production. There is nothing natural about such rights, but they are normatively presented as the quintessence of human dignity, another elusive term loaded with cultural and political bias. Second, political society must be constructed in a way that protects and nurtures this vision of the ideal individual.

How, or why, is political democracy the moral expression of human rights? Political democracy, as understood today, describes a normative typology of government that is characterized by certain procedural attributes. Even though it is a regime of institutions, political democracy is not consequentialist, or result-based, in substantive terms. Rather, some of its well-known theorists and proponents have defined it in purely procedural language.²³ Democracy is at some level a *method* that yields a *particular system*. As Samuel Huntington describes it, the democratic method has two key dimensions: contestation and participation, through which the “most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote.”²⁴ This definition does not problematize democracy and its proclivity for machine politics and the vested class interests that encumber the state through the media and other institutions of social control. But that is largely the point—democracy is mostly about process that on its face looks fair and ostensibly permits popular participation. What happens underneath the process, or its outcome, is not the major concern of democracy.

What is important is that contestation and participation—as critical pillars of the system—imply the existence of a number of vitally significant rights. These democratic rights are necessary for free and fair elections. Among others, they include the rights to speak, assemble, organize, and publish.²⁵ But they make a polity a democracy only if universal suffrage is granted, real political opposition is permitted, and the elections are free and fair.²⁶ According to Huntington, therefore, “Elections, open, free, and fair, are the essence of democracy, the inescapable *sine qua non*.”²⁷ This view assumes that the elected leaders will be responsible for addressing—or not—the most pressing issues once they assume office. But what if the elected leaders—or the political class—are not concerned about certain forms of powerlessness or assaults on human dignity? Is the populace then doomed? This minimalist definition of democracy hearkens to liberalism’s cardinal commitments—formal autonomy and juridical equality. Steiner has captured this commitment well:

Under the traditional understandings of liberal democratic theory, the correlative duties of government do not obligate it to create the institutional frameworks for political debate and action, or to assure all groups of equal ability to propagate their views. Rather, those traditional understandings require governments to protect citizens in their political organization and activities: forming political parties, mobilizing interest groups, soliciting campaign funds, petitioning and demonstrating, campaigning for votes, establishing associations to monitor local government, lobbying.²⁸

Thus, traditional understandings of liberalism or political democracy are not concerned about the asymmetries of power between citizens or the ability of entrenched interests to maintain social control over politics. This marketplace approach to political democracy retains impediments to actual equality and constrains the autonomous individual. Again, Steiner has identified this question:

Government makes many paths possible, but it is for citizens to open and pursue them. Choices about types and degrees of participation may depend on citizens' economic resources and social status. But it is not the government's responsibility to alleviate that dependence, to open paths to political participation which lack of funds or education or status would otherwise block.²⁹

Steiner suggests that both the UDHR and ICCPR provide for a regime of political participation that is virtually identical to political democracy.³⁰ The drafting of both documents drew from at least a century of Western liberal pluralist doctrine and practice, and the two documents provide for other civil and political rights—such as due process protections, independence of the judiciary, and equality and nondiscrimination norms that are essential for a political democracy. Today, the spread of the liberal constitution—and constitutionalism—are deeply rooted in the human rights corpus and its discourse, and, in fact, constitutionalism is the model of government envisioned by the human rights corpus. Its pillars are popular sovereignty, an idea based on the will of the people as the basis of government; genuine periodic elections in a multiparty system; checks and balances with an independent judiciary; and the guarantee of individual rights.³¹ The bill of rights in many post-1945 constitutions is central to the spread of this model. William P. Alford has correctly written that after the end of the Cold War, the United States embarked on a campaign to export political democracy, even if it was done on a selective basis.³² European political democracies

followed suit. In this civilizing orgy, human rights were often employed interchangeably with political democracy.

HUMAN RIGHTS, IDEOLOGY, AND POLITICS

Human rights scholars and advocates, such as Luis Henkin and Jack Donnelly,³³ often present the movement as above politics. Even though its basic texts assume a genre of political and social organization, the literature and discourse of human rights, they say, are divorced from self-interest, ideology, materialism, and partisanship. Instead, movement scholars and activists paint it as a universal creed driven by nobility and higher human intelligence. Their writing is tinged with metaphors and language that suggest eternity or a pinnacle in human history, and they present the basic human rights documents not as instrumentalist, utilitarian, experimental, or convenient, but as though they hold the final truth. Their language is eternal, almost heavenly, and forbidding in its messianic vision; it is elusive, yet lofty, idealism that implies that questioning its doctrine is perverse and unwelcome. The reality, however, is that human rights norms and standards address mundane and everyday human problems and are routine politics. This veneration of human rights and accompanying attempts to clean the movement of partisanship require close and critical scrutiny. Why not admit, at the beginning, that human rights is a patently political project?

To understand why its proponents are hesitant to assert the ideological and historical origins of the human rights corpus, one need not look further than their cradle in Europe. Admittedly, many of the ideas in human rights find analogies in other cultures and traditions, but this particular human rights corpus has a specific identity that yields certain societal typologies. As David Kennedy has aptly noted, the “human rights movement is the product of a particular moment and place.”³⁴ Kennedy describes the origins of the human rights movement as “post-enlightenment, rationalist, secular, Western, modern, capitalist.”³⁵ He suggests that these origins could be problematic for the movement—in obtaining legitimacy in other cultures, in the type of society that is created by the movement, and in the social and other costs associated with this vision.³⁶ Unlike most Western legal academics writing on human rights, Kennedy has no problem in identifying this movement with the politics of the modern, liberal, capitalist West, or with political democracy. The reason for Kennedy’s ambivalence or even opposition to the movement’s ideology, as he himself alludes, is that he is not fully committed to the human rights project. He sees a movement in crisis:

The generation that built the human rights movement focused its attention on the ways in which evil people in evil societies

could be identified and restrained. More acute now is how good people, well-intentioned people in good societies, can go wrong, can entrench, and support, the very things they have learned to denounce.³⁷

Yet, even so, Kennedy falls prey to the dichotomous view of the human rights movement in which the “good” secular West civilizes the “evil” or “other,” savage South.³⁸ For what does he mean by “well-intentioned people in good societies?” Is that not the kind of language that excuses, legitimizes, and apoliticizes the human rights movement without picking apart its political agenda? Perhaps Kennedy uses that language tongue-in-cheek. Ironically or not, this is the kind of language that implies that the human rights movement *does* have a political agenda. After all, the “good society” is itself a normative project, and “well-intentioned people” are driven by the norms of the “good society.” What those norms are is what constitutes the political project of the human rights movement. Even so, Kennedy would probably object to the comments that Kenneth Roth, the executive director of Human Rights Watch, made in 1998 at a conference organized by the Carr Center for Human Rights Policy at the John F. Kennedy School at Harvard University.³⁹ In response to a critique of human rights as a Eurocentric project, Roth likened human rights norms to antibiotics that must be administered to the sick, in this case the global South, even if they are unwilling to cooperate. Roth’s arrogance was a throwback to earlier expressions of Eurocentrism, which saw people in the South largely as “subjects” and “objects” of the West.⁴⁰

Not all human rights activists refuse to own up to the political program of the movement. Ian Martin, a former head of Amnesty International, the one organization whose name is synonymous with human rights, called for the grounding of the movement in the “Universal Declaration of Human Rights and the two principal covenants on civil-political rights and social-economic-cultural rights.”⁴¹ Here, he was emphasizing the universality and equal importance of both sets of rights and arguing against a bias for the former over the latter. But he also warned that human rights should not identify with the new Western rhetoric of “democracy, human rights, and the free market economy.”⁴² Martin’s admonition appeared to be tactical—if not strategic—although it was not based on principle or a sophisticated analysis of the relationship between human rights norms, democracy, and free markets. He suggested that the movement should not be associated with the rhetoric of Western states, not that the rhetoric has no justification, philosophical foundation, or that it is wrong-headed. Rather, he opposed an *open* alliance between the human rights movement and the foreign policy objectives of the West. Nevertheless, he directly associated human rights norms with democracy:

Of course the human rights movement works to guarantee democracy. Universal human rights principles subsume democracy. They provide, however, a more precise definition of rights than can be derived from the hazier notion of promoting democracy, which itself can lead to too great a tolerance of human rights violations of governments which have been popularly elected—whatever the conditions and larger context for the elections.⁴³

Martin's assertions were unusual for a Western human rights crusader and deserve further review. For example, how might Martin extrapolate on what constitutes political democracy, and where does he see a divergence, if any, between democracy and human rights? To the extent that democracy is a *subset* of human rights, could he envisage other political systems, apart from political democracy, that are acceptable to human rights norms? Interestingly, as secretary general of Amnesty International, he did not do much to change its mandate and philosophy or to embrace economic and social rights. In an apparent contradiction, Louis Henkin—who seemed to suggest a link between democracy and human rights—wrote that human rights norms point to a particular political society although not its form.

The idea of rights reflected in the instruments, the particular rights recognized, and the consequent responsibilities for political societies imply particular political ideas and moral principles. International human rights does not hint at any theory of social contract, but it is committed to popular sovereignty. “The will of the people shall be the basis of the authority of government” and is to “be expressed in periodic elections which shall be by universal and equal suffrage.” [Art. 21 of the Universal Declaration of Human Rights]. It is not required that government based on the will of the people take any particular form.⁴⁴

It is not clear what Henkin means by “form” here. Perhaps he is referring to *different forms* of political democracy such as presidential or parliamentary systems, or to different electoral systems such as proportional representation as against first-past-the-post system. As Henry J. Steiner points out, and it seems Henkin would have agreed, open political dictatorships, sham democracies, inherited leaderships, monarchies, and one-party states would violate the associational rights central to human rights and political democracy.⁴⁵ A more direct and honest conversation about the political purposes of human rights can be had once these admissions are openly made. Then it will be easier to debate the values of the human rights movement, its deficits, and ultimately the reformist project that must be undertaken to fully legitimize

it. Whether that reformist project is really possible—as a pragmatic matter—is a different question.

What is important at this point in the history of the human rights movement is not whether its norms call for the installation of a political democracy. Movement scholars and activists should outwardly acknowledge this inherent conceptual and philosophical link so that attention can be focused on the meaning of that linkage. Are there, for example, some normative problems that are caused by this linkage? Do those problems deny the human rights movement—or political democracy—an opportunity to redeem their shortcomings? What are those shortcomings, and can they be corrected, or is there a necessity for a radical transformation of the human rights regime? It will be difficult, if not impossible, to get at some of these pressing questions if full disclosures are not made by the guardians of the human rights movement.

PATHOLOGIES OF CHOICE AND SUBSTANCE

The human rights corpus exhibits a variety of pathologies—both of choice and substance, that is, those which are based on biases, and those that are intrinsic to the corpus—that are limited and limiting. Many of these pathologies arise not only from the internal logic of the corpus but also from the tactical and strategic choices that its proponents have made over the past sixty years. One of these is the relationship between the containment of state despotism and the attainment of human dignity. Without going into a discussion about the critique of rights—indeterminacy, elasticity, and their double edge—suffice it to note that the human rights project basically polices the space between the state and the individual and not between individual citizens. As Karl Klare wrote, the dominant understanding of the human rights project “is to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power.”⁴⁶ Yet nothing intrinsic about human beings requires only their protection from the state and not also protection from the asymmetries of power between them.

The view of human dignity from a human rights perspective, which draws heavily from liberalism and political democratic theory, has an atrophied understanding of the role of the state. Admittedly, the thick welfare state is an attempt to emphasize a more robust view of liberalism. In human rights doctrine, this fuller iteration of liberalism is ostensibly contained in the ICESCR, but that document’s flaccidity, impotency, and vagueness are evidence of the bias of the corpus to a more limited vision.⁴⁷ As is the case with political democracy, the human rights regime appears to be more concerned with certain forms of human powerlessness and not others, a practice

particularly seen in the most influential human rights NGOs and institutions (that is, because no major human rights NGO in the West focuses on economic, social, and cultural rights). The problem is not simply one of orientation; rather, it is the fundamental philosophical commitment by movement scholars and activists to vindicate “core” political and civil rights over a normative articulation that would disrupt vested class interests and require a different relationship between the state and citizens and between citizens. Human rights NGOs conveniently shied away from questions of economic powerlessness during the Cold War because charities and Western governments frowned upon them, a bias that was more than strategic—it was ideological. The few exceptions were Physicians for Human Rights and groups such as Oxfam, although the latter is not identified as a human rights organization per se. Several groups now exclusively focus on economic and social rights, including the National Human Rights Initiative⁴⁸ and the older Center for Economic and Social Rights.⁴⁹

One of the more interesting pathologies of the human rights texts is their avoidance of or reluctance to employ a certain vocabulary to describe powerlessness. How plausible is the UDHR—the single most important human rights document and one that calls itself a “common standard of achievement for all peoples and nations”⁵⁰—if it does not recognize that, at the time of its writing, the bulk of the global South was under European colonial rule and subject to the vilest economic exploitation? It is difficult to believe that such an omission was an oversight, given that several powerful states and actors were engaged in an epochal contest between socialism and capitalism. In fact, the document seems to indicate a surreptitious recognition of secularism, capitalism, and political democracy through the guarantee of the rights that yield a society framed by those systems.

From the start, the movement and its founders did not see themselves as charged with the responsibility of addressing economic powerlessness. Economic, social, and cultural rights were relegated to just six articles in the UDHR, and they are the last ones addressed. Those articles are not scripted in a way that directly confronts powerlessness and exploitation. The rights relating to work and labor assume, for example, the fact and legitimacy of capitalism and free markets.⁵¹ Working people are therefore expected to fight for their rights *within* those systems and structures. The same logic is at work in the ICESCR; that is, it grants rights within a system of free enterprise that protects workers from the worst excesses of global capitalism. In this regard, the ICESCR should be understood as a normative project for a *thick welfare state* within a market economy, as a document that seeks to mitigate the harshness of capitalism and give it a more human face.

The human rights movement’s failure of imagination and its acquiescence to a free market vision of political democracy impedes its ability to think beyond markets and systems of exploitation that produce ugly social

structures. In political society, an absolute dictator would be impermissible under human rights norms and contemporary understandings of political democracy. Yet the movement sets no standards to prevent the existence of or to protect the victims of the economic equivalent of an absolute dictator—for example, exceedingly wealthy market monopolists such as billionaires in the United States. On the contrary, these figures are celebrated and venerated individuals in a political democracy; they certainly are not understood as the market equivalent of the political dictator by the human rights corpus. Yet the existence of their personal economic empires is a radical perversion of any egalitarian or equitable notions of human dignity. It is very difficult, if not impossible, to articulate a plausible argument that a system that permits such vast differences among citizens does not violate basic notions of human dignity. In an era of globalization, where capital knows no borders and is virtually unaccountable, questions of economic justice and fairness should obsess the human rights corpus and the movement. It is not enough to decry, as human rights NGOs do, the worst excesses of globalization or the most shocking practices, such as sweatshops and slave-like conditions of work. It must also develop a defensible normative project to address economic and social arrangements and systems. Human rights norms must do more than treat the government simply as the regulator of markets, as is the case in a political democracy.

Finally, the human rights corpus and movement focus too much on process and rights at the expense of politics and substance. Politics is partisan and lacking in neutrality, so the movement steers clear of it. The movement chooses to vindicate rights that are coded in positive law; by casting themselves as doing the work of the law, movement activists perpetuate a myth of objectivity. For example, during the Cold War the human rights community in the West deliberately distanced itself from the overt promoters of democracy in the global South and the Soviet bloc.⁵² They wished to present themselves as a community interested in process and the rule of law, not politics or the ideological project of democracy, in order to avoid being seen as supporting the Western crusade, particularly under U.S. president Ronald Reagan, of rooting out communism in favor of pro-Western market or political democracies. Nevertheless, the human rights movement in the West relentlessly focused on Soviet bloc states and third world countries for their closed or authoritarian political systems, working with pro-democracy human rights advocates in those countries. Objectively, human rights groups were pursuing an agenda very similar to that of the Reagan administration.

CONCLUSION

The central arguments of this book rest on critiques of human rights—corpus, discourse, movement—that explore its dynamism, but also its exclusions,

biases, deficits, and incompleteness. It uses the lens of standard setting to anchor these arguments. Ultimately, it concludes that despite the shortcomings—and its errors—the human rights movement is a baby that should not be thrown out with the bathwater. There is normative reconstruction that is necessary. So is a cultural reimagination of the human rights project. The human rights texts and instruments examined here reveal complex realities and power dynamics that need to change to give the entire world a stake in the human rights movement. If that is not done—and done sooner rather than later—then the era of the human rights movement will end more quickly than one can anticipate. Resurgent ideologies and extremist views point to a new moral vacuum. Has the failure of human rights to respond effectively and as a legitimate weapon to the dystopian catastrophes in Syria, Iraq, Afghanistan, DRC, and CAR, Somalia, Yemen, and Ukraine exposed the impotence of human rights? This is why the call for reconstruction in this book is critical to the future of human rights.

To be sure, the human rights movement, whose constitutional anchor is the 1948 Universal Declaration of Human Rights, is arguably the most important crusade of our times. The language of human rights has been the language of decolonization, women's rights, and the rights of racial, sexual, and religious groups. It has been a language of power in the hands of the elites and of excluded groups alike. In that sense, human rights demonstrate the ambivalence and double-edged sword of the rights discourse. The movement's two foundational treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted by the United Nations in 1966—promise a society largely free of gross human rights violations and the most abominable economic deprivation. The former promises freedom from political tyranny and the abuse of power, and the latter, freedom from economic deprivation (although without promising equality).

Critiques of the human rights movement make sense only as attacks on its normative content and the nature of the society it would construct. Shorn of its high rhetoric, the human rights project is a scheme of norms that seeks to create a system of political democracies in which a culture of constitutionalism thrives. The UDHR and the huge catalogue of human rights treaties enacted thereafter have sought to implant in every country a constitutional system of laws founded on political and economic liberalism. Analyses of the key human rights texts reveal that the rights therein would create a state animated by these principles. In brief, such a state is based on the conception of popular sovereignty in which accountability by the people is exercised through a number of institutions and devices, the most important of which is the requirement of periodic and genuine elections in

a multiparty process. This most basic requirement implies the guarantee of a broad range of rights, including those of speech, assembly, and movement.

Critics have argued that the human rights movement is an attempt to universalize liberalism through its globalization. Leading human rights scholars such as Antonio Cassese and Virginia Leary have categorically stated that the West imposed its philosophy of human rights on the rest of the world because of its control of the UN in 1948. That is, the human rights corpus is not universal because of its Eurocentric origins and biases, which is perhaps the most poignant critique of the human rights movement. This argument springs from the fact that the original drafters of the UDHR and the initial basic texts were either Westerners or individuals who were educated in the West or steeped in its traditions. This is how the early formulation and codification of the human rights standards—whose legacy is the signature of the corpus—were dominated by Western cultural norms and political ideas. Largely absent were African, Asian, Muslim, Hindu, and other traditions. This failure of multiculturalism at the start of the movement remains one of its most troubling drawbacks.⁵³

The attempts to export human rights to the global South through the UN and the foreign policies of the Western industrial democracies have given credence to human rights as a historical continuum of the civilizing mission of Eurocentrism. In this view, human rights are perceived as an attack on non-European cultures that it deems barbaric and seeks to transform. The fact that the major international human rights organizations such as Amnesty International and Human Rights Watch are located in the West—and have traditionally focused their work in the third world—has done nothing to change the perception of human rights as a neocolonialist project. Furthermore, the rhetoric of imperial states—such as the United States and United Kingdom in their recent war and occupation of Iraq—was often couched and justified on human rights grounds, but it provides evidence of the use of human rights discourse as a language of Western domination. The description of human rights as a gift of the West to the rest of the benighted, non-European world finds resonance in many countries.

To be sure, 2015 is not 1948. A lot has changed even in the world of human rights. The normative character of the human rights corpus is slowly being transformed into a more inclusive dogma. But that transformation is not yet deep enough. For example, as a secular enlightenment project, the human rights movement still does not know how to relate to Islamic societies, that is, how to understand and work with their views about the relationship between the state and religion or their understanding of gender. Nor has the human rights movement figured out how to respond to markets and globalization. The problems here are embedded in the biases of

the corpus toward secularism, individualism, and Eurocentrism; they remain conceptual hurdles that the human rights movement is either intellectually lazy about or simply unwilling to address.

The challenge of the human rights movement is to free itself from Eurocentric cultural biases and its natural alliance with the West. If it does so, it will gain cultural legitimacy as the universal weapon for battle in the hands of the powerless. If not, it will continue to be perceived as a tool for imperial states bent on global domination. A truly universal human rights movement must rethink its conceptual biases, analytic assumptions, and strategic alliances. To do so, it must be purged of knee-jerk Eurocentrism, racist discourses, and free market assumptions. That is the only way human rights can truly become a higher form of human intelligence. But who is best placed to rethink and reformulate the human rights movement? Can this change come from the top, that is, the West, where the traditional human rights movement has its most ardent supporters and defenders? Or will it be initiated from below, the South, where the grassroots, on-the-ground work is being done?

In the last seventy years the world has seen substantial progress in addressing state tyranny.⁵⁴ Part of this success is clearly attributable to the human rights movement and its marketing of the liberal constitution and the values of political democracy. But the successful march against state despotism has been conducted as a cloak and dagger contest—pushing a value system without directly stating its normative and political identity. Even if one were to allow for the tactical and strategic choices the movement had to make, this unfortunate situation need not become the movement's legacy. Its advocates have an opportunity to think more robustly about human rights as a political project, to question its broader prescriptions for the society of the future.

This intellectual diffidence has been limiting to the human rights movement. Why hide the ball? Everything should be placed on the open table so that the world may openly debate questions of power and powerlessness and how to reformulate the human rights corpus to address pressing crises. Perhaps the world will decide that human rights is not the right language for this struggle. Perhaps it will decide that it is. In any case, no one will ever know until the veil is taken off. The movement will lose its relevance unless it can address—seriously and as a priority—human powerlessness in all its dimensions.

Perhaps the task of rethinking and reformulating the human rights project should not be left to NGOs or advocates with a religious belief in it or to those who are too preoccupied with the promotion and protection of human rights. There is a role for true believers, or those who take the norms as they are, and are primarily interested in how they can be realized

in practice, but they are too invested in practice to engage in distant and critical thinking, even heresy. While praxis is a reality, it does not overrule a subtle division of labor. Universities and think tanks in both the North and the South, but especially in the South, can make a critical contribution to the reformulation. Ideally, a university should be free from the tyranny of practice, or policy, and the political correctness associated with both, particularly in the human rights field. They can be a place of refuge for the irreverent and detached scholar, one who can think without the biases of movement commitment and loyalties. The scholar's work can be done in "pure theory" offering and research or within the more timid confines of the many human rights programs that have sprung up in the academy. Such programs offer a mixture of critique, research, and practice, but without the tyranny of unbending commitment or conformity. The youth of these programs—the most senior among them is just a couple of decades old—gives them an elastic and experimental status so that their rationale and identity are still open to searching questions. Perhaps this is the most hopeful thing about these programs: that they are not frozen and have not been fully captured by traditional biases, a fact that would prevent them from imagining more progressive and cutting-edge roles. Unfortunately, an audit of these programs, and in particular their academic aspects, yields some worrying signs.

Typically, from a programmatic point of view, university human rights programs follow a familiar script, influenced by the earliest programs at Yale and Harvard. As such, human rights programs are composed of the following facets, to a lesser or larger degree, depending on their resources and the imagination of the program director: coursework, which includes courses, seminars, research papers, and thesis for regular law students; clinics, which mimic an apprenticeship model for human rights advocacy, and therefore act as training grounds for human rights cadres; publication of human rights journals; hosting conferences; internship programs, in which students are placed in institutions and groups pursuing human rights work; a speaker series on campus; fellowship programs—usually non-degree affiliated—for senior scholars, leaders in the human rights movement, jurists, and others; and occasional fieldwork. This could be the wellspring for new thinking, but it is lacking in "pure theory" offerings where the most searching and discomfiting questions are bound to emerge.

The large hodgepodge of pursuits within the university human rights program suggests a blurring of lines between strictly academic and non-academic aspects of the program, and it largely conflates scholarship and activism, or, put differently, the search for knowledge and the advocacy of a perceived truth. This inability to unambiguously situate themselves either within or in relation to the human rights movement is the fundamental

problem faced by human rights programs. The prevailing view at human rights programs is that they are an integral part of the human rights movement, that they are, in effect, proselytizers. For this reason, they approach what they see as their duty in the human rights movement with an evangelical zeal and largely treat the human rights text as holy writ, sacred and beyond reproach. Being the “amen corner” of the human rights movement is a misunderstanding of their role in the university. They can, and should, train the next cadre of human rights thinkers and workers, but they should instill the critical thinking and analytical skills that nurture the imagination and intellect, not the fervor that feeds a religion.

In this traditional role, human rights programs have a bond of trust with the human rights corpus and act as the intellectual guardians of the human rights movement. Their intellectual stewardship of the human rights movement is essential, but not as cheerleaders. Many of these programs start from the premise that human rights are a glimpse of eternity, of the good society, a view that preserves universities as uncritical advocates of the human rights project. Given the relationship between human rights and liberalism or Western civilization, universities must politicize and problematize human rights as a language of power and imperialism. They—and the human rights programs within them—should be skeptical about assertions of final truths; they must embrace human rights as a discipline of inquiry and not as a cause.

The first area of inquiry for human rights programs should be in the doctrine and discourse of human rights, that is, its corpus and movement. These programs should seek to unpack, understand, critique, and systematize both of these elements of human rights. In effect, they must critically examine the human rights corpus and identify its conceptual gaps and inconsistencies, its cultural relevance, and its illegitimacy. They must clarify and expand the scope of the text and critique the institutions and the actors that author and participate in the production and implementation of its norms. In their second role, they must critique the NGO, INGO, and IGO communities, the so-called foot soldiers and “real guardians” of human rights, for biases, inefficiencies, and inequalities among themselves. NGOs, for instance, are too busy to reflect on the vexing nature of human rights, they generally look through a black-or-white, good-or-evil lens, and they treat human rights norms as sacred. Third, the university ought to be the funnel through which individuals who wish to work in human rights are trained as thoughtful and even skeptical activists. This training should produce activists who are alert to the complexities of the human rights corpus itself. It would preclude the university’s involvement in direct advocacy like NGOs—filing briefs, conducting field research, and denouncing governments—except as a forum for clinical, hands-on training for students. This is

not to say that human rights clinics should not have live clients. They can—and should—but without putting advocacy above the educational mission of the clinic. The value of human rights clinics in law schools is indisputable as a crucible for training sensitive, skilled, and competent human rights lawyers. That is why Eric Posner is dead wrong when he dismisses clinics as a charade that wastes money and has no pedagogical value.⁵⁵ Human rights clinics are no different from clinical programs in other law subjects or even in other disciplines such as medicine. Their impact on training the next generation of professionals, thinkers, and citizens cannot be gainsaid.⁵⁶ But universities and human rights programs should not be sucked into the human rights vortex of self-righteousness, lest they lose their sense of studied distance and skepticism. The identity of human rights study and research at universities, including the human rights programs, ought to evolve along these lines, so that they can play a more useful role in constructing a movement that avoids the pitfalls of power and ideological biases, that shuns religious zealotry, that recognizes that human rights are deeply political, that sees human rights as an experiment in affirming human dignity and reducing powerlessness. Human rights programs ought to see themselves as guardians of the search for the knowledge of human rights and human dignity, not as the primary, or co-equal, implementers of that truth.

This reconstructionist role would be best led by universities in the South working with critical thinkers in universities in the North. Although universities in the South still face many challenges—resource constraints, state interference, and a brain drain—they produce thinking that is not necessarily wedded to liberalism. They also have an incentive to make original contributions to conceptions of human dignity that are not tied to, or dominated by, European ideas and history. Indians and other Asians, Arabs and Muslims, Africans, and other demographics that historically were not allowed to exert intellectual influence on human rights standard setting should do so through the university in the South. It is possible, as Santos argues, that other ways of knowing the human condition and of creating normative and institutional responses to human privation and powerlessness do exist.⁵⁷

NOTES

PREFACE

1. Makau Mutua, "The Ideology of Human Rights," *Virginia Journal of International Law* 36 (1996): 589; "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 42 (2001): 201; "Standard Setting in Human Rights: Critique and Prognosis," *Human Rights Quarterly* 29 (2007): 547.

2. Makau Mutua, "What is TWAIL?" *Proceedings of the 94th Annual Meeting of the American Society of International Law* 31 (2000): 31–39.

INTRODUCTION

1. Leon Aron, "Everything You Think You Know about the Collapse of the Soviet Union Is Wrong," *Foreign Policy*, June 20, 2011, <http://foreignpolicy.com/2011/06/20/everything-you-think-you-know-about-the-collapse-of-the-soviet-union-is-wrong/> (accessed January 27, 2015).

2. Saskia Sassen, "Towards Post-National and Denationalized Citizenship," in *Handbook on Citizenship Studies*, ed. Engin F. Isin and Bryan S. Turner (Thousand Oaks: Sage, 2003).

3. The term *North* refers to the Northern Hemisphere, but includes Australia, New Zealand, the West, and the first and second worlds. The term *South* refers to the developing world, and includes Africa, most of Asia, and Latin America. The divide is not strictly geographic because some states from the South have joined the first world (for example, South Korea, Japan, Singapore, and Malaysia). See Kunibert Raffer and Hans Wolfgang Singer, *The Economic North-South Divide: Six Decades of Unequal Development* (Cheltenham: Edward Elgar, 2002).

CHAPTER ONE. NORM SETTING IN INTERNATIONAL LAW AND HUMAN RIGHTS

1. Nicolas Valticos, "The Role of the ILO: Present Action and Future Perspectives," in *Human Rights: Thirty Years after the Universal Declaration*, ed. B. G. Ramcharan (Hague, Netherlands: Martinus Nijhoff, 1979), 216.

2. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988).

3. Henry J. Steiner, "The Youth of Rights," *Harvard Law Review* 104 (1991): 917.
4. James Crawford, "The Criteria for Statehood in International Law," *British Yearbook of International Law* 48, no. 1 (1976): 93, 98.
5. John Norton Pomeroy, *Lectures on International Law in Time of Peace*, ed. Theodore Salisbury Woolsey (Boston: Houghton, Mifflin, 1886), 4–5; Herbert Arthur Smith, *Great Britain and the Law of Nations*, (London: P. S. King, 1932), 12; James Thuo Gathii, "International Law and Eurocentricity," *European Journal of International Law* 9 (1998): 184; Anthony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40, no. 1 (1999): 1; Anthony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," *Social and Legal Studies* 5, no. 4 (1996): 321.
6. Thomas Buergenthal et al., *International Human Rights in a Nutshell*, 3rd ed. (St. Paul: West, 2002), 3.
7. League of Nations. *The Covenant of the League of Nations: (Amendments in Process of Ratification)*, article 22. Geneva: Information Section, League of Nations Secretariat, 1924.
8. *Ibid.*, art. 23.
9. Geneva Committee, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Convention of 1864)*, art. 6(1). Geneva: Swiss Federal Council, 1864.
10. Samuel Moyn, *The Last Utopia* (Cambridge: Harvard University Press, 2010): 84–119.
11. Mohamed Bedjaoui, "Poverty of the International Order" in *International Law: A Contemporary Perspective*, ed. Richard Falk et al. (Boulder: Westview, 1985): 152.
12. The UN Security Council is the only organ of the United Nations with the power to authorize the use of force and to make binding decisions on all member states. The Security Council has five permanent members—Russia, China, France, the United States, and Great Britain—each of which holds veto power. See United Nations, *Charter of the United Nations*, arts. 23, 24, 25, 27, 39, 42, 1 UNTS XVI (1945) (hereafter UN Charter).
13. UN Charter, preamble, 1 UNTS XVI (1945).
14. *Ibid.*, art. 1(3).
15. *Ibid.*, art. 55(c).
16. UN General Assembly, *Universal Declaration of Human Rights*, preamble. G.A. Res. 217(III), U.N. GAOR, 3d Session, 183d meeting at 71, U.N. Doc. A/810 (1948) (hereafter referred to as UDHR).
17. Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights," *Notre Dame Law Review* 73 (1998): 1153.
18. Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Yearbook* 1 (1988): 77, 79.
19. Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996), 120.
20. Antonio Cassese, "The General Assembly: Historical Perspective 1945–1989" in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (Oxford: Clarendon Press, 1992), 25, 31–32.

21. American Anthropological Association, "Statement on Human Rights," *American Anthropologist* 49, no. 4 (1947): 539.

22. Theo van Boven, "United Nations Policies and Strategies: Global Perspectives?" in *Human Rights: Thirty Years after the Universal Declaration*, ed. B. G. Ramcharan (Hague, Netherlands: Martinus Nijhoff, 1979), 91.

23. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002).

24. Abdullahi An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), 427–28.

25. *Ibid.*

26. *Ibid.*

27. Bertrand Ramcharan, "Human Rights: Universality and Cultural Diversity," in *Rendering Justice to the Vulnerable*, ed. Fons Coomans et al. (The Hague: Kluwer Law International, 2000), 239–58. Elsewhere, Ramcharan has asserted that development strategies need to be influenced in their conception and implementation by international human rights norms. He identified that the way forward for human rights rests on three conceptual pillars, the first of which is maintaining the UN consensus on the universality of human rights. See Bertrand Ramcharan, "Human Rights and Human Security," paper prepared for the Workshop on Relationship Between Human Rights and Human Security, San José, Costa Rica, December 2, 2001. See <http://unidir.org/files/publications/pdfs/strengthening-disarmament-and-security-en-342.pdf> (accessed January 27, 2015); see also Bertrand Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff, 2002).

28. Nicolas Valticos, "The Role of the ILO: Present Action and Future Perspectives," in *Human Rights: Thirty Years after the Universal Declaration*, ed. B. G. Ramcharan (The Hague: Martinus Nijhoff, 1979), 213–14. N. Valticos has stated that questioning the universality of human rights is "dangerous . . . skeptical relativism," tantamount to admitting that there should be "sub-standards for sub-humans." However, he sees a limited role for regional organizations on matters of regional interest, which would supplement the universal standards, or provide stimulus to subsequent universal action.

29. Virginia Leary, "The Effect of Western Perspectives on International Human Rights," in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi A. An-Na'im and Francis Deng (Washington, DC: Brookings, 1990), 15; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), x–xi.

30. Buergenthal et al., *International Human Rights*, 38–43; See also Jaye Ellis, "Shades of Grey: Soft Law and the Validity of Public International Law," *Leiden Journal of International Law* 25, no. 2 (2012): 313.

31. Henry J. Steiner, "Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond," *Harvard Magazine* (Sept.-Oct. 1998), 45.

32. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Math Noortmann and Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (England: Ashgate, 2010).

CHAPTER TWO. THE PROCESS OF
STANDARD SETTING IN HUMAN RIGHTS

1. UDHR.
2. Ronald Cohen, “Endless Teardrops: Prolegomena to the Study of Human Rights in Africa,” in *Human Rights and Governance in Africa*, ed. Ronald Cohen et al. (Gainesville: University Press of Florida, 1993), 3–4.
3. See Internal Displacement Monitoring Centre (IDMC) for estimates of IDPs, <http://www.internal-displacement.org/> (accessed January 28, 2015).
4. UN Office for the Coordination of Humanitarian Affairs (OCHA), “Guiding Principles on Internal Displacement,” introduction, para 1. U.N. Doc. E/CN.4/1998/53/Add.2 (2004).
5. Norwegian Refugee Council, *Internally Displaced People: A Global Survey*, 2d ed. (London: Earthscan Publications, 2002), 3.
6. Chaloka Beyani, a Zambian national and professor of international law at the London School of Economics, was appointed as Special Rapporteur on the Human Rights of Internally Displaced Persons by the Human Rights Council in September 2010, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12868&LangID=E.#sthash.gi5QzCEH.dpuf> (accessed January 28, 2015). In 2004, Walter Kälin, a Swiss academic, was appointed UN Secretary General on Internally Displaced Persons; <http://www.ohchr.org/EN/Issues/IDPersons/Pages/WalterKalin.aspx> (accessed January 28, 2015).
7. Francis Mading Deng and United Nations, *Internally Displaced Persons: Compilation and Analysis of Legal Norms* (New York: United Nations, 1998), 9; See also *Compilation and Analysis of Legal Norms*, report of the Representative of the Secretary General, submitted pursuant to Commission on Human Rights Resolution 1995/57, UN Doc. E/CN.4/1996/52/Add.2.
8. United Nations, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, *Compilation and analysis of legal norms*, UN Doc. E/CN.4/1996/52/Add.2 (December 5, 1995).
9. Ibid.
10. Deng and United Nations, *Internally Displaced Persons*, iii.
11. Ibid.
12. Walter Kälin, “How Hard Is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework” in *Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement*, ed. Francis Deng and Roberta Cohen, (New York: The Brookings-CUNY Project on Internal Displacement, April 2002), 1, 3 (hereafter *Recent Commentaries on Guiding Principles*).
13. Kälin, *Recent Commentaries on Guiding Principles*, 4.
14. Ibid.
15. African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, Special Summit of the Union, [http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_\(KAMPALA_CONVENTION\).pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf).

(accessed January 28, 2015). The convention came into force on December 6, 2012. See “An international model emerges today in Africa to address the plight of millions of internally displaced persons,” *UN Human Rights: Office of the High Commissioner for Human Rights*. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12868&LangID=E> (accessed January 28, 2015).

16. UN Commission on Human Rights, “Resolution 1996/52.” U.N. Doc. E/CN.4/RES./1996/52, 19 (1996). This resolution called on the “Representative of the Secretary General to continue, on the basis of his compilation and analysis of legal norms, to develop an appropriate framework in this regard for the protection of internally displaced persons.”

17. United Nations, Report of the Representative of the Secretary General to the United Nations Commission on Human Rights, *Specific Groups and Individuals: Mass Exodus and Displaced Persons*, UN Doc. E/CN.4/2002/95, para. 11 (January 16, 2002).

18. *Ibid.*, paras. 12–20.

19. *Ibid.*, paras. 21–54.

20. Henry J. Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* (Cambridge: Human Rights Program, Harvard Law School, 1991), 19–22. INGOs refer to a very select group of human rights NGOs, which are based in the most important political and cultural capitals of the West. These include Amnesty International in London, Human Rights Watch and the Lawyers Committee for Human Rights in New York, the International Human Rights Law Group in Washington, D.C., and the International Commission of Jurists in Geneva.

21. Norwegian Refugee Council, *Internally Displaced People*, 17.

22. “Special Rapporteur on the Human Rights of Internally Displaced Persons,” *UN Human Rights: Office of the High Commissioner for Human Rights*. <http://www.ohchr.org/EN/Issues/IDPersons/Pages/IDPersonsIndex.aspx> (accessed January 28, 2015).

23. United Nations General Assembly, “Resolution 53/144 [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms].” U.N. Doc. A/RES/53/144 (1999) (hereafter Declaration on Human Rights Defenders).

24. United Nations General Assembly, “Resolution 41/128 [Declaration on the Right to Development].” U.N. Doc. A/RES/41/128 (1986).

25. United Nations, “Draft Declaration on the Rights of Indigenous People.” U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, art. 20 (April 1994).

26. United Nations, “Resolution 48/109 [Improvement of the situation of women in rural areas].” UN Doc. A/48/629 (1994), reprinted in *International Legal Matters* 33 (1994): 1050.

27. Organization of African Unity (OAU), *African Charter on Human and People’s Rights* (“*Banjul Charter*”), article 22. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986. The right to development was first recognized in 1981 in Article 22 of the African Charter on Human and Peoples’ Rights as a definitive individual and collective right. Article 22(1) provides that: “All peoples shall have the right to their economic, social and cultural development

with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”

28. U.N. Commission on Human Rights, “Res. 4(XXXIII) [Question of the violation of human rights in the territories occupied as a result of hostilities in the Middle East],” U.N. Doc E/CN.4/RES/1(XXXIII) (1977); OAU, *African Charter*, art. 22; “Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003,” *ESCR-Net*. <http://www.escr-net.org/docs/i/1216218> (accessed January 31, 2013).

29. UN General Assembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para 6, U.N. Doc A/CONF.157/23 (June 25, 1993).

30. Steiner and Alston, *International Human Rights in Context*, 1325.

31. See Friedrich Ebert Stiftung, “The Declaration of Human Rights Defenders,” <http://library.fes.de/fulltext/bueros/usa/00986008.htm> (accessed January 28, 2015).

32. *Ibid.*

33. *Ibid.*

34. UN Office of the High Commissioner for Human Rights, “Secretary General Names Hina Jilani, Pakistan, Special Representative for Human Rights Defenders,” August 18, 200, <http://www.un.org/press/en/2000/20000818.sga743.doc.html> (accessed January 28, 2015).

35. UN Office of the High Commissioner for Human Rights, “Resolution 2000/61 [Human rights defenders]” U.N. Doc E-CN_4-RES-2000-61 (April 2000).

36. United Nations, *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF. 39/27, 63 A.J.I.L.875 (1969). Art. 26, which is entitled *Pacta Sunt Servanda*, provides that: “Every treaty in force is binding upon the parties to it and must be performed in good faith.”

37. The Library of Congress, “U.N. Human Rights Council: First Resolution Against Discrimination Based on Sexual Orientation,” http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402721_text (accessed January 28, 2015).

38. UN Office of the High Commissioner for Human Rights, “Resolution 45/158 [Convention on the Rights of Migrant Workers and Their Families],” G.A. Res. 45/158 (Dec. 18, 1990).

39. CEDAW, *International Legal Matters* 19 (1980): 33.

40. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, Amendment to Art. 20, para. 1, decided by States Parties to CEDAW on May 22, 1995, CEDAW/SP/1995/2, annex, UN Doc. A/34/46 (hereafter CEDAW).

41. UN Commission on Human Rights, “Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” E/CN.4/2002/WG.11/CRP.1 (January 17, 2002) (hereafter Optional Protocol to CAT).

42. Optional Protocol to CAT, see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> (accessed January 28, 2015).

43. Optional Protocol to CAT, art. 28.

44. *Ibid.*, art. 30.

45. Brendan Koerner, "Is Torture against the Law: What Uncle Sam Has to Say about It," *Slate*, May 13, 2003, http://www.slate.com/articles/news_and_politics/explainer/2004/05/is_torture_against_the_law.html (accessed January 28, 2015).

46. Agence France Presse, "UN Torture Prevention Plan Adopted Despite US Opposition," July 25, 2002, <http://www.unitedstatesgovernment.net/UNTorturePreventionPlanAdoptedDespiteUSOpposition.htm> (accessed January 28, 2015).

47. Optional Protocol to CAT, arts. 1, 2.

48. *Ibid.*, arts.3, 4.

49. Official Records of the U.N. General Assembly, 49th Session, Supp. No. 10, ¶ 381, U.N. Doc. A/49/10 (1994). In 1994 the International Law Commission appointed Alain Pellet a Special Rapporteur to study problems of reservations in human rights treaties.

50. Andrew Moravcsik, "Why Is U.S. Human Rights Policy So Unilateralist?" in *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, ed. Stewart Patrick and Shepard Forman (Boulder: Lynne Rienner, 2001), 345.

51. *Vienna Convention on the Law of Treaties*, art. 2(1) (d).

52. *Ibid.*, art. 19 provides that: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

53. Restatement (Third), Foreign Relations Law of the United States § 313 (1987).

54. International Court of Justice (ICJ), "Advisory Opinion [Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide]," 1951 I.C.J. 15 (1951).

55. *Ibid.*

56. CEDAW, art. 28(2).

57. Kälin, "How Hard Is Soft Law?" 4.

58. *Ibid.*

59. CEDAW; UN General Assembly, *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 U.N. GAOR, 43rd Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. No. 15, at 35, UN Doc. A/5515 (1963).

60. UN General Assembly, "Rome Statute of the International Criminal Court," *International Legal Matters* 999 (1998). The ICC Statute was adopted by a vote of 120 to seven, with twenty-one abstentions.

61. Kenneth Roth, "The Court the US Doesn't Want," *The New York Review of Books* (November 19, 1998), 45.

62. "Chronology of the International Criminal Court," *International Criminal Court (ICC)*, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm> (accessed January 30, 2013). The Statute of the ICC came into force on April 11, 2002, when it was ratified by the necessary sixty states.

63. The International Criminal Court, "State Parties to the Rome Statute," http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed January 28, 2015).

64. See International Council on Human Rights Policy, *Human Rights after September 11* (Geneva: ICHRP, 2002).

65. See, generally, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

66. Makau Mutua, "Terrorism and Human Rights: Power, Culture, and Subordination," *Buffalo Human Rights Law Review* 8 (2002): 1.

67. Amnesty International, *Amnesty International Report 2008: The State of the World's Human Rights*, 12–13.

68. Nigel S. Rodley, "On the Necessity of United States Ratification of the International Human Rights-conventions," in *US Ratification of Human Rights Treaties: With or Without Reservations?*, ed. Richard B. Lillich (Charlottesville: University of Virginia Press, 1981), 3, 4.

69. UN Framework Convention on Climate Change, "Kyoto Protocol to the UN Framework Convention on Climate Change," U.N. Doc. FCCC/CP/1997/7/Add.2 (December 10, 1997).

70. Barack Obama, "Ensuring Lawful Interrogations," Executive Order 13491, 22 January 2009, http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations (accessed January 29, 2015).

71. Neil A. Lewis, "U.S. Rejects All Support for a New Court on Atrocities," *New York Times* (May 7, 2002): A11.

72. See, generally, Makau Mutua and Peter Rosenblum, *Zaire: Repression as Policy* (New York: Lawyers Committee for Human Rights, 1990).

73. Nimy Mayidika Ngimbi (Vice Premier, Commissioner of State for Department of Citizens' Rights and Liberties, Kinshasa) in discussion with the author, August 1989; See also Mutua and Rosenblum, *Zaire: Repression as Policy*.

74. *Ibid.*

75. Amartya Sen, *Development as Freedom* (New York: Knopf, 1999), 35.

76. *Ibid.*

77. Many commentators concluded that the Arab Spring was fuelled partly by social media; see http://www.huffingtonpost.com/raymond-schillinger/arab-spring-social-media_b_970165.html (accessed January 29, 2015).

78. Alf Gunvald Nilsen, *Dispossession and Resistance in India: The River and the Rage* (New York: Routledge, 2010).

79. Georges Abi-Saab, "The Legal Formulation of the Right to Development," in *The Right to Development at the International Level* (The Hague: Academy of International Law, 1980), 159, 163.

80. An-Na'im, *Human Rights in Cross-Cultural Perspectives*.

81. Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," in *Human Rights: Cultural and Ideological Perspectives*, ed. Adamantia Pollis and Peter Schwab (New York: Pager, 1980), 1.

82. Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), 74.

83. Paula Gerber, "Prevention Is Better than Cure When It Comes to Human Rights," ElgarBlog, September 14, 2012, <https://elgarblog.wordpress.com/2012/09/14/prevention-is-better-than-cure-when-it-comes-to-human-rights-by-paula-gerber/> (accessed January 29, 2015); See also, Paula Gerber, "Prevention is Better Than Cure: The UN and Human Rights Education," The Geneva Academy of International Humanitarian law and Human Rights, October 2009, http://www.academia.edu/200434/Prevention_is_Better_than_Cure_The_UN_and_Human_Rights_Education (accessed January 29, 2015).

84. Barbara Crosette, "Rights Leaders Urge Powell to Attend U.N. Racism Conference," *New York Times* (July 11, 2001).

85. Cassese, "The General Assembly: Historical Perspective 1945–1989."

86. Morsink, *The Universal Declaration of Human Rights*, 9.

87. *Ibid.*, ix, 9.

88. *Ibid.*, 96.

89. UN General Assembly, *International Covenant on Civil and Political Rights*, art. 1, entry into force March 23, 1976 (No. 14668), *United Nations Treaty Series* 999 (1966), 171 (hereafter ICCPR).

90. *Ibid.*, art. 27.

91. Michael Posner, "The Four Freedoms Turn 70: Ensuring Economic, Political, and National Security in the 21st Century," Annual Meeting of the American Society of International Law, Washington DC, April 4, 2011, <http://www.state.gov/r/pa/prs/ps/2011/03/158815.htm>.

92. Organization of African Unity, *African Charter on Human and Peoples' Rights*.

93. *Ibid.*, art. 21.

94. *Ibid.*, art. 23.

95. *Ibid.*, art. 24.

96. *Ibid.*, arts. 27–29; See Makau Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," *Virginia Journal of International Law* 25 (1995): 339.

97. Bilahari Kausikan, "Asia's Different Standard," *Foreign Policy* 92 (1993): 24; See Yash Ghai, "Human Rights and Governance: The Asia Debate," *Australian Yearbook of International Law* 15 (1994): 1, for a critique of the proponents of distinctive Asian cultural outlooks.

98. Ban Ki-moon, "Secretary-General's remarks on the occasion of the entry into force of the Convention on the Rights of Persons with Disabilities," *United Nations Enable*, last modified May 12, 2008, <http://www.un.org/disabilities/default.asp?id=562>. Since 2001, when President Vicente Fox of Mexico called for a UN convention on disabilities, pressure has mounted for a treaty. UN Secretary General Ban Ki-moon proclaimed that "we must take concrete steps to transform the vision of the Convention into real victories on the ground."

99. Mary Robinson (former United Nations High Commissioner for Human Rights, New York) in discussion with the author, November 28, 2002.

100. "About Us," *International Service for Human Rights (ISHR)*, <http://www.ishr.ch/about-us> (accessed January 29, 2015). The Geneva-based International Service for Human Rights is an international association serving human rights defenders.

101. Joe-Onyango (Member, UN Sub-Commission on the Promotion and Protection of Human Rights, and Rapporteur on Globalization, New York, New York) in discussion with the author, December 1, 2002.

102. Josh Kron, "Antigay Bill in Uganda Is Shelved in Parliament," *New York Times*, May 13, 2011.

103. "Intervention of the Observatory on the situation of human rights defenders before the African Commission on Human and Peoples' Rights," *World Organisation Against Torture*, <http://www.omct.org/human-rights-defenders/events/2002/10/d16021/> (accessed January 31, 2013). See also "Human Rights Defenders: FAQ," *Amnesty International*, <https://amnesty.org/en/human-rights-defenders/faq> (accessed January, 31, 2013).

104. Sidiki Kaba and Eric Sottas, "To Defend Human Rights: A High Risk," *The Perspective* (March 25, 2002), <http://www.theperspective.org/highrisk.html> (accessed January 31, 2013); General Assembly of the OAS, "Resolution AG/RES.1818 (XXXI-O/01) [Human Rights Defenders in the Americas: Support for the Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas], AG/RES.1818 (XXXI-O/01) (June 5, 2001).

105. Declaration on Human Rights Defenders, art. 13. It provides, in part, that "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means."

106. Makau Mutua, ed., *Human Rights NGOs in East Africa: Political and Normative Tensions* (Philadelphia: University of Pennsylvania Press, 2009).

107. Human Rights Watch, *Human Rights Watch World Report 2000* (New York: Human Rights Watch, 2000), 15–17, for restrictive measures taken by African states against human rights NGOs.

108. Declaration on Human Rights Defenders, art. 9(3) (b), gives everyone, including associations, the right to observe trials to assess whether they meet international legal obligations. Art. 9(3) (c) permits anyone or any organization the right to offer and provide legal advice and representation. States have in the past severely restricted both rights.

109. Joe Oloka-Onyango (associate professor of law, Faculty of Law, Makerere University, Kampala, Uganda) in discussion with the author, December 1, 2002.

110. *Ibid.*

111. *Ibid.*

112. Francis Deng, "The Global Challenge of Internal Displacement," *Washington University Journal of Law and Policy* 5 (2001): 141–42. See also Norwegian Refugee Council, *Internally Displaced People*, 75.

113. Norwegian Refugee Council, *Internally Displaced People*, 32.

114. Bacre Waly Ndiaye, Director (UN Office of the High Commissioner for Human Rights, New York) in discussion with the author, December 2, 2002.

115. Stephanie Kleine-Alhbrandt (Human Rights Officer, Office of the High Commissioner for Human Rights, Geneva) in discussion with the author, December 6, 2002; Jean-Philippe Lavoyer, "Forced Displacement: The Relevance of International Humanitarian Law," in *Human Rights and Forced Displacement*, ed. Anne F. Bayefsky and Joan Fitzpatrick (The Hague: Kluwer International Law, 2000), 50–65;

“Guiding Principles on Internal Displacement,” *International Review of the Red Cross* 324 (Sept. 1998): 467–80; and Robert K. Goldman, “Codification of International Rules on Internally Displaced Persons,” *International Review of the Red Cross* 324 (Sept. 1998): 463–66.

116. Bjorn Petterson, “Complementarity between Key Instruments of International Law: International Human Rights and Humanitarian Law Merged into One Operational Instrument: The UN Guiding Principles on Internal Displacement,” *The Global IDP Project*, http://www.irinnews.org/pdf/in-depth/IDP/legal_complimentarity_2002.pdf (accessed January 31, 2013).

117. European Union, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, E. T. S. 126, entered into force on February 1, 1989.

118. United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

119. Malcolm Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998); See also Buergethal, *International Human Rights*, 191–93.

120. “Public Statement on Turkey,” *CPT: 3rd General Report on the CPT’s activities covering the period 1 January to 31 December 1992*, <http://www.cpt.coe.int/en/annual/rep-03.htm#II.c> (accessed January 30, 2013). A number of European states, including the United Kingdom, have been accused of torture and ill treatment before the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe; See also “European States Accused of Torture,” *BBC News* (April 6, 2000), <http://news.bbc.co.uk/2/hi/europe/703670.stm> (accessed January 31, 2013); Amnesty International, *Failures at Fifty: Impunity for Torture and Ill-Treatment in Europe on the 50th Anniversary of the European Convention on Human Rights* (London: Amnesty International, 2000).

121. Walter Kalyn (professor of law, Bern University, Switzerland) in discussion with the author, December 3, 2002.

122. *Ibid.*

CHAPTER THREE. THE MULTIPLICATION OF ACTORS

1. Edith M. Lederer, “South Sudan Joins UN as 193rd Member,” *Huffington Post*, July 14, 2011, http://www.huffingtonpost.com/2011/07/14/south-sudan-unt-nations_n_898460.html.

2. Steven Wheatley, “A Democratic Rule of International Law,” *European Journal of International Law* 22 (2011): 525.

3. Matthias Goldmann, “We Need to Cut off the Head of the King: Past, Present, and Future Approaches to International Soft Law,” *Leiden Journal of International Law* 25 (2012): 335; Hilary Charlesworth and Jean-Marc Coicaud, eds., *Fault Lines of International Legitimacy* (New York: Cambridge University Press, 2010).

4. UN Charter, preamble, 1 UNTS XVI (1945).

5. *Ibid.*

6. Thomas Buergenthal et al., *International Human Rights in a Nutshell*, 3d ed. (St. Paul: West, 2002), 34–35.
7. ICCPR.
8. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. 16, at 49, U.N. Doc. A/6316 (1966) (hereafter ICESCR).
9. UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted December 9, 1948, entered into force January 12, 1951, 78 U.N.T.S. 277.
10. Steiner and Alston, *International Human Rights in Context*, 600–601; See also Theo van Boven, “The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy,” *California Western International Law Journal* 20, no. 2, (1989): 207.
11. Organization of African Unity (OAU), *African Charter on Human and People’s Rights* (“Banjul Charter”), article 30. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.
12. Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.
13. Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, <http://www.achpr.org/instruments/women-protocol/> (accessed January 31, 2013).
14. “The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change,” in *Environmental Change and International Law: New Challenges and Dimensions*, ed. Edith Brown Weiss (Tokyo: United Nations University Press, 1992).
15. UN Charter, art. 52, para. 1.
16. Bertrand Ramcharan, “The Role of Regional, National, and Local Institutions: Future Perspectives” in *Human Rights: Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff, 1979), 233–48.
17. Bertrand Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff, 2002).

CHAPTER FOUR. THE ROLE OF NGOS IN THE CREATION OF NORMS

1. “Ethiopian Parliament Adopts Repressive New NGO Law,” *Amnesty International*, last modified January 8, 2009, <http://www.amnesty.org/en/news-and-updates/news/ethiopian-parliament-adopts-repressive-new-ngo-law-20090108> (accessed February 3, 2015).
2. Mutua, ed., *Human Rights NGOs in East Africa*.
3. Theo van Boven, “The Role of Non-Governmental Organizations in International Human Rights Standard Setting: A Prerequisite for Democracy,” in *Human Rights from Exclusion to Inclusion: Principles and Practices—An Anthology from the Work of Theo Van Boven*, ed. Fons Coomans et al. (The Hague: Kluwer Law International, 2000), 209–10.

4. "Act for the Abolition of Slavery throughout the British Colonies (1833)," William Loney *RN Background: West African Trade Legislation*, http://www.pdavis.nl/Legis_07.htm (accessed February 1, 2013); See also Howard Temperley, *British Antislavery, 1833–1870* (London: Longman, 1972).

5. Temperley, *British Antislavery*, 211; Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Kluwer Academic Publishers, 1987), 823. Charles Malik, one of the prominent drafters of the UDHR, noted that "non-governmental organizations, therefore, served as batteries of unofficial advisors to the various delegations [to the UN Commission on Human Rights], supplying them with streams of ideas and suggestions"; See O. Frederick Nolde, *Free and Equal: Human Rights in Ecumenical Perspective* (Geneva: World Council of Churches, 1968).

6. Rein Mullerson, "New Thinking by Soviet Scholars; Sources of International Law: New Tendencies in Soviet Thinking," *American Journal of International Law* 83, no. 3 (July 1989): 494, 512.

7. Steiner and Alston, *International Human Rights in Context*, 938.

8. UN Charter, Art. 71, 1 UNTS XVI (1945).

9. World Trade Organization (WTO), "Marrakesh Agreement Establishing the World Trade Organization," art. V (2), *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

10. UN Economic and Social Council, "Resolution 1296 (XLIV) [Arrangements for consultation with non-governmental organizations]" (May 23, 1968).

11. Steiner and Alston, *International Human Rights in Context*, 980; See also Michael Posner, and Candy Whittome, "The Status of Human Rights NGOs," *Columbia Human Rights Law Review* 25 (1994): 269–90.

12. Christine Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?" in *The Role of Law in International Politics*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 131, 135.

13. Rachel Brett, "Non-Governmental Actors in the Field of Human Rights," in *An Introduction to the International Protection of Human Rights*, ed. Raija Hanski and Markku Suski (Abo: Abo Akademi University, Institute for Human Rights, 1997), 327, 329.

14. UN Office of the High Commissioner for Human Rights, "Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies," U.N. Doc. A/49/537 (1994).

15. "Human Rights Watch Board of Directors," *Human Rights Watch*, <http://www.hrw.org/en/node/76172> (accessed February 1, 2013).

16. See Steiner, *Diverse Partners*, 19–22. INGOs refer to a very select group of human rights NGOs, which are based in the most important political and cultural capitals of the West. These include Amnesty International in London, Human Rights Watch and Human Rights First in New York, Global Rights in Washington, D.C., and the International Commission of Jurists in Geneva.

17. Mutua, "The Ideology of Human Rights": 589–657.

18. Steiner, *Diverse Partners*.

19. Steiner and Alston, *International Human Rights in Context*, 361–65, 989–91.

20. Claude C. Welch Jr., *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2000).

21. "About Us," *Center for Economic and Social Rights*, <http://www.cesr.org/article.php?list=type&type=3> (accessed February 1, 2013). The Center for Economic and Social Rights was founded in New York in 1993. It sought to promote social justice through human rights.

22. "About ESCR-net," *ESCR-Net*, <http://www.escr-net.org/about> (accessed February 1, 2013).

23. For Physicians for Human Rights, see <http://physiciansforhumanrights.org/about/contact/> (accessed February 3, 2015).

24. For Oxfam, see https://www.google.com/search?sourceid=navclient&aq=&oq=oxfam&ie=UTF-8&rlz=1T4AURU_enUS499US500&q=oxfam&gs_l=hp...015.0.0.2.247697.....0.igmIk6cNTkY (accessed February 3, 2015).

25. See <http://www.fian.org/> (accessed February 1, 2013).

26. Philip Alston, "The Fortieth Anniversary of the Universal Declaration of Human Rights," in *Human Rights in a Pluralist World: Individuals and Collectivities*, ed. J. Berting et al. (Westport: Meckler, 1990), 1, 12.

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*

30. "History of the CLO," *Civil Liberties Organization of Nigeria*, http://clonigeria.org/index.php?option=com_content&view=article&id=47&Itemid=54 (accessed December 27, 2013).

31. "Board of Directors," *Social and Economic Action Rights Center*, <http://www.serac.org/Pages.asp?id=357> (accessed February 1, 2013). The Nigerian Lagos-based Social and Economic Action Rights Centre (SERAC), which was founded by Felix Moroka, a Nigerian human rights advocate, became a leader on economic and social rights in Nigeria.

32. Willy Mutunga (executive director, Kenya Human Rights Commission, Nairobi, Kenya) in discussion with the author, 2002.

33. Anthony Kariuki, "Kenya gets new Chief Justice," *Daily Nation*, last modified June 16, 2011, <http://www.nation.co.ke/News/politics/Kenya+gets+new+Chief+Justice/-/1064/1183714/-/tp72xsz/-/index.html>.

34. Chidi Anselm Odinkalu, "Why More Africans Don't Use Human Rights Language," *Human Rights Dialogue* (Winter 2000): 3, 4.

35. The diversity of NGOs is captured by their acronyms: CBOs (community-based organizations); PVOs (private voluntary organizations); GONGOs (government organized NGOs); DONGOs (donor organized NGOs); CSOs (civil society organizations); MONGOs (my own NGOs); FANGOs (family NGOs); INGOs (international NGOs); QUANGOs (quasi-governmental NGOs); and BINGOs (business and industry NGOs).

36. Chidi Anselm Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment," *Transnational Law and Contemporary Problems* 8, no. 2 (1998): 359.

37. Van Boven, *The Role of Non-Governmental Organizations*, 212.

38. Virginia Leary, "A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Develop-

ment of International Norms on Torture,” in *UN Law Fundamental Rights: Two Topics in International Law*, ed. Antonio Cassese (Dordrecht: Kluwer Academic Publishers, 1979), 197–210.

39. Van Boven, *The Role of Non-Governmental Organizations*, 213.

40. Amnesty International, *Report On Torture*, (New York: Farrar, Straus and Giroux, 1975), 34. According to Amnesty International, torture includes the following essential elements in its definition: (1) the involvement of at least two persons, the torturer and the victim; (2) an implication that the victim is under the physical control or restraint of the torturer; and (3) the infliction of acute pain or suffering on the victim by the torturer.

41. UN General Assembly, “Resolution 3452 [Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment],” 30 U.N. GAOR Supp. No. 34 at 91, 30 U.N. Doc. A/10034 (1975).

42. UN General Assembly, “Resolution 34/169 [Code of Conduct for Law Enforcement Officials],” G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

43. UN General Assembly, “Resolution 37/194 [Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment],” G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982).

44. Van Boven, *The Role of Non-Governmental Organizations*, 214–15.

45. Emma Carmen-Guevas (Office of the High Commissioner for Human Rights, Geneva) in discussion with the author, December 6, 2002.

46. UN Permanent Forum on Indigenous Issues (UNPFII), “Martinez-Cobo Study of the Problem of Discrimination Against Indigenous Populations,” U.N. Doc. E/CN.4/Sub.2/1986/7 and Addenda, U.N. Sales No. E.86.XIV.3 (1986).

47. International Labor Organization (ILO), “Convention 106 [Weekly Rest (Commerce and Offices) Convention],” Geneva, 40th ILC session (26 June 1957); ILO, “Convention 169 [Indigenous and Tribal Peoples Convention],” Geneva, 76th ILC session (27 June 1989).

48. UN Working Group on Indigenous Populations, “Report of Working Group on Indigenous Populations on its Seventh Session,” at 6–7, U.N. Doc. E/CN.4/Sub.2/1989/36.

49. Steiner and Alston, *International Human Rights in Context*, 1301–1302.

50. Declaration on the Rights of Indigenous Peoples, G.A. Res. 60/251, 1st Sess., U.N. Doc. No. A/HRC/1/L.3, June 23, 2006.

51. “UN Human Rights Council Adopts Documents on Disappearances and Indigenous Peoples,” *UN News Center*, last modified June 29, 2006, <http://www.un.org/apps/news/story.asp?NewsID=19056&Cr=rights&Cr1=council>.

52. UN General Assembly, “Resolution 61/295 [Declaration of the Rights of Indigenous Peoples],” U.N. Doc. A/RES/61/295 (2007).

53. “Indigenous Rights Outlined by UN,” *BBC News*, last modified September 13, 2007, http://news.bbc.co.uk/2/hi/in_depth/6993776.stm.

54. Ibid.

55. "Australia Backs Indigenous Rights," *BBC News*, last modified April 3, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/7980537.stm>.

56. Gina Cosentino, "It's Time to Reconcile Indigenous Rights and Democracy in Canada," *The Hill Times Online*, last modified December 6, 2010, <http://www.hilltimes.com/opinion-piece/opinion/2010/12/06/its-time-to-reconcile-indigenous-rights-and-democracy-in-canada/25119>.

57. "New Zealand Statement On Adoption of Declaration At UN Permanent Forum On Indigenous Issues," *Indigenous Peoples Issues & Resources* (April 20, 2010), http://indigenousspeoplesissues.com/index.php?option=com_content&view=article&id=4850:new-zealand-statement-on-adoption-of-declaration-at-un-permanent-forum-on-indigenous-issues&catid=58:oceania-indigenous-peoples&Itemid=80 (accessed February 1, 2013).

58. Caren Bohan, "Obama Backs U.N. Indigenous Rights Declaration," *Reuters* (December 16, 2010), <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216> (accessed February 1, 2013).

59. Hilary Charlesworth and Christine Chinkin, "The Gender of Jus Cogens," *Human Rights Quarterly* 15 (1993): 63.

60. UN World Conference on Human Rights, Vienna Declaration and Program of Action, *International Legal Matters* 32 (1993): 1661.

61. UN General Assembly, "Resolution 48/103 [Crime prevention and criminal justice]," U.N. Doc. A/RES/48/103 (December 20, 1993).

62. UN Office of the High Commissioner for Human Rights, "Special Rapporteur on violence against women, its causes and consequences," <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> (accessed February 1, 2013).

63. UN Security Council, "Statute of the International Criminal Tribunal for the Former Yugoslavia," S.C. Res. 827 (May 25, 1993); UN Security Council, "Statute of the International Criminal Tribunal for Rwanda," S.C. Res. 955 (Nov. 8, 1994).

64. Tuba Inal, *Looting and Rape Wartime: Law and Change in International Relations* (Philadelphia: University of Pennsylvania Press, 2013).

65. Chinkin, "Human Rights and the Politics of Representation," 133–34.

66. United Nations, *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and their Destruction*, Oslo (Sept. 18, 1997).

67. Chinkin, "Human Rights and the Politics of Representation," 134–35.

68. Walter Kälin (professor of law, Bern University, Switzerland) in discussion with the author, December 3, 2002.

69. Ibid.

70. David Johnson (Secretary to the Committee on the Rights of the Child, Human Rights Officer, UN Office of the High Commissioner for Human Rights, Geneva) in discussion with the author, December 4, 2002.

71. Ibid.

72. Nigel Cantwell, "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child," in *The United Nations*

Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires," ed. S. Detrick (Dordrecht: Kluwer Academic Publishers, 1992): 19.

73. Ibid.

74. Kenneth Anderson, "The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society," *European Journal of International Law* 11, no. 1 (2000): 92.

75. Ibid.

76. Ibid.

77. David Johnson in discussion with the author, December 4, 2002.

78. A. Clark, E. Friedman, and K. Hochstetler, "The Sovereign Limits of Global Society," *World Politics* 51 (1998): 15.

79. Chinkin, "Human Rights and the Politics of Representation," 137.

80. UN General Assembly, "Resolution 57/199 [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]," 57th Sess., U.N. Doc. A/RES/57/199 (December 18, 2002).

81. Barbara Crosette, "A Dispute On U.N. Post For Women," *New York Times*, September 26, 1995.

82. Patrick Tyler, "Hillary Clinton in Beijing as Women's Conference Opens," *New York Times*, September 5, 1995.

83. See "NGOs and the ASP," *The Rome Statute: The International Criminal Court*, <http://www.romestatute.com/post/11538932886/ngos-and-the-asp> (accessed December 27, 2013).

84. Mauro Politi, ed., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (London: Ashgate, 2001).

85. D. Otto, "A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women," in *Women and International Human Rights Law*, ed. K. Askin and D. Koenig, vol. 1 (Ardslay: Transnational 1999), 115.

CHAPTER FIVE. THE QUESTION OF DEFICITS

1. See Henry Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 3rd ed. (New York: Oxford University Press, 2007), 475–81.

2. Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

3. Steve Ouma (Programme Officer, Kenya Human Rights Commission, Nairobi) in discussion with the author, January-February, 2003.

4. See Fareed Zakaria, "Fareed's Take: Egypt Still is Not Free," *Global Public Square*, CNN, May 22, 2011.

5. See Ognyan Minchev, "Modernization: The Forgotten Strategy of Social Transformation: Post-Communist Lessons for the Arab Revolutions," Policy Brief, *The German Marshall Fund of the United States*, last modified August 1, 2011, <http://www.gmfus.org/archives/modernization-the-forgotten-strategy-of-social-transformation/>; see also Gareth Jones and Gabriela Baczyńska, "Special Report: Solidarity in the Arab Spring," *Reuters*, last modified Jun 16, 2011, <http://www.reuters.com/article/2011/06/16/us-arab-spring-east-idUSTRE75F2EW20110616>.

6. Ian Martin, *The New World Order: Opportunity or Threat for Human Rights*, Lecture at the Harvard Law School Human Rights Program (1993), 20.

7. Dan Bilefsky and Mark Landler, "As U.N. Backs Military Action in Libya, U.S. Role Is Unclear," *New York Times*, A1, last modified March 17, 2011, http://www.nytimes.com/2011/03/18/world/africa/18nations.html?pagewanted=all&_r=0.

8. See Ernest Haas, *When Knowledge Is Power: Three Models of Change in International Organizations* (Berkeley: University of California Press, 1990), 7. IGOs are usually dominated either by a single state or a coalition of elite states because of their military, economic, or other hegemonic power, as is the case with the United States and the United Nations.

9. Emma Carmen-Guevas (Office of the High Commissioner for Human Rights, Geneva) in discussion with the author, December 6, 2002.

10. Joe Oloka-Onyango (associate professor of law, Makerere University, Uganda) in discussion with the author, December 1, 2002.

11. *Ibid.*

12. See Makau Mutua, ed., *Human Rights NGOs in East Africa: Political and Normative Tensions* (Philadelphia: University of Pennsylvania Press, 2009).

13. Walter Kälin (professor of law, Bern University, Switzerland) in discussion with the author, December 3, 2002.

14. Jeffrey Gettleman and Josh Kron, "In Uganda, Unrest Gains Little Ground," *New York Times*, last modified February 17, 2011, http://www.nytimes.com/2011/02/18/world/africa/18uganda.html?_r=0.

15. Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Boulder: Lynne Rienner Publishers, 2008).

16. "Ford Foundation Staff Member Willy Mutunga Appointed Chief Justice of Kenya," Press Release, *PR Newswire*, last modified June 15, 2011, <http://www.reuters.com/article/2011/06/15/idUS213540+15-Jun-2011+PRN20110615>.

17. See Harry Smith, "Costa Rica's Triangle of Solidarity: Can Government-Led Spaces for Negotiation Enhance the Involvement of Civil Society in Governance?" *Environment and Urbanization* 16 (2004): 63.

18. See James F. Hoge Jr., "A Global Power Shift in the Making," *Foreign Affairs* (July/August 2004), <http://www.foreignaffairs.com/articles/59910/james-f-hoge-jr/a-global-power-shift-in-the-making> (accessed December 27, 2013).

19. Larry Cox, "Reflections on Human Rights at Century's End," *Human Rights Dialogue* (Winter 2000): 5.

20. *Ibid.*

21. Chinkin, "Human Rights and the Politics of Representation," 144.

22. Celina Romany, "Black Women and Gender in a New South Africa: Human Rights and the Intersection of Race and Gender," *Brooklyn Journal of International Law* 21 (1996): 857; Hope Lewis, "Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide," *Harvard Human Rights Journal* 8 (1995): 1; Isabelle Gunning, "Arrogant Perception, World Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries," *Columbia Human Rights Law Review* 23 (Summer 1992): 189.

23. Chinkin, "Human Rights and the Politics of Representation," 144–45.

24. See, e.g., Jan Nederveen Pieterse, *White on Black: Images of Africa and Blacks in Western Popular Culture* (New Haven: Yale University Press, 1992).

25. Adam Nossiter, "Behind Those Fast Growth Rates, Rising Inequality," *New York Times*, last modified November 5, 2013, <http://www.nytimes.com/2013/11/06/world/africa/behind-those-fast-growth-rates-rising-inequality.html>.

26. UN Charter, preamble, 1 UNTS XVI (1945).

27. *Ibid.*, Chapter V.

28. *Ibid.*, Chapter IV.

29. Martin, *The New World Order*, 20.

30. Jose E. Alvarez, "The Once and the Future Security Council," *The Washington Quarterly* 18, no. 2 (Spring 1995): 3.

31. Michael Ignatieff, *Whose Universal Values? The Crisis in Human Rights* (Hague, Netherlands: Premium Erasmianum Essay, 1999), 19. Ignatieff has captured this Western domination of the UN Security Council and human rights in unambiguous language:

[S]ince 1989, there has been a single human rights culture in the world, and nothing stands in the way to defy its moral imperium. Russia and China no longer have the power to do anything but deny Security Council approval to Western coalitions of the willing. Their veto power may deny legitimacy to actions by coalitions of the willing, but as the NATO operation in Kosovo shows, determined coalitions simply bypass the Security Council altogether. This momentous shift has combined with the coming of age of human rights advocacy from the grassroots in Western countries. . . . But the impact of *this shift has not necessarily been to the benefit of oppressed individuals, but rather to the benefit of the states which intervene in other states in the name of human rights.* (emphasis added);

See also, Abdullahi An-Na'im, "NATO on Kosovo Is Bad for Human Rights," *Netherlands Quarterly of Human Rights* 17 (1999): 229.

32. Key among these principles is sovereign equality. See Juliane Kokott, "States, Sovereign Equality," in the *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113?rkey=TZr17l&result=5&prd=EPIL> (accessed December 27, 2013).

33. See *Minister of Home Affairs and Another v. Fourie and Another*, South African Constitutional Court (CCT) 60/04 (2005), <http://www.saflii.org/za/cases/ZACC/2005/19.html> (accessed February 20, 2013).

34. Alan Cowell, "Uganda Lawmakers Pass Measure Imposing Harsh Penalties on Gays," *New York Times*, December 20, 2013.

35. Riva Krut et al., *Globalization and Civil Society NGO Influence in International Decision-Making*, UNRISD, Discussion Paper 83 (April 1997), 1–15.

36. Warren Nyamugasira, "NGOs and Advocacy: How Well Are the Poor Represented?" *Development in Practice* 8 (1998): 297.

37. Canadian Foreign Minister Axworthy, quoted in Kenneth Anderson, "The Ottawa Convention Banning Landmines: the Role of International Non-Governmental Organizations and the Idea of International Civil Society," *European Journal of International Law* 11 (2000): 111.

38. *Ibid.*, 118.

39. Ibid.

40. Ibid.

41. Ibid., 117.

42. Bertrand Ramcharan (then Deputy High Commissioner for Human Rights, Geneva, Switzerland) in discussion with the author, December 4, 2002.

43. Sonya Sceats and Sean Breslin, "China and the International Human Rights System," (Chatham House:212), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf (accessed February 3, 2015).

44. UN Charter, Arts 55, 56.

45. UDHR.

46. More recent work by some Western academics, however, has been encouraging of the right to development. See, for example, Patrick Macklem, "Global Poverty and the Right to Development in International Law," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271686. See also Helena Alviar Garcia, Karl Klare, and Lucy A. Williams, eds., *Social and Economic Rights in Theory and Practice* (New York: Routledge, 2015). But their forebears were less enthusiastic about the right to development. Stephen P. Marks, for instance, has argued that third-generation human rights, of which the right to development is the most prominent, are "too vague to be justifiable and are no more than slogans." Jack Donnelly, an opponent of group or collective rights, has been more critical, declaring the right to development "fallacious," "bizarre," "misguided," and "dangerous." See, respectively, Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* 33 (1981): 435, 451; and Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and the Politics of the Right to Development," *California Western International Law Journal* 15 (1985): 473, 482. With virtually no prominent defenders, the right to development lacks elaboration and has remained murky.

47. Henry J. Steiner (Director, Human Rights Program, Harvard Law School, Cambridge, Massachusetts) in discussion with the author, November 29, 2002; See, generally, Margot E. Salomon and Arjun Sengupta, *The Right to Development: Obligations of States and the Right of Minorities and Indigenous Peoples* (London: Minority Rights Group International, 2003).

48. Walter Kälin, "How Hard Is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework," in *Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement*, ed., Francis Deng and Roberta Cohen, (New York: The Brookings-CUNY Project on Internal Displacement, April 2002), 7,8 (hereafter *Recent Commentaries on Guiding Principles*).

49. Francis Deng, "The Global Challenge of Internal Displacement," *Washington University Journal of Law and Policy* 5 (2001): 147.

50. Kälin, *Recent Commentaries on Guiding Principles*, 10.

51. "Data on Human Rights Treaties," *UN Treaty Collection*, accessed on December 27, 2013, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en.

52. Gerison Lansdown, "The Reporting Process under the Convention on the Rights of the Child," in *The Future of Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 113.

53. David Johnson (Office of the High Commissioner for Human Rights, Geneva) in discussion with the author, November 4, 2002.

54. Helen Keller, Geir Ulfstein, and Leena Grover, *UN Human Rights Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012); Makau Mutua, "Looking Past the Human Rights Committee," *Buffalo Human Rights Law Review* 4 (1998): 211.

55. See, for example, Charles Krauthammer, "The Curse of Legalism: International Law? It's Purely Advisory," *The New Republic*, November 6, 1989, 44–46, 50.

56. Abdullahi An-Na'im (professor of law, Emory University School of Law, Atlanta, Georgia) in discussion with the author, November 27, 2002.

57. Henry J. Steiner (director, Human Rights Program, Harvard Law School, Cambridge, Massachusetts) in discussion with the author, November 29, 2002.

58. UN General Assembly, Official Records, "Annotations on the Text of the Draft International Covenants on Human Rights," at 7, UN Doc.A/2929 (1955).

59. *Ibid.*, para 9.

60. *Ibid.*; See also Philip Alston and Gerald Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9 (1987): 156.

61. ICESCR. In 1987, ECOSOC established the Committee on Economic, Social and Cultural Rights to oversee the implementation of the ICESCR.

62. *Ibid.*, art. 2(1).

63. UN Commission on Human Rights, "Resolution 2000/82 [Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights]," E/CN.4/RES/2000/82 (2000).

64. UN Commission on Human Rights, "Resolution 2005/69 [Human Rights and Transnational Corporations and Other Business Enterprises]," E/CN.4/RES/2005/69 (2005).

65. "Data on Human Rights Treaties," *UN Treaty Collection*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en (accessed February 22, 2013).

66. *Ibid.*

67. *Ibid.*

68. Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 2000).

69. ICCPR.

70. UN General Assembly, "Resolution 2200 (XXI) [Optional Protocol to the International Covenant on Civil and Political Rights]," 21 UN GAOR, Supp. (No. 16) 59, UN Doc. A/6316 (1967), reprinted in *International Legal Matters* 6 (1967): 383.

71. "Monitoring the Core International Human Rights Treaties," *UN Human Rights: Office of the High Commissioner on Human Rights*, <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (accessed March 1, 2013). These include the Committee on the ICESCR, the CRC, and the Committee on CERD, CAT, and the CEDAW Committee.

72. Torkel Opsahl, "The Human Rights Committee" in *The United Nations and Human Rights: A Critical Appraisal* ed. Philip Alston (Oxford: Clarendon Press, 1992), 371; see also Dominic McGoldrick, *The Human Rights Committee* (Oxford: Oxford University Press, 1991).

CHAPTER SIX. NEW AND EMERGING STANDARDS

1. Michael Battle, *Ubuntu: I in You and You in Me* (New York: Seabury Books, 2009).
2. Samuel Moyn, *Human Rights and the Uses of History* (New York: Verso, 2014); Samuel Moyn, *The Last Utopia* (Cambridge: Harvard University Press, 2010).
3. See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1993).
4. Peter Baehr, "Amnesty International and Its Self-Imposed Limited Mandate," *Netherlands Quarterly of Human Rights* 12 (1994): 5; Human Rights Watch, *Human Rights Watch World Report 2000* (2000): vii.
5. In September 1996, Human Rights Watch abandoned its opposition to economic and social rights and adopted a limited and qualified policy whereby it would monitor compliance with the violations of the ICESCR, but only so long as they touched on the ICCPR. See Human Rights Watch, *Human Rights Watch's Proposed Interim Policy on Economic, Social, and Cultural Rights* (September 30, 1996).
6. Aryeh Neier, "Social and Economic Rights: A Critique," *Human Rights Brief* 13, no. 2 (2006), <http://www.wcl.american.edu/hrbrief/13/2neier.pdf> (accessed February 26, 2013).
7. Roth, Kenneth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 4 (2004); Leonard Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth," *Human Rights Quarterly* 26, no. 4 (2004).
8. Katarina Tomasevski, "Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson," *Human Rights Quarterly* 27 (2005); Mary Robinson, "Advancing Economic, Social, and Cultural Rights: The Way Forward," *Human Rights Quarterly* 26, no. 4 (2004).
9. Amnesty International, *Annual Report 1998* (London: Amnesty International, 1999), <http://amnesty.org/en/library/asset/POL10/001/1998/en/c32b001d-e822-11dd-9deb-2b812946e43c/pol100011998en.pdf> (accessed on December 28, 2013).
10. Koldo Casla, "Impact Assessment of Non-Governmental Organizations on Economic, Social and Cultural Rights," *Human Rights Impact Resource Centre* (May 2010): 2.
11. "Demand Dignity," *Amnesty International*, <https://campaigns.amnesty.org/campaigns/demand-dignity> (accessed February 26, 2013).
12. See "Secretary General, Salil Shetty," *Amnesty International*, <http://www.amnesty.org/en/who-we-are/our-people/secretary-general> (accessed August 2011); see also discussion with Salil Shetty in *Poverty Matters Blog*, post by Annie Kelly, "How Can We Achieve Development Goals if We Ignore Human Rights?," *The Guardian*, February 28, 2011, <http://www.guardian.co.uk/global-development/poverty-matters/2011/feb/28/shetty-amnesty-human-rights-development> (accessed December 28, 2013).

13. Ibid.

14. UN Committee on Economic, Social, and Cultural Rights, "Statement of the UN Committee on Economic, Social, and Cultural Rights at the 1993 Vienna World Conference on Human Rights," Annex III, paras 5 and 7, UN Doc. E/1993/22 (1993).

15. Karin Buhmann, "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalizing New Forms of Law and Law-making Approaches," *Nordic Journal of International Law* 78, no. 1 (2009): 1–52.

16. In the popular mind, disability connotes a physical impairment such as a lost or malformed limb. But disability involves more than what is physically visible to the naked eye. There are no doubt large numbers of people in the world who live with disabilities.

17. Mary T. Westbrook, Varoe Legge, and Mark Pennay, "Attitudes Towards Disabilities in a Multicultural Society," *Social Science & Medicine* 36, no. 5 (1993): 615–723.

18. Americans With Disabilities Act of 1990. Public Law 101-336. 108th Congress, 2nd session (July 26, 1990).

19. Constitutional Court, *Constitution of the Republic of South Africa*, Art. 9(3) (1996).

20. UN General Assembly, "Resolution 31/123 [International Year of Disabled Persons]," A/RES/31/123 (1976).

21. UN General Assembly, "Resolution 37/52 [World Programme of Action concerning Disabled Persons]," A/RES/37/52 (1982).

22. UN General Assembly, "Resolution 48/96 [Standard Rules on the Equalization of Opportunities for Persons with Disabilities]," A/Res/48/96 (1993).

23. See "Disability Buzz," *Disability World*, 10, no. 1 (2001), doi: http://disabilityworld.org/09-10_01/buzz.shtml; "President Vicente Fox Awarded for His Work to Assist Persons with Disabilities," *Inter-American Development Bank*, last modified December 10, 2001, <http://www.iadb.org/en/news/news-releases/2001-12-10/president-viceinte-fox-awarded-for-his-work-to-assist-persons-with-disabilities,1072.html> [reporting on Fox's support for disability rights].

24. UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 5: Persons with Disabilities," E/1995/22 (1994).

25. Bengt Lindqvist, "All Means All," (Keynote speech by UN Special Rapporteur on Disability, Osaka Forum, Japan, October 2002).

26. Ibid.

27. Neera Bharihoke, ed., *Human Rights and the Law* (New Delhi: Serials Publications, 2009).

28. The IDA was a leading NGO lobby group for a disability convention.

29. The Ad Hoc Committee held its seventh session from January 16 to February 3, 2006, in order to discuss the status of negotiations on the Draft Convention.

30. See "Data on Human Rights Treaties," *UN Treaty Collection*, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (accessed December 28, 2013).

31. Ibid.

32. Ibid.

33. UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, U.N. Doc.A/61/611 (2006).

34. *Ibid.*

35. Wayne Morgan, "Identifying Evil for What It Is: Tasmania, Sexual Perversity, and the United Nations," *Melbourne University Law Review* 19 (1994): 740 (analyzing the revision of an Australian law that was deemed to violate the ICCPR).

36. *Lustig-Prean and Beckett v. United Kingdom*, European Court of Human Rights (1999), www.echr.coe.int/eng/Judgments.htm (accessed December 28, 2013); *Norris v. Ireland*, European Court of Human Rights Ser. A, No. 142, 13 EHRR 186 (1989).

37. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, Views of the Committee, UN Doc. CCPR/C/50/D/488/1992 (1994).

38. Peter Baehr, "Amnesty International and its Limited Self-imposed Limited Mandate," *Netherlands Quarterly of human rights* 12, no. 1 (1994): 5–21.

39. Constitutional Court, *Constitution of the Republic of South Africa*, Art. 9(3) (1996).

40. Jackie Calmes and Peter Baker, "Obama Says Same-Sex Marriage Should Be Legal," *New York Times*, May 9, 2012.

41. Adam Liptak, "Supreme Court Bolsters Gay Marriage with Two Major Rulings," *New York Times*, June 26, 2013, http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?_r=0 (accessed December 28, 2013).

42. Makau Mutua, "It Is Nonsense to Assert That Being Gay is Un-African," *Sunday Nation*, (Nairobi, Kenya) November 1, 2009; See also, more generally, a seminal work on homosexuality in Africa, Sylvia Tamale, ed., *African Sexualities: A Reader* (London: Pambazuka Press, 2011).

43. Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).

44. Irene Khan, *The Unheard Truth: Poverty and Human Rights* (New York: W. W. Norton, 2009); see also UN Charter, art. 55 (c), 1 UNTS XVI (1945).

45. Anthony R. Reeves, "Sexual Identity as a Fundamental Human Right," *Buffalo Human Rights Law Review* 15 (2009): 215.

46. Republic of Kenya, *Constitution of the Republic of Kenya* [promulgated August 27, 2010]. Conservatives feared that Article 27(4) on equality and nondiscrimination, and Article 45, on family and marriage, could be used to decriminalize homosexuality and permit same-sex unions or marriages.

47. The Anti-Homosexuality Bill was presented to the Uganda Parliament in 2009.

48. Sylvia Tamale, "A Human Rights Impact Assessment of the Anti-Homosexuality Bill," *East African Journal of Peace and Human Rights* 15 (2009): 509.

49. The Anti-Homosexuality Bill, Section 1.1.

50. Jeff Zeleny, "Obama Calls for 'Civility' at Prayer Breakfast," *New York Times*, last modified February 4, 2010, <http://thecaucus.blogs.nytimes.com/2010/02/04/obama-calls-for-civility-at-prayer-breakfast/>.

51. Alan Cowell, "Ugandan Lawmakers Pass Measure Imposing Harsh Penalties on Gays," *New York Times*, last modified December 20, 2013, <http://www.nytimes.com/2013/12/21/world/africa/ugandan-parliament-approves-antigay-law.html>.

52. Jeffrey Gettleman, "Uganda Anti-Gay Law Struck down by Court," *New York Times*, August 1, 2014, http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html?_r=0 (accessed February 4, 2015).

53. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, Views of the Committee, UN Doc. CCPR/C/50/D/488/1992 (1994).

54. *Norris v. Ireland*, European Court of Human Rights Ser. A, No. 142, 13 EHRR 186 (1989).

55. South African Constitution section 9(3), (1996).

56. *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11/98, 1999(1) SA6 (CC), 1998 (1) BCLR 1517 (CC).

57. Gabe Joselow, "Gay Rights in Africa Move Slowly, Cautiously Forward," *Voice of America*, last modified March 28, 2013, http://www.voanews.com/content/gay_rights_in_africa_moving_slowly_cautiously_forward/1630496.html.

58. Barry Bearak, "Gay Couple, Arrested After Engagement Ceremony, Are Convicted of Indecency in Malawi," *New York Times*, May 19, 2010.

59. Josh Kron, "Uganda Panel Gives Setback to Antigay Bill," *New York Times*, May 8, 2010.

60. Tacy Connor, "'Who Am I to Judge?': The Pope's Most Powerful Phrase in 2013," *NBC News*, last modified December 22, 2013, http://worldnews.nbc-news.com/_news/2013/12/22/21984495-who-am-i-to-judge-the-popes-most-powerful-phrase-in-2013.

61. Robert Barnes, "As Gay Marriage Begins in Florida, Supreme Court Is Set to Meet on the Issue," *Washington Post*, January 5, 2015, http://www.washingtonpost.com/politics/courts_law/as-gay-marriages-begin-in-florida-supreme-court-is-set-to-meet-on-issue/2015/01/05/ee0edaf8-9513-11e4-aabd-d0b93ff613d5_story.html (accessed February 4, 2015).

62. Clarissa Start Davidson, *God's Man: The Story of Pastor Niemoeller* (Westport, CT: Greenwood Press, 1979).

63. Brian Joseph Gilley, *Becoming Two-Spirit: Gay Identity and Social Acceptance in Indian Country* (Lincoln: University of Nebraska Press, 2006); Walter L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Cultures* (Boston: Beacon Press, 1986); Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* (New York: St. Martin's Press, 1998).

64. Agencies, "Hinduism Does not Condemn Gay People: UK Hindu Council," *Indian Express*, last modified July 3, 2009, <http://indianexpress.com/article/news-archive/print/hinduism-does-not-condemn-gay-people-uk-hindu-council/>.

65. Mutua, "It Is Nonsense to Assert That Being Gay is Un-African."

66. See generally Tamale, "A Human Rights Assessment of the Anti-Homosexuality Bill."

67. Childhood conversation between the author and his mother [date unknown].

68. Mutua, "It Is Nonsense to Assert That Being Gay is Un-African."

69. Rev. Father James Gatiti, "I Differ with Don on Gay Rights," *Sunday Nation*, October 31, 2009.

70. Denys W. T. Shropshire, *The Church and the Primitive Peoples* (London: S.P.C.K, 1938).

71. Irene Khan, *The Unheard Truth: Poverty and Human Rights* (New York: W. W. Norton, 2009).

72. Tamale, "A Human Rights Assessment of the Anti-Homosexuality Bill," 510.

73. Sylvia Tamale, "Law, Sexuality, and Politics in Uganda," in *Human Rights NGOs in East Africa: Political and Normative Tensions*, ed. Makau Mutua (Philadelphia: University of Pennsylvania Press 2009), 58; John Faupel, *African Holocaust: The Story of the Ugandan Martyrs* (New York: P. J. Kennedy, 1962); Tamale, ed., *African Sexualities: A Reader*.

74. Helmut Graupner and Phillip Tahmindjis, *Sexuality and Human Rights: A Global Overview* (Binghamton: Taylor and Francis, 2005).

75. UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights," Art. 2, para 2, E/C.12/GC/20, (2009).

76. UN Committee on the Elimination of Discrimination against Women, "General Recommendation Number 28 on the Core Obligation of States Parties Under Article of the Convention on the Elimination of All Forms of Discrimination Against Women," CEDAW/C/GC/28 (2010).

77. Dimitry Kochenov, "On Options of Citizens and Moral Choices of States: Gays in the European Union," *Fordham International Law Journal* 33 (2009): 156.

78. European Union, *Charter of the Fundamental Rights of the European Union*, art. 21 (1), Official Journal of the European Communities, (OJ C 364/01) (2000).

79. Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity, and International Human Rights Law: Contextualizing the Yogyakarta Principles," *Human Rights Law Review* 8 (2008): 207.

80. Julie Mertus, "The Rejection of Human Rights Framings: The Case of LGBTI Advocacy in the US," *Human Rights Quarterly* 29, no. 4 (2007): 1036.

81. For the Human Rights Campaign, the organization, see <http://www.hrc.org/>.

82. UN Human Rights Council, "Human Rights, Sexual Orientation and Gender Identity," A/HRC/17/L.9/Rev.1, adopted June 17, 2011, by a vote of 23 in favor, 19 against, and 3 abstentions.

83. Julie Mertus, *Human Rights Matters* (Stanford: Stanford University Press, 2009); Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Cambridge: Polity Press, 2007).

84. United Nations Development Programme, *Human Development Report 1993* (Oxford: Oxford University Press, 1993), 25.

85. UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN GA RES/54/4 of October 6, 1999. It came into force on December 22, 2000, and has been ratified by 104 states with eighty signatories.

86. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Resolution 1994/45 [Draft United Nations declaration on the rights of indigenous peoples]," E/CN.4/Sub.2/1994/ (1994).

87. UN Commission on Human Rights, "Decision 2004/110 [Special Rapporteur on trafficking in persons, especially in women and children]," see chap. XII, E/2004/23-E/CN.4/2004/127 (2004).

88. UN Human Rights Council, “Resolution 15/23 [Elimination of discrimination against women],” A/HRC/RES/15/23 (2010).

89. Organization of African Unity (OAU), *African Charter on Human and People’s Rights* (“Banjul Charter”), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

90. See “Legal Instruments,” *African Commission on Human and Peoples’ Rights*, <http://www.achpr.org/instruments/> (accessed February 28, 2013).

91. African Commission on Human and Peoples’ Rights, “Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa,” ACHPR/res.38 (XXV) 99 (1999); “Special Rapporteur on Rights of Women,” *African Commission on Human and Peoples’ Rights*, <http://www.achpr.org/search/?q=rappporteur+on+women> (accessed February 28, 2013).

92. *Ibid.*

93. Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Article 4(3), CETS No.:210 (2011).

94. *Ibid.*

95. “Rapporteurship on the Rights of Women,” *Organization of American States: Inter-American Commission on Human Rights*, <http://www.oas.org/en/iachr/women/default.asp> (accessed February 28, 2013).

96. Mara Bustelo, “The Committee on the Elimination of Discrimination against Women at the Crossroads,” in *The Future of Human Rights Treaty Monitoring*, ed. Alston and Crawford (Cambridge: Cambridge University Press, 2000), 79.

97. Abdullahi An-Na’im, “Human Rights in the Muslim World,” *Harvard Human Rights Journal* 3, (1990): 13; Abdullahi An-Na’im, “State Responsibility Under International Human Rights Law to Change Religious and Customary Law,” in *Human Rights of Women: National and International Perspectives*, ed. Rebecca Cook (Philadelphia: University of Pennsylvania Press, 1994).

98. Michael Ignatieff, “Is the Human Rights Era Ending?” *New York Times*, February 5, 2002; Rosemary Foot, “Is the Human Rights Era Over? Reflections on the Asia-Pacific Post-September 11th,” *Pacific Rim Report* 23 (January 2003), http://usf.usfca.edu/pac_rim/new/research/pacrimreport/pacrimreport26.html#n1.

99. Ignatieff, “Is the Human Rights Ending?”

100. International Council on Human Rights Policy, *Human Rights After September 11* (Geneva: ICHRP, 2002).

101. Michael John Garcia, “Renditions: Constraints Imposed by Laws on Torture,” *Congressional Research Service*, last modified September 8, 2009, <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>.

102. Daphne Eviatar, “Torture Cases Tests Obama Secret Policy: Will Obama Administration Break with Bush on Extraordinary Rendition?” *Washington Independent*, last modified January 26, 2009, <http://www.webcitation.org/query?url=http%3A%2F%2Fwashingtonindependent.com%2F27199%2Ftorture-case-poses-early-state-secret-test&date=2009-11-05>.

103. Council of Europe (European Parliament), “Alleged Secret Detentions and Unlawful inter-State Transfers of Detainees Involving Council of Europe Members,” Resolution 1507 (2006), available at s.

104. Barack Obama, “Ensuring Lawful Interrogations,” Executive Order 13491, January 22, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf> (accessed February 28, 2013).

105. George W. Bush, “Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency,” Executive Order 13, 440, July 20, 2007, <http://www.gpo.gov/fdsys/pkg/FR-2007-07-24/pdf/07-3656.pdf> (accessed February 28, 2013).

106. David P. Forsythe, “United States Policy toward Enemy Detainees in the ‘War Against Terrorism,’” *Human Rights Quarterly* 28 (2006); Kenneth Roth and Minky Worden, eds., *Torture: A Human Rights Perspective* (Oxford: The New Press, 2005).

107. David Westbrook and Amy Berquist, “Extraordinary Rendition: A Human Rights Analysis,” *Human Rights Journal* 19 (2006): 123.

108. Council of Europe, *European Convention on the Suppression of Terrorism*, Strasbourg, November 10, 1976, entered into force on August 4, 1978. 15 INT. L. MAT. 1272 (1976); UN General Assembly, *International Convention against the Taking of Hostages*, U.N.G.A. Res. 34/146 (XXXIV), 34 UN GAOR, Supp. (No. 46) 245, UN Doc. A/34/786 (1979), reprinted in *International Legal Matters* 18 (1979): 1456.

109. UN Commission on Human Rights, “Resolution 2005/80 [Protection of Human Rights and Fundamental Freedoms While Countering Terrorism],” E/CN.4/RES/2005/80 (2005).

110. Bertrand Ramcharan (Deputy High Commissioner for Human Rights, Geneva) in discussion with the author, November 4, 2002.

111. Makau Mutua, “Critical Race Theory and International Law: The View of an Insider-Outsider,” *Villanova Law Review* 45 (2000): 841–53.

112. Mutua, “What is TWAAIL?”: 31–39.

113. Clifford Bob, ed., *The International Struggle for Human Rights* (Philadelphia: University of Pennsylvania Press, 2008).

CHAPTER SEVEN. A NORMATIVE CRITIQUE OF HUMAN RIGHTS

1. Mike Dolan, “Sanctions Hurt Russia, but Still Far from Changing Minds,” *Reuters*, February 4, 2015, <http://in.reuters.com/article/2015/02/04/us-investment-russia-sanctions-analysis-idINKBN0L80W720150204w> (accessed February 4, 2015).

2. Walter Rodney, *Europe Underdeveloped Africa* (Washington DC: Howard University Press, 1981); Fernando Henrique Cardoso and Faletto Enzo, *Dependency and Development in Latin America*, trans. Marjory Mattingly Urquidi (Los Angeles: University of California Press, 1979). Dependency theory posits that wealth and resources from the periphery (the global South) are exploited to benefit the global North, thereby impoverishing the former to enrich the latter.

3. Boaventura Santos, *Voices of the World (Reinventing Social Emancipation: Towards New Manifestos)* (New York: Verso, 2010); Boaventura Santos, *The Rise of the Global Left: The World Social Forum and Beyond* (London: Zed Books, 2006); Boaventura Santos and Cesar Rodriguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (New York: Cambridge University Press, 2005);

Boaventura Santos, ed., *Another Knowledge Is Possible: Beyond Northern Epistemologies (Reinventing Social Emancipations: Towards New Manifestos)* (New York: Verso, 2008).

4. Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), ix.

5. *Ibid.*

6. *Ibid.*

7. Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005).

8. UDHR.

9. Glendon, *A World Made New*, 73–78.

10. *Ibid.*, 76; See also Morsink, *The Universal Declaration of Human Rights*.

11. ICESCR.

12. This is a term I coin to refer to the state whose political, economic, and social norms and structures are designed to eliminate, to a large extent, glaring manifestations of poverty, exclusion, and privation. Usually, this is done through social security and other economic safety nets that prevent extreme forms of powerlessness.

13. Another term that I invent to capture the less generous welfare state in which government is more reticent to support social programs for despised or marginalized groups.

14. Jack Donnelly, “Human Rights and Western Liberalism,” in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi A. An-Na’im and Francis M. Deng (Washington, DC: Brookings Institution, 1990), 31; Virginia Leary, “The Effect of Western Perspectives on International Human Rights,” in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi A. An-Na’im and Francis M. Deng (Washington, DC: Brookings Institution, 1990), 15.

15. Mary Ann Glendon, “The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea,” *Harvard Human Rights Journal* 16 (2003): 27.

16. Antonio Cassese, “The General Assembly: Historical Perspective 1945–1989,” in *The United Nations and Human Rights: A Critical Appraisal* 25, ed. Philip Alston (Oxford: Clarendon Press, 1992), 31.

17. UDHR, Article 29(2). Article 29 (2) of the UDHR provides that “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

18. Article 21 of the ICCPR states that “[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

19. John Locke, *Two Treatises of Government*, 2nd ed., ed. Peter Laslett (Cambridge: Cambridge University Press, 1967).

20. Steiner and Alston, *International Human Rights in Context*, 990.

21. Locke, *Two Treatises of Government*; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1965), 248; Donnelly, "Human Rights and Western Liberalism," 33–38.

22. Mutua, "The Ideology of Human Rights": 589, 601.

23. Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, 3rd ed. (London: Routledge, 1950); Huntington, *The Third Wave*.

24. Huntington, *The Third Wave*, 7.

25. *Ibid.*

26. *Ibid.*

27. *Ibid.*, 9.

28. Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Yearbook* 1 (1988): 77, 109.

29. *Ibid.*, 109–10.

30. *Ibid.*, 85–94.

31. Steiner and Alston, *International Human Rights in Context*, 990.

32. William P. Alford, "Exporting the 'Pursuit of Happiness,'" *Harvard Law Review* 113 (2000): 1677. Alford's article is a review of Thomas Carothers's *Aiding Democracy Abroad: The Learning Curve*.

33. Both have written extensively, but see Luis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2013).

34. David Kennedy, "The International Human Rights Movement: Part of the Problem," *Harvard Human Rights Law Journal* 15 (2002), 114.

35. *Ibid.*

36. *Ibid.*

37. *Ibid.*, 125.

38. Mutua, "Savages, Victims, and Saviors": 201.

39. The conference was the basis for an edited collection of essays on human rights. See Samantha Power and Graham Allison, eds., *Realizing Human Rights: Moving from Inspiration to Impact* (London: Palgrave MacMillan, 2000).

40. James Thuo Gathii, "International Law and Eurocentricity," *European Journal of International Law* 9 (1998): 184; Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40, no. 1 (1999): 51; Jeremy Levitt, *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (New York: Cambridge University Press, 2012).

41. Ian Martin, *The New World Order: Opportunity or Threat for Human Rights* (Cambridge: Harvard Law School Human Rights Program, 1993), 21.

42. *Ibid.*

43. *Ibid.*, 21–22.

44. Henkin, *The Age of Rights*, 7.

45. Henry J. Steiner, "The Youth of Rights," *Harvard Law Review* 104 (1991): 930–31.

46. Karl Klare, "Legal Theory and Democratic Reconstruction," *University of British Columbia Law Review* 25 (1991): 97.

47. David Beetham, "What Future for Economic and Social Rights?," *Political Studies* 43 (1995): 41.
48. For the National Economic and Social Rights Initiative, see <http://www.nesri.org/>.
49. For the Center for Economic and Social Rights, see <http://www.cesr.org/>.
50. UDHR, Preamble.
51. *Ibid.*, arts. 23–25.
52. Thomas Carothers, "Democracy and Human Rights: Policy Allies or Rivals?" *Washington Quarterly* 17 (1994): 109.
53. An-Na'im, *Human Rights in Cross-Cultural Perspectives*.
54. Huntington, *The Third Wave*.
55. Eric Posner, "The Human Rights Charade," *Chronicle of Higher Education*, November 17, 2014, <http://chronicle.com/article/Peace-LoveGrandstanding/149961/>.
56. Sital Kalantri, "Eric Posner Has a Narrow Understanding of Human Rights Clinics," *Chronicle of Higher Education*, November 24, 2014, <http://chronicle.com/blogs/conversation/2014/11/24/eric-posner-doesnt-understand-human-rights/>.
57. Boaventura Santos, ed., *Another Knowledge Is Possible: Beyond Northern Epistemologies (Reinventing Social Emancipations: Towards New Manifestos)* (London: Verso, 2008).

BIBLIOGRAPHY

- Abi-Saab, Georges. "The Legal Formulation of the Right to Development." In *The Right to Development at the International Level*. The Hague: Academy of International Law, 1980.
- "About ESCR-Net." *ESCR-Net*. Accessed February 1, 2013. <http://www.escr-net.org/about>.
- "About Us." *Center for Economic and Social Rights*. Accessed February 1, 2013. <http://www.cesr.org/article.php?list=type&type=3>.
- "About Us." *International Service for Human Rights (ISHR)*. Accessed January 29, 2015. <http://www.ishr.ch/about-us>.
- "Act for the Abolition of Slavery throughout the British Colonies (1833)." *William Loney RN Background: West African Trade Legislation*. Accessed February 1, 2013. http://www.pdavis.nl/Legis_07.htm.
- African Union. *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Special Summit of the Union*. Accessed January 28, 2015. [http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_\(KAMPALA_CONVENTION\).pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf).
- Agence France Presse. "UN Torture Prevention Plan Adopted Despite US Opposition." Last modified July 25, 2002. <http://www.unitedstatesgovernment.net/UNTorturePreventionPlanAdoptedDespiteUSOpposition.htm>.
- Agencies. "Hinduism Does not Condemn Gay People: UK Hindu Council." *Indian Express*, last modified July 3, 2009. <http://indianexpress.com/article/news-archive/print/hinduism-does-not-condemn-gay-people-uk-hindu-council/>.
- Alford, William P. "Exporting the "Pursuit of Happiness." *Harvard Law Review* 113 (2000): 1677.
- Alston, Philip. "The Fortieth Anniversary of the Universal Declaration of Human Rights." In *Human Rights in a Pluralist World: Individuals and Collectivities*, edited by J. Berting et al. Westport: Meckler, 1990.
- , and Gerald Quinn. "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" *Human Rights Quarterly* 9 (1987): 156.
- Alvarez, Jose E. "The Once and the Future Security Council." *The Washington Quarterly* 18, no. 2 (Spring 1995): 3.

- American Anthropological Association. "Statement on Human Rights." *American Anthropologist* 49, no. 4 (1947): 539.
- Americans with Disabilities Act of 1990. Public Law 101-336. 108th Congress, 2nd session, July 26, 1990.
- Amnesty International. *Amnesty International Report 2008: The State of the World's Human Rights*.
- . *Annual Report 1998*. London: Amnesty International, 1999. Accessed on December 28, 2013. <http://amnesty.org/en/library/asset/POL10/001/1998/en/c32b001d-e822-11dd-9deb-2b812946e43c/pol100011998en.pdf>.
- . *Failures at Fifty: Impunity for Torture and Ill-Treatment in Europe on the 50th Anniversary of the European Convention on Human Rights*. London: Amnesty International, 2000.
- . *Report On Torture*. New York: Farrar, Straus and Giroux, 1975.
- Anderson, Kenneth. "The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society." *European Journal of International Law* 11, no. 1 (2000): 92.
- Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press, 2005.
- . "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law." *Harvard International Law Journal* 40, no. 1 (1999): 51.
- . "Francisco de Vitoria and the Colonial Origins of International Law." *Social and Legal Studies* 5, no. 4 (1996): 321.
- An-Na'im, Abdullahi Ahmed. *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. Philadelphia: University of Pennsylvania Press, 1992.
- . "Human Rights in the Muslim World," *Harvard Human Rights Journal* 3, (1990): 13.
- . "NATO on Kosovo Is Bad for Human Rights." *Netherlands Quarterly of Human Rights* 17 (1999): 229.
- . "State Responsibility under International Human Rights Law to Change Religious and Customary Law." In *Human Rights of Women: National and International Perspectives*, edited by Rebecca Cook. Philadelphia: University of Pennsylvania Press, 1994.
- Aron, Leon. "Everything You Think You Know about the Collapse of the Soviet Union Is Wrong." *Foreign Policy*, June 20, 2011. Accessed January 27, 2015. <http://foreignpolicy.com/2011/06/20/everything-you-think-you-know-about-the-collapse-of-the-soviet-union-is-wrong/>.
- "Australia Backs Indigenous Rights." BBC News. Last modified April 3, 2009. <http://news.bbc.co.uk/2/hi/asia-pacific/7980537.stm>.
- Baehr, Peter. "Amnesty International and Its Self-Imposed Limited Mandate." *Netherlands Quarterly of Human Rights* 12 (1994): 5.
- Barnes, Robert. "As Gay Marriage Begins in Florida, Supreme Court Is Set to Meet on the Issue." *Washington Post*, January 5, 2015. http://www.washingtonpost.com/politics/courts_law/as-gay-marriages-begin-in-florida-supreme-court-is-set-to-meet-on-issue/2015/01/05/ee0edaf8-9513-11e4-aabd-d0b93ff613d5_story.html.

- Battle, Michael. *Ubuntu: I in You and You in Me*. New York: Seabury Books, 2009.
- Bearak, Barry. "Gay Couple, Arrested After Engagement Ceremony, Are Convicted of Indecency in Malawi," *New York Times*, May 19, 2010.
- Bentham, David. "What Future for Economic and Social Rights?" *Political Studies* 43 (1995): 41.
- Bedjaoui, Mohamed. "Poverty of the International Order." In *International Law: A Contemporary Perspective*, edited by Richard Falk et al., 152–63. Boulder: Westview, 1985.
- Bharihoke, Neera, ed. *Human Rights and the Law*. New Delhi: Serials Publications, 2009.
- Bilefsky, Dan, and Mark Landler. "As U.N. Backs Military Action in Libya, U.S. Role Is Unclear." *New York Times*, A1, last modified March 17, 2011. http://www.nytimes.com/2011/03/18/world/africa/18nations.html?pagewanted=all&_r=0.
- "Board of Directors." *Social and Economic Action Rights Center*. Accessed February 1, 2013. <http://www.serac.org/Pages.asp?id=357>.
- Bob, Clifford, ed. *The International Struggle for Human Rights*. Philadelphia: University of Pennsylvania Press, 2008.
- Bohan, Caren. "Obama Backs U.N. Indigenous Rights Declaration." *Reuters*, December 16, 2010. <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216>.
- Bossuyt, Marc. *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*. Dordrecht: Kluwer Academic Publishers, 1987.
- Boven, Theo van. "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy." *California Western International Law Journal* 20, no. 2, (1989): 207.
- . "The Role of Non-Governmental Organizations in International Human Rights Standard Setting: A Prerequisite for Democracy." In *Human Rights from Exclusion to Inclusion: Principles and Practices—An Anthology from the Work of Theo Van Boven*, edited by Fons Coomans, Cees Flinterman, Fred Grünfeld, Ingrid Westendorp, and Jan Willems. The Hague: Kluwer Law International, 2000.
- . "United Nations Policies and Strategies: Global Perspectives?" In *Human Rights: Thirty Years after the Universal Declaration*, edited by B. G. Ramcharan, 91. The Hague: Martinus Nijhoff, 1979.
- Brett, Rachel. "Non-Governmental Actors in the Field of Human Rights." In *An Introduction to the International Protection of Human Rights*, edited by Raija Hanski and Markku Suski. Abo: Abo Akademi University, Institute for Human Rights, 1997.
- Buergenthal, Thomas, Dinah Shelton, and David Stewart. *International Human Rights in a Nutshell*, 3d ed. St. Paul: West, 2002.
- Buhmann, Karin. "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalizing New Forms of Law and Law-making Approaches." *Nordic Journal of International Law* 78, no. 1 (2009): 1–52.
- Bush, George W. "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central

- Intelligence Agency." Executive Order 13, 440, July 20, 2007. Accessed February 28, 2013. <http://www.gpo.gov/fdsys/pkg/FR-2007-07-24/pdf/07-3656.pdf>.
- Bustelo, Mara. "The Committee on the Elimination of Discrimination against Women at the Crossroads." In *The Future of Human Rights Treaty Monitoring*, edited by Alston and Crawford. Cambridge: Cambridge University Press, 2000.
- Calmes, Jackie, and Peter Baker. "Obama Says Same-Sex Marriage Should Be Legal." *New York Times*, May 9, 2012.
- Cantwell, Nigel. "The Origins, Development, and Significance of the United Nations Convention on the Rights of the Child." In *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, edited by S. Detrick, 19. Dordrecht: Kluwer Academic Publishers, 1992.
- Cardoso, Fernando Henrique, and Faletto Enzo. *Dependency and Development in Latin America*. Translated by Marjory Mattingly Urquidi. Los Angeles: University of California Press, 1979.
- Carmen-Guevas, Emma. (Office of the High Commissioner for Human Rights, Geneva). In discussion with the author, December 6, 2002.
- Carothers, Thomas. "Democracy and Human Rights: Policy Allies or Rivals?" *Washington Quarterly* 17 (1994): 109.
- Casla, Koldo. "Impact Assessment of Non-Governmental Organizations on Economic, Social, and Cultural Rights." *Human Rights Impact Resource Centre* (May 2010): 2.
- Cassese, Antonio. "The General Assembly: Historical Perspective 1945–1989." In *The United Nations and Human Rights: A Critical Appraisal* 25, edited by Philip Alston, 31. Oxford: Clarendon Press, 1992.
- Charlesworth, Hilary, and Christine Chinkin. "The Gender of Jus Cogens." *Human Rights Quarterly* 15 (1993): 63.
- Chinkin, Christine. "Human Rights and the Politics of Representation: Is There a Role for International Law?" In *The Role of Law in International Politics: Essays in International Law and International Relations*, edited by Michael Byers. Oxford: Oxford University Press, 2001.
- "Chronology of the International Criminal Court." *International Criminal Court*. Accessed January 30, 2013. <http://www.icccpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm>.
- Cohen, Ronald. "Endless Teardrops: Prolegomena to the Study of Human Rights in Africa." In *Human Rights and Governance in Africa*, edited by Ronald Cohen, Winston P. Nagan, and Goran S. Hyden, 3–4. Gainesville: University Press of Florida, 1993.
- Connor, Tacy. "'Who Am I to Judge?' the Pope's Most Powerful Phrase in 2013." *NBC News*, last modified December 22, 2013, http://worldnews.nbcnews.com/_news/2013/12/22/21984495-who-am-i-to-judge-the-popes-most-powerful-phrase-in-2013.
- Constitutional Court. *Constitution of the Republic of South Africa*, Art. 9(3), 1996.
- Cosentino, Gina. "It's Time to Reconcile Indigenous Rights and Democracy in Canada." *The Hill Times Online*. Last modified December 6, 2010. <http://www.hilltimes.com/opinion-piece/opinion/2010/12/06/its-time-to-reconcile-indigenous-rights-and-democracy-in-canada/25119>.

- Council of Europe. *European Convention on the Suppression of Terrorism*. Strasbourg, November 10, 1976, entered into force on August 4, 1978. 15 INT. L. MAT. 1272, 1976.
- Council of Europe (European Parliament). "Alleged Secret Detentions and Unlawful inter-State Transfers of Detainees Involving Council of Europe Members." Resolution 1507 (2006), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1507.htm>.
- Cowell, Alan. "Uganda Lawmakers Pass Measure imposing Harsh Penalties on Gays." *New York Times*, December 20, 2013. <http://www.nytimes.com/2013/12/21/world/africa/ugandan-parliament-approves-antigay-law.html>.
- Cox, Larry. "Reflections on Human Rights at Century's End." *Human Rights Dialogue* (Winter 2000).
- Crawford, James. "The Criteria for Statehood in International Law." *British Yearbook of International Law* 48, no. 1 (1976): 93–98.
- Crosette, Barbara. "A Dispute on U.N. Post for Women." *New York Times*, Sept. 26, 1995.
- . "Rights Leaders Urge Powell to Attend U.N. Racism Conference." *New York Times*, July 11, 2001.
- Dahl, Robert. *A Preface to Democratic Theory*. Chicago: University of Chicago Press, 1956.
- "Data on Human Rights Treaties." *UN Treaty Collection*. Accessed on February 22, 2013. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en.
- Davidson, Clarissa Start. *God's Man: The Story of Pastor Niemoeller*. Greenwood Press, 1979.
- "Demand Dignity." *Amnesty International*. Accessed February 26, 2013. <https://campaigns.amnesty.org/campaigns/demand-dignity>.
- Deng, Francis Mading, and United Nations. *Internally Displaced Persons: Compilation and Analysis of Legal Norms*. New York: United Nations, 1998.
- . *Compilation and Analysis of Legal Norms*. Report of the Representative of the Secretary General. Submitted pursuant to Commission on Human Rights Resolution 1995/57, UN Doc. E/CN.4/1996/52/Add.2. December 5, 1995.
- . "The Global Challenge of Internal Displacement," *Washington University Journal of Law and Policy* 5 (2001): 141–47.
- "Disability Buzz." *Disability World*, 10, no. 1 (2001). doi: http://disabilityworld.org/09-10_01/buzz.shtml.
- Dolan, Mike. "Sanctions Hurt Russia, but Still far from Changing Minds." *Reuters*. February 4, 2015. Accessed February 4, 2015. <http://in.reuters.com/article/2015/02/04/us-investment-russia-sanctions-analysis-idINKBN0L80W720150204w>.
- Donnelly, Jack. "Human Rights and Western Liberalism." In *Human Rights in Africa: Cross-Cultural Perspectives*, edited by Abdullahi A. An-Na'im and Francis M. Deng. Washington, DC: Brookings Institution, 1990.
- . *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 2013.

- Ellis, Jaye. "Shades of Grey: Soft Law and the Validity of Public International Law." *Leiden Journal of International Law* 25, no. 2 (2012): 313.
- "Ethiopian Parliament Adopts Repressive New NGO Law." *Amnesty International*. Last modified January 8, 2009. Accessed February 3, 2015. <http://www.amnesty.org/en/news-and-updates/news/ethiopian-parliament-adopts-repressive-new-ngo-law-20090108>.
- "European States Accused of Torture." *BBC News*, April 6, 2000. <http://news.bbc.co.uk/2/hi/europe/703670.stm>.
- European Union. *Charter of the Fundamental Rights of the European Union*. art. 21 (1), Official Journal of the European Communities, (OJ C 364/01) (2000).
- . *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. E. T. S. 126, entered into force on February 1, 1989.
- Evans, Malcolm, and Rod Morgan. *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Oxford: Clarendon Press, 1998.
- Eviatar, Daphne. "Torture Cases Test Obama Secret Policy: Will Obama Administration Break with Bush on Extraordinary Rendition?" *Washington Independent*, last modified January 26, 2009. <http://www.webcitation.org/query?url=http%3A%2F%2Fwashingtonindependent.com%2F27199%2Ftorture-case-poses-early-state-secret-test&date=2009-11-05>.
- Fault Lines of International Legitimacy*, Edited by Hilary Charlesworth and Jean-Marc Coicaud. New York: Cambridge University Press, 2010.
- Faupel, John. *African Holocaust: The Story of the Ugandan Martyrs*. New York: P. J. Kennedy, 1962.
- Foot, Rosemary. "Is the Human Rights Era Over? Reflections on the Asia-Pacific Post-September 11th," *Pacific Rim Report* 23, January 2003. http://usf.usfca.edu/pac_rim/new/research/pacrimreport/pacrimreport26.html#n1.
- "Ford Foundation Staff Member Willy Mutunga Appointed Chief Justice of Kenya." Press Release, *PR Newswire*, last modified June 15, 2011. <http://www.reuters.com/article/2011/06/15/idUS213540+15-Jun-2011+PRN20110615>.
- Forsythe, David P. "United States Policy Toward Enemy Detainees in the 'War Against Terrorism.'" *Human Rights Quarterly* 28 (2006).
- Friedman, A., E. Clark, and K. Hochstetler. "The Sovereign Limits of Global Society." *World Politics* 51 (1998): 15.
- Garcia, Michael John. "Renditions: Constraints Imposed by Laws on Torture." *Congressional Research Service*. Last modified September 8, 2009. <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>.
- Gathii, James Thuo. "International Law and Eurocentricity." *European Journal of International Law* 9 (1998): 184.
- Gatiti, Rev. Father James. "I Differ with Don on Gay Rights," *Sunday Nation* (Nairobi, Kenya), October 31, 2009.
- General Assembly of the OAS. "Resolution AG/RES.1818 (XXXI-O/01) [Human Rights Defenders in the Americas: Support for the Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas]." AG/RES.1818 (XXXI-O/01). June 5, 2001.

- Geneva Committee. *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Convention of 1864)*, art. 6(1). Geneva: Swiss Federal Council, 1864.
- Gerber, Paula. "Prevention is Better than Cure: The UN and Human Rights Education." *The Geneva Academy of International Humanitarian Law and Human Rights*, October 2009. Accessed January 29, 2015. http://www.academia.edu/200434/Prevention_is_Better_than_Cure_The_UN_and_Human_Rights_Education.
- . "Prevention Is Better than Cure When It Comes to Human Rights." *ElgarBlog*, September 14, 2012. Accessed January 29, 2015. <https://elgarblog.wordpress.com/2012/09/14/prevention-is-better-than-cure-when-it-comes-to-human-rights-by-paula-gerber/>.
- Gettleman, Jeffrey. "Uganda Anti-Gay Law Struck down by Court." *New York Times*, August 1, 2014. Accessed February 4, 2015. http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html?_r=0.
- , and Josh Kron. "In Uganda, Unrest Gains Little Ground." *New York Times*, last modified February 17, 2011. http://www.nytimes.com/2011/02/18/world/africa/18uganda.html?_r=0.
- Ghai, Yash. "Human Rights and Governance: The Asia Debate." *Australian Yearbook of International Law* 15 (1994): 1.
- Gilley, Brian Joseph. *Becoming Two-Spirit: Gay Identity and Social Acceptance in Indian Country*. Lincoln: University of Nebraska Press, 2006.
- Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2001.
- . "Knowing the Universal Declaration of Human Rights." *Notre Dame Law Review* 73 (1998): 1153.
- . *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press, 1993.
- . "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea." *Harvard Human Rights Journal* 16 (2003): 2.
- Goldman, Robert K. "Codification of International Rules on Internally Displaced Persons." *International Review of the Red Cross* 324 (September 1998): 463–66.
- Goldmann Matthias. "We Need to Cut off the Head of the King: Past, Present, and Future Approaches to International Soft Law." *Leiden Journal of International Law* 25 (2012): 335.
- Graupner, Helmut, and Phillip Tahmindjis, *Sexuality and Human Rights: A Global Overview*. Binghamton: Taylor and Francis, 2005.
- "Guiding Principles on Internal Displacement." *International Review of the Red Cross* 324 (September 1998): 467–80.
- Gunning, Isabelle. "Arrogant Perception, World Travelling, and Multicultural Feminism: The Case of Female Genital Surgeries." *Columbia Human Rights Law Review* 23 (Summer 1992): 189.
- Haas, Ernest. *When Knowledge Is Power: Three Models of Change in International Organizations*. Berkeley: University of California Press, 1990.
- Henkin, Louis. *The Age of Rights*. New York: Columbia University Press, 1990.

- "History of the CLO." *Civil Liberties Organization of Nigeria*. Accessed December 27, 2013. http://clonigeria.org/index.php?option=com_content&view=article&id=47&Itemid=54.
- Hoge Jr., James F. "A Global Power Shift in the Making." *Foreign Affairs* (July/August 2004). Accessed December 27, 2013. <http://www.foreignaffairs.com/articles/59910/james-f-hoge-jr/a-global-power-shift-in-the-making>.
- Holmes, Stephen, and Cass Sunstein. *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W. W. Norton, 2000.
- Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, Views of the Committee, UN Doc. CCPR/C/50/D/488/1992, 1994.
- "Human Rights Defenders: FAQ." *Amnesty International*. Accessed January 31, 2013. <https://amnesty.org/en/human-rights-defenders/faq>.
- Human Rights Watch. *Human Rights Watch World Report 2000*. New York: Human Rights Watch, 2000.
- "Human Rights Watch Board of Directors." *Human Rights Watch*. Accessed February 1, 2013. <http://www.hrw.org/en/node/76172>.
- Huntington, Samuel. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press, 1991.
- Ignatieff, Michael. "Is the Human Rights Ending?" *New York Times*, February 5, 2002. ———. *Whose Universal Values? The Crisis in Human Rights*. The Hague: Premium Erasmianum Essay, 1999.
- Inal, Tuba. *Looting and Rape Wartime: Law and Change in International Relations*. Philadelphia: University of Pennsylvania Press, 2013.
- "Indigenous Rights Outlined by UN." *BBC News*. Last modified September 13, 2007. http://news.bbc.co.uk/2/hi/in_depth/6993776.stm.
- Internal Displacement Monitoring Centre. *Estimates of IDPs*. Accessed January 28, 2015. <http://www.internal-displacement.org/>.
- International Council on Human Rights Policy. *Human Rights after September 11*. Geneva: ICHRP, 2002.
- International Court of Justice. "Advisory Opinion [Reservations to The Convention on the Prevention and Punishment of the Crime of Genocide]." 1951 I.C.J. 15 (1951).
- International Labor Organization (ILO), "Convention 106 [Weekly Rest (Commerce and Offices) Convention]," Geneva, 40th ILC session (26 Jun 1957); ILO, "Convention 169 [Indigenous and Tribal Peoples Convention]," Geneva, 76th ILC session (June 27, 1989).
- "Intervention of the Observatory on the Situation of Human Rights Defenders before the African Commission on Human and Peoples' Rights." *World Organisation Against Torture*. Accessed on January 31, 2013. <http://www.omct.org/human-rights-defenders/events/2002/10/d16021/>.
- Jones, Gareth, and Gabriela Baczynska. "Special Report: Solidarity in the Arab Spring." *Reuters*. Last modified Jun 16, 2011. <http://www.reuters.com/article/2011/06/16/us-arabspring-east-idUSTRE75F2EW20110616>.
- Joselow, Gabe. "Gay Rights in Africa Move Slowly, Cautiously Forward." *Voice of America*. Last modified March 28, 2013, http://www.voanews.com/content/gay_rights_in_africa_moving_slowly_cautiously_forward/1630496.html.

- Kaba, Sidiki, and Eric Sottas. "To Defend Human Rights: A High Risk." *The Perspective*, March 25, 2002. Accessed January 31, 2013, <http://www.theperspective.org/highrisk.html>.
- Kalantry, Sital. "Eric Posner Has a Narrow Understanding of Human Rights Clinics." *Chronicle of Higher Education*. Accessed November 24, 2014. <http://chronicle.com/blogs/conversation/2014/11/24/eric-posner-doesnt-understand-human-rights/>.
- Kälin, Walter. "How Hard Is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework." In *Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement*, edited by Francis Deng and Roberta Cohen, 1–3. New York: The Brookings-CUNY Project on Internal Displacement, 2002.
- Kariuki, Anthony. "Kenya Gets New Chief Justice." *Daily Nation*. Last modified June 16, 2011. <http://www.nation.co.ke/News/politics/Kenya+gets+new+Chief+Justice/-/1064/1183714/-/tp72xsz/-/index.html>.
- Kausikan, Bilahari. "Asia's Different Standard." *Foreign Policy* 92 (1993): 24.
- Keller, Helen, Geir Ulfstein, and Leena Grover. *UN Human Rights Bodies: Law and Legitimacy*. Cambridge University Press, 2012.
- Kelly, Annie. "How Can We Achieve Development Goals If We Ignore Human Rights?" *The Guardian*, February 28, 2011. Accessed December 28, 2013. <http://www.guardian.co.uk/global-development/poverty-matters/2011/feb/28/shetty-amnesty-human-rights-development>.
- Kennedy, David. "The International Human Rights Movement: Part of the Problem." *Harvard Human Rights Law Journal* 15 (2002): 114.
- Khan, Irene. *The Unheard Truth: Poverty and Human Rights*. New York: W. W. Norton, 2009.
- Ki-moon, Ban. "Secretary-General's Remarks on the Occasion of the Entry into Force of the Convention on the Rights of Persons with Disabilities." *United Nations Enable*. Last modified May 12, 2008. <http://www.un.org/disabilities/default.asp?id=562>.
- Klare, Karl. "Legal Theory and Democratic Reconstruction." *University of British Columbia Law Review* 25 (1991): 97.
- Kochenov, Dimitry. "On Options of Citizens and Moral Choices of States: Gays in the European Union." *Fordham International Law Journal* 33 (2009): 156.
- Koerner, Brendan. "Is Torture Against the Law: What Uncle Sam Has to Say about It." *Slate*. Last modified May 13, 2003. http://www.slate.com/articles/news_and_politics/explainer/2004/05/is_torture_against_the_law.html.
- Kokott, Juliane. "States, Sovereign Equality." In the *Max Planck Encyclopedia of Public International Law*. Accessed December 27, 2013. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113?rskey=TZR17I&result=5&prd=EPIL>.
- Krauthammer, Charles. "The Curse of Legalism: International Law? It's Purely Advisory." *The New Republic*, Nov. 6, 1989, 44–50.
- Kron, Josh. "Antigay Bill in Uganda Is Shelved in Parliament." *New York Times*, May 13, 2011.
- . "Uganda Panel Gives Setback to Antigay Bill," *New York Times*, May 8, 2010.

- Krut, Riva, et al. *Globalization and Civil Society NGO Influence in International Decision-Making*. UNRISD, Discussion Paper 83 (April 1997), 1–15.
- Lansdown, Gerison. "The Reporting Process under the Convention on the Rights of the Child." In *The Future of Human Rights Treaty Monitoring*, edited by Philip Alston and James Crawford. Cambridge: Cambridge University Press, 2000.
- Lavoyer, Jean-Philippe. "Forced Displacement: The Relevance of International Humanitarian Law." In *Human Rights and Forced Displacement*, edited by Anne F. Bayefsky and Joan Fitzpatrick, 50–65. The Hague: Kluwer International Law, 2000.
- League of Nations. *The Covenant of the League of Nations: (Amendments in Process of Ratification)*, article 22. Geneva: Information Section, League of Nations Secretariat, 1924.
- Leary, Virginia. "A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Development of International Norms on Torture." In *UN Law Fundamental Rights: Two Topics in International Law*, edited by Antonio Cassese, 197–210. Dordrecht: Kluwer Academic Publishers, 1979.
- . "The Effect of Western Perspectives on International Human Rights." In *Human Rights in Africa: Cross-Cultural Perspectives*, edited by Abdullahi A. An-Na'im and Francis M. Deng, 15. Washington, DC: Brookings Institution, 1990.
- Lederer, Edith M. "South Sudan Joins UN as 193rd Member." *Huffington Post*, July 14, 2011. http://www.huffingtonpost.com/2011/07/14/south-sudan-United-nations_n_898460.html.
- "Legal Instruments," African Commission on Human and Peoples' Rights. Accessed February 28, 2013. <http://www.achpr.org/instruments/>.
- Levitt, Jeremy. *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta*. New York: Cambridge University Press, 2012.
- Lewis, Hope. "Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide." *Harvard Human Rights Journal* 8 (1995): 1.
- Lewis, Neil. "U.S. Rejects All Support for a New Court on Atrocities." *New York Times*, May 7, 2002.
- Lindqvist, Bengt. All Means All. Keynote speech by UN Special Rapporteur on Disability, Osaka Forum, Japan, October 2002.
- Liptak, Adam. "Supreme Court Bolsters Gay Marriage with Two Major Rulings." *New York Times*, June 26, 2013. Accessed December 28, 2013. http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?_r=0.
- Locke, John. *Two Treatises of Government*. 2nd ed. Edited by Peter Laslett. Cambridge: Cambridge University Press, 1967.
- . *Two Treatises of Government*. Cambridge: Cambridge University Press, 1988.
- Martin, Ian. *The New World Order: Opportunity or Threat for Human Rights*. Cambridge: Harvard Law School Human Rights Program, 1993.
- McGoldrick, Dominic. *The Human Rights Committee*. Oxford: Oxford University Press, 1991.
- Mertus, Julie. *Human Rights Matters*. Stanford: Stanford University Press, 2009.

- . “The Rejection of Human Rights Framings: The Case of LGBTI Advocacy in the US.” *Human Rights Quarterly* 29, no. 4 (2007): 1036.
- Minchev, Ognyan. “Modernization: The Forgotten Strategy of Social Transformation: Post-Communist Lessons for the Arab Revolutions.” Policy Brief, *The German Marshall Fund of the United States*. Last modified August 1, 2011. <http://www.gmfus.org/archives/modernization-the-forgotten-strategy-of-social-transformation/>.
- Minister of Home Affairs and Another v. Fourie and Another, South African Constitutional Court (CCT) 60/04 (2005). Accessed February 20, 2013. <http://www.saflii.org/za/cases/ZACC/2005/19.html>.
- “Monitoring the Core International Human Rights Treaties.” *UN Human Rights: Office of the High Commissioner on Human Rights*. Accessed March 1, 2013. <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.
- Moravcsik, Andrew. “Why Is U.S. Human Rights Policy So Unilateralist?” In *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, edited by Stewart Patrick and Shepard Forman. 345. Boulder: Lynne Rienner, 2001.
- Morgan, Wayne. “Identifying Evil for What It Is: Tasmania, Sexual Perversity, and the United Nations.” *Melbourne University Law Review* 19 (1994): 740.
- Morsink, Johannes. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Philadelphia: University of Pennsylvania Press, 2000.
- Moyn, Samuel. *The Last Utopia*. Cambridge: Harvard University Press, 2010.
- . *Human Rights and the Uses of History*. Verso, 2014.
- Mullerson, Rein. “New Thinking by Soviet Scholars; Sources of International Law: New Tendencies in Soviet Thinking.” *American Journal of International Law* 83, no. 3 (July 1989): 494–512.
- Mutua, Makau. “Critical Race Theory and International Law: The View of an Insider-Outsider,” *Villanova Law Review* 45 (2000): 841–53.
- . *Human Rights: A Political and Cultural Critique*. Philadelphia: University of Pennsylvania Press, 2002.
- . “It Is Nonsense to Assert That Being Gay is Un-African,” *Sunday Nation* (Nairobi, Kenya), November 1, 2009.
- . *Kenya’s Quest for Democracy: Taming Leviathan*. Boulder: Lynne Rienner, 2008.
- . “Looking Past the Human Rights Committee.” *Buffalo Human Rights Law Review* 4 (1998): 211.
- . “Savages, Victims, and Saviors: the Metaphor of Human Rights,” *Harvard International Law Journal* 42 (2001): 201.
- . “Standard Setting in Human Rights: Critique and Prognosis.” *Human Rights Quarterly* 29 (2007): 547.
- . “Terrorism and Human Rights: Power, Culture, and Subordination.” *Buffalo Human Rights Law Review* 8 (2002): 1.
- . “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties.” *Virginia Journal of International Law* 25 (1995): 339.
- . “The Ideology of Human Rights.” *Virginia Journal of International Law* 36 (1996): 589–657.

- . “What Is TWAIL?” *Proceedings of the 94TH Annual Meeting of the American Society of International Law* 31 (2000): 31–39.
- , ed. *Human Rights NGOs in East Africa: Political and Normative Tensions*. Philadelphia: University of Pennsylvania Press, 2009.
- , and Peter Rosenblum. *Zaire: Repression as Policy*. New York: Lawyers Committee for Human Rights, 1990.
- National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11/98, 1999(1) SA6 (CC), 1998 (1) BCLR 1517 (CC).
- Neier, Aryeh. “Social and Economic Rights: A Critique,” *Human Rights Brief* 13, no. 2 (2006), Accessed February 26, 2013. <http://www.wcl.american.edu/hrbrief/13/2neier.pdf>.
- “New Zealand Statement on Adoption of Declaration At UN Permanent Forum On Indigenous Issues.” *Indigenous Peoples Issues & Resources*, April 20, 2010. Accessed February 1, 2013. http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4850:new-zealand-statement-on-adoption-of-declaration-at-un-permanent-forum-on-indigenous-issues&catid=58:oceania-indigenous-peoples&Itemid=80.
- “NGOs and the ASP.” *The Rome Statute: The International Criminal Court*. Accessed December 27, 2013. <http://www.romestatute.com/post/11538932886/ngos-and-the-asp>.
- Nilsen, Alf Gunvald. *Dispossession and Resistance in India: The River and the Rage*. New York: Routledge, 2010.
- Nolde, O. Frederick. *Free and Equal: Human Rights In Ecumenical Perspective*. Geneva: World Council of Churches, 1968.
- Noorthmann, Math, and Cedric Ryngaert. *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*. England: Ashgate, 2010.
- Norris v. Ireland*, European Court of Human Rights Ser. A, No. 142, 13 EHRR 186 (1989).
- Norwegian Refugee Council. *Internally Displaced People: A Global Survey*. 2nd ed. London: Earthscan, 2002.
- Nossiter, Adam. “Behind Those Fast Growth Rates, Rising Inequality.” *New York Times*. Last modified November 5, 2013. <http://www.nytimes.com/2013/11/06/world/africa/behind-those-fast-growth-rates-rising-inequality.html>.
- Nyamugasira, Warren. “NGOs and Advocacy: How Well Are the Poor Represented?” *Development in Practice* 8 (1998): 297.
- Obama, Barack. “Ensuring Lawful Interrogations.” Executive Order 13491, 22 January 2009. Accessed January 29, 2015. http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations.
- Oberleitner, Gerd. *Global Human Rights Institutions: Between Remedy and Ritual*. Cambridge: Polity Press, 2007.
- Odinkalu, Chidi Anselm. “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment.” *Transnational Law and Contemporary Problems* 8, no. 2 (1998): 359.
- . “Why More Africans Don’t Use Human Rights Language.” *Human Rights Dialogue* (Winter 2000): 3–4.

- O'Flaherty, Michael, and John Fisher. "Sexual Orientation, Gender Identity, and International Human Rights Law: Contextualizing the Yogyakarta Principles." *Human Rights Law Review* 8 (2008): 207.
- Official Records of the U.N. General Assembly, 49th Session, Supp. No. 10, ¶ 381, U.N. Doc. A/49/10 (1994).
- Opsahl, Torkel. "The Human Rights Committee." In *The United Nations and Human Rights: A Critical Appraisal*, edited by Philip Alston. Oxford: Clarendon Press, 1992.
- Organization of African Unity (OAU). *African Charter*, art. 22; "Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003." *ESCR-Net*. Accessed January 31, 2013. <http://www.escr-net.org/docs/i/1216218>.
- . *African Charter on Human and People's Rights ("Banjul Charter")*. Article 22. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Entered into force October 21, 1986.
- . *African Charter on the Rights and Welfare of the Child*. Doc. CAB/LEG/24.9/49 (1990). Entered into force November 29, 1999.
- . *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Accessed January 31, 2013. <http://www.achpr.org/instruments/women-protocol/>.
- . "Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa," ACHPR/res.38 (XXV) 99, 1999.
- Otto, D. "A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women." In *Women and International Human Rights Law*, edited by K. Askin and D. Koenig, vol. 1, 115. Ardsley: Transnational, 1999.
- Pieterse, Jan Nederveen. *White on Black: Images of Africa and Blacks in Western Popular Culture*. New Haven: Yale University Press, 1992.
- Petterson, Bjorn. "Complementarity between Key Instruments of International Law: International Human Rights and Humanitarian Law Merged into One Operational Instrument: The UN Guiding Principles on Internal Displacement." *The Global IDP Project*. Accessed January 31, 2013. http://www.irinnews.org/pdf/in-depth/IDP/legal_complimentarity_2002.pdf.
- Politi, Mauro, ed. *The Rome Statute of the International Criminal Court: A Challenge to Impunity*. London: Ashgate, 2001.
- Pollis, Adamantia, and Peter Schwab. "Human Rights: A Western Construct with Limited Applicability." In *Human Rights: Cultural and Ideological Perspectives*, edited by Adamantia Pollis and Peter Schwab, 1. New York: Pager, 1980.
- Pomeroy, John Norton. *Lectures on International Law in Time of Peace*, Edited by Theodore Salisbury Woolsey. Boston: Houghton, Mifflin, 1886.
- Posner, Eric. "The Human Rights Charade." *Chronicle of Higher Education*. Accessed November 17, 2014. <http://chronicle.com/article/Peace-LoveGrandstanding/149961/>.
- Posner, Michael. "The Four Freedoms Turn 70: Ensuring Economic, Political, and National Security in the 21st Century." *Annual Meeting of the American Society*

- of *International Law*. Washington, D.C., April 4, 2011. <http://www.state.gov/r/pa/prs/ps/2011/03/158815.htm>.
- , and Candy Whittome. “The Status of Human Rights NGOs.” *Columbia Human Rights Law Review* 25 (1994): 269–90.
- “President Vicente Fox Awarded for His Work to Assist Persons with Disabilities.” *Inter-American Development Bank*. Last modified December 10, 2001. <http://www.iadb.org/en/news/news-releases/2001-12-10/president-vice-fox-award-ed-for-his-work-to-assist-persons-with-disabilities,1072.html>.
- “Public Statement on Turkey.” *CPT: 3rd General Report on the CPT’s activities covering the period 1 January to 31 December 1992*. Accessed January 30, 2013. <http://www.cpt.coe.int/en/annual/rep-03.htm#II.c>.
- Raffer, Kunibert, and Hans Wolfgang Singer. *The Economic North-South Divide: Six Decades of Unequal Development*. Cheltenham: Edward Elgar, 2002.
- Rajagopal, Balakrishnan. *International Law from Below: Development, Social Movements, and Third World Resistance*. Cambridge: Cambridge University Press, 2003.
- Ramcharan, Bertrand. “Human Rights and Human Security.” Paper prepared for the Workshop on Relationship between Human Rights and Human Security, San José, Costa Rica, December 2, 2001. Accessed January 27, 2015. <http://unidir.org/files/publications/pdfs/strengthening-disarmament-and-security-en-342.pdf>.
- . *Human Rights and Human Security*. The Hague: Martinus Nijhoff, 2002.
- . “Human Rights: Universality and Cultural Diversity.” In *Rendering Justice to the Vulnerable*, edited by Fons Coomans, Fred Grünfeld, Ingrid Westendorp, and Jan Willems, 239–58. The Hague: Kluwer Law International, 2000.
- . “The Role of Regional, National, and Local Institutions: Future Perspectives.” In *Human Rights: Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights*, 233–48. The Hague: Martinus Nijhoff, 1979.
- “Rapporteurship on the Rights of Women.” Organization of American States: Inter-American Commission on Human Rights. Accessed February 28, 2013, <http://www.oas.org/en/iachr/women/default.asp>.
- Reeves, Anthony R. “Sexual Identity as a Fundamental Human Right.” *Buffalo Human Rights Law Review* 15 (2009): 215.
- Restatement (Third), Foreign Relations Law of the United States § 313 (1987).
- Robinson, Mary. “Advancing Economic, Social and Cultural Rights: The Way Forward.” *Human Rights Quarterly* 26, no. 4. 2004.
- Rodley, Nigel S. “On the Necessity of United States Ratification of the International Human Rights-Conventions.” In *US Ratification of Human Rights Treaties: With or Without Reservations?* edited by Richard B. Lillich, 3–4. Charlottesville: University of Virginia Press, 1981.
- Rodney, Walter. *Europe Underdeveloped Africa*. Washington, DC: Howard University Press, 1981.
- Romany, Celina. “Black Women and Gender in a New South Africa: Human Rights and the Intersection of Race and Gender.” *Brooklyn Journal of International Law* 21 (1996): 857.

- Roscoe, Will. *Changing Ones: Third and Fourth Genders in Native North America*. New York: St. Martin's Press, 1998.
- Roth, Kenneth. "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization." *Human Rights Quarterly* 26, no. 4 (2004).
- . "The Court the US Doesn't Want." *The New York Review of Books*, November 19, 1998.
- , and Minky Worden, eds. *Torture: A Human Rights Perspective*. Oxford: The New Press, 2005.
- Rubenstein, Leonard. "How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth." *Human Rights Quarterly* 26, no. 4 (2004).
- Salomon, Margot E., and Arjun Sengupta. *The Right to Development: Obligations of States and the Right of Minorities and Indigenous Peoples*. London: Minority Rights Group International, 2003.
- Santos, Boaventura. *The Rise of the Global Left: The World Social Forum and Beyond*. London: Zed Books, 2006.
- . *Voices of the World (Reinventing Social Emancipation: Towards New Manifestos)*. New York: Verso, 2010.
- , and Cesar Rodriguez-Garavito. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. New York: Cambridge University Press, 2005.
- Santos, Boaventura, Tewolde Berhan Gebre Egziabher, Margarita Florez Alonso, Luis Carlos Arenas, and Joao Paulo Borges Coelho. *Another Knowledge Is Possible: Beyond Northern Epistemologies (Reinventing Social Emancipations: Towards New Manifestos)*. London: Verso, 2008.
- Sassen, Saskia. "Towards Post-National and Denationalized Citizenship." In *Handbook on Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 277–291. New York: Sage, 2003.
- Sceats, Sonya, and Sean Breslin. "China and the International Human Rights System." Chatham House: 212. Accessed February 3, 2015. http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf.
- Schillinger, Raymond. "Social Media and the Arab Spring: What Have We Learned?" *Huffington Post*. Last modified November 20, 2011. http://www.huffingtonpost.com/raymond-schillinger/arab-spring-social-media_b_970165.html.
- Schumpeter, Joseph. *Capitalism, Socialism, and Democracy*. 3rd ed. London: Routledge, 1950.
- "Secretary General, Salil Shetty." *Amnesty International*. Accessed on August 2011. <http://www.amnesty.org/en/who-we-are/our-people/secretary-general>.
- Sen, Amartya. *Development as Freedom*. New York: Knopf, 1999.
- Shropshire, Denys W. T. *The Church and the Primitive Peoples*. London: S.P.C.K, 1938.
- Smith, Harry. "Costa Rica's Triangle of Solidarity: Can Government-Led Spaces for Negotiation Enhance the Involvement of Civil Society in Governance?" *Environment and Urbanization* 16 (2004).

- Smith, Herbert Arthur. *Great Britain and the Law of Nations*. London: P. S. King, 1932.
- South African Constitution section 9(3), (1996).
- “Special Rapporteur on Rights of Women.” *African Commission on Human and Peoples’ Rights*. Accessed February 28, 2013. <http://www.achpr.org/search/?q=rappporteur+on+women>.
- Steiner, Henry J. *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement*. Cambridge: Human Rights Program, Harvard Law School, 1991.
- . “Political Participation as a Human Right.” *Harvard Human Rights Yearbook* 1 (1988): 77–109.
- . “Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond.” *Harvard Magazine* (September-October 1998): 45.
- . “The Youth of Rights.” *Harvard Law Review* 104 (1991): 930–31.
- , and Philip Alston. *International Human Rights in Context: Law, Politics, and Morals*. 2nd ed. Oxford: Clarendon Press, 1996.
- Steiner, Henry, Philip Alston, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. 3rd ed. New York: Oxford University Press, 2007.
- Stiftung, Friedrich Ebert. “The Declaration of Human Rights Defenders.” Accessed January 28, 2015. <http://library.fes.de/fulltext/bueros/usa/00986008.htm>.
- Strauss, Leo. *Natural Right and History*. Chicago: University of Chicago Press, 1965.
- Tamale, Sylvia. “A Human Rights Impact Assessment of the Anti-Homosexuality Bill,” *East African Journal of Peace and Human Rights* 15 (2009): 509.
- . “Law, Sexuality, and Politics in Uganda.” In *Human Rights NGOs in East Africa: Political and Normative Tensions*, edited by Makau Mutua. Philadelphia: University of Pennsylvania Press.
- , ed. *African Sexualities: A Reader*. London: Pambazuka Press, 2011.
- Temperley, Howard. *British Antislavery, 1833–1870*. London: Longman, 1972.
- “The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change.” In *Environmental Change and International Law: New Challenges and Dimensions*, edited by Edith Brown Weiss. Tokyo: United Nations University Press, 1992.
- The International Criminal Court. “State Parties to the Rome Statute.” Accessed January 28, 2015. http://www.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, accessed January 28, 2015.
- The Library of Congress. “U.N. Human Rights Council: First Resolution against Discrimination Based on Sexual Orientation.” Accessed January 28, 2015. http://www.loc.gov/lawweb/servlet/lloc_news:disp3_l205402721_text.
- Tomasevski, Katarina. “Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson.” *Human Rights Quarterly* 27 (2005).
- Tyler, Patrick. “Hillary Clinton in Beijing as Women’s Conference Opens.” *New York Times*, Sept. 5, 1995.

- United Nations Commission on Human Rights. "An International Model Emerges Today in Africa to Address the Plight of Millions of Internally Displaced Persons." Accessed January 28, 2015. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12868&LangID=E.#sthash.gi5QzCEH.dpuf>.
- . Decision 2004/110 (Special Rapporteur on Trafficking in Persons, Especially in Women and Children). See chap. XII, E/2004/23–E/CN.4/2004/127. 2004.
- . Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. E/CN.4/2002/WG.11/CRP.1. January 17, 2002.
- . "Mr. Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons." Accessed January 28, 2015. <http://www.ohchr.org/EN/Issues/IDPersons/Pages/WalterKalin.aspx>.
- . Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Accessed January 28, 2015. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.
- . Resolution 4(XXXIII) (Question of the Violation of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East). U.N. Doc E/CN.4/RES/1(XXXIII). 1977.
- . Resolution 1996/52. U.N. Doc. E/CN.4/RES./1996/52,19. 1996.
- . Resolution 2000/82 (Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights). E/CN.4/RES/2000/82. 2000.
- . Resolution 2005/69 (Human Rights and Transnational Corporations and Other Business Enterprises). E/CN.4/RES/2005/69. 2005.
- . Resolution 2005/80 (Protection of Human Rights and Fundamental Freedoms While Countering Terrorism). E/CN.4/RES/2005/80. 2005.
- . "Special Rapporteur on the Human Rights of Internally Displaced Persons," *UN Human Rights: Office of the High Commissioner for Human Rights*. Accessed January 28, 2015. <http://www.ohchr.org/EN/Issues/IDPersons/Pages/IDPersonsIndex.aspx>.
- . "Specific Groups and Individuals: Mass Exodus and Displaced Persons." *Report of the Representative of the Secretary General to the United Nations*. UN Doc. E/CN.4/2002/95, para. 11. January 16, 2002.
- United Nations Committee on Economic, Social and Cultural Rights (CESCR). "General Comment No. 5: Persons with Disabilities," E/1995/22, 1994.
- . "General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights," Art. 2, para 2, E/C.12/GC/20, 2009.
- United Nations Development Programme. *Human Development Report 1993*. Oxford: Oxford University Press, 1993.
- United Nations Economic and Social Council. Resolution 1296 (XLIV) (Arrangements for Consultation with Non-Governmental Organizations). May 23, 1968.
- United Nations General Assembly. *Charter of the United Nations*. 1 UNTS XVI, 1945.
- . Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51. 1984.

- . Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Amendment to Art. 20, para. 1. Decided by States Parties to CEDAW on May 22, 1995. CEDAW/SP/1995/2, annex, UN Doc. A/34/46.
- . Convention on the Prevention and Punishment of the Crime of Genocide. Adopted December 9, 1948. Entered into force January 12, 1951. 78 U.N.T.S. 277.
- . Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction. Oslo. September 18, 1997.
- . Convention on the Rights of the Child. G.A. Res. 44/25, 44 U.N. GAOR, 43rd Sess., Supp. No. 49, at 166. U.N. Doc. A/44/49. 1989.
- . Declaration on the Rights of Indigenous Peoples. G.A. Res. 60/251, 1st Sess. U.N. Doc. No. A/HRC/1/L.3. June 23, 2006.
- . Draft Declaration on the Rights of Indigenous People. U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, art. 20. April 1994.
- . Framework Convention on Climate Change, “Kyoto Protocol to the UN Framework Convention on Climate Change.” U.N. Doc. FCCC/CP/1997/7/Add.2. December 10, 1997.
- . International Covenant on Civil and Political Rights. Art 40, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52. U.N. Doc. A/6316. 1966.
- . International Convention against the Taking of Hostages. U.N.G.A. Res. 34/146 (XXXIV), 34 UN GAOR, Supp. (No. 46) 245. UN Doc. A/34/786 (1979). Reprinted in *International Legal Matters* 18 (1979): 1456.
- . International Covenant on Economic, Social and Cultural Rights, Part IV, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. 16, at 49. U.N. Doc. A/6316. 1966.
- . International Convention on the Elimination of All Forms of Racial Discrimination. G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. No. 15, at 35. UN Doc. A/5515. 1963.
- . Official Records, “Annotations on the Text of the Draft International Covenants on Human Rights,” at 7, UN Doc.A/2929. 1955.
- . Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. UN GA RES/54/4. October 6, 1999.
- . Optional Protocol to the Convention on the Rights of Persons with Disabilities. U.N. Doc.A/61/611. 2006.
- . Resolution 3452 (Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). 30 U.N. GAOR Supp. No. 34 at 91. 30 U.N. Doc. A/10034. 1975.
- . Resolution 34/169 (Code of Conduct for Law Enforcement Officials). G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186. U.N. Doc. A/34/46. 1979.
- . Resolution 31/123 (International Year of Disabled Persons). A/RES/31/123. 1976.

- . Resolution 37/52 (World Programme of Action concerning Disabled Persons). A/RES/37/52. 1982.
- . Resolution 37/194 (Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211. U.N. Doc. A/37/51. 1982.
- . Resolution 41/128 (Declaration on the Right to Development). U.N. Doc. A/RES/41/128. 1986.
- . Resolution 48/96 (Standard Rules on the Equalization of Opportunities for Persons with Disabilities). A/Res/48/96. 1993.
- . Resolution 48/103 (Crime Prevention and Criminal Justice). U.N. Doc. A/RES/48/103. December 20, 1993.
- . Resolution 48/109 (Improvement of the Situation of Women in Rural Areas). UN Doc. A/48/629. 1994.
- . Resolution 53/144 [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms]. U.N. Doc. A/RES/53/144. 1999.
- . Resolution 57/199 (Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). 57th Sess., U.N. Doc. A/RES/57/199. December 18, 2002.
- . Resolution 61/295 (Declaration of the Rights of Indigenous Peoples). U.N. Doc. A/RES/61/295. 2007.
- . Resolution 2200 (XXI) (Optional Protocol to the International Covenant on Civil and Political Rights). 21 UN GAOR, Supp. (No. 16) 59. UN Doc. A/6316 (1967), reprinted in *International Legal Matters* 6 (1967): 383.
- . “Rome Statute of the International Criminal Court.” *International Legal Matters* 999 (1998).
- . Universal Declaration of Human Rights. Article 29(2), G.A. Res. 217(III), U.N. GAOR, 3d Session, 183d meeting at 71. U.N. Doc. A/810. 1948.
- . Vienna Convention on the Law of Treaties. U.N. Doc. A/CONF. 39/27, 63 A.J.I.L.875. 1969.
- . Vienna Declaration and Programme of Action, para 6. U.N. Doc A/CONF.157/23. June 25, 1993.
- United Nations Human Rights Council. Human Rights, Sexual Orientation, and Gender Identity. A/HRC/17/L.9/Rev.1. Adopted June 17, 2011, by a vote of 23 in favor, 19 against, and 3 abstentions.
- United Nations Office for the Coordination of Humanitarian Affairs. Guiding Principles on Internal Displacement. Introduction, para 1. U.N. Doc. E/CN.4/1998/53/Add.2. 2004.
- United Nations Office of the High Commissioner for Human Rights. Resolution 2000/61 (Human Rights Defenders). U.N. Doc E-CN_4-RES-2000-61. April 2000.
- . Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies. U.N. Doc. A/49/537. 1994.

- . Resolution 45/158 (Convention on the Rights of Migrant Workers and Their Families). G.A. Res. 45/158. December 18, 1990.
- . “Secretary General Names Hina Jilani, Pakistan, Special Representative for Human Rights Defenders.” August 18, 2000. Accessed January 28, 2015. <http://www.un.org/press/en/2000/20000818.sga743.doc.html>.
- . “Special Rapporteur on Violence against Women, Its Causes and Consequences.” Accessed February 1, 2013, <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>.
- United Nations Permanent Forum on Indigenous Issues (UNPFII). Martinez-Cobo Study of the Problem of Discrimination against Indigenous Populations. U.N. Doc. E/CN.4/Sub.2/1986/7 and Addenda, U.N. Sales No. E.86.XIV.3. 1986.
- United Nations Security Council. Statute of the International Criminal Tribunal for Rwanda. S.C. Res. 955. November 8, 1994.
- . Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 827. May 25, 1993.
- United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. Resolution 1994/45 (Draft United Nations Declaration on the Rights of Indigenous Peoples). E/CN.4/Sub.2/1994/. 1994.
- United Nations Working Group on Indigenous Populations. Report of Working Group on Indigenous Populations on Its Seventh Session. At 6–7. U.N. Doc. E/CN.4/Sub.2/1989/36.
- “UN Human Rights Council Adopts Documents on Disappearances and Indigenous Peoples.” *UN News Center*. Last modified June 29, 2006. <http://www.un.org/apps/news/story.asp?NewsID=19056&Cr=rights&Cr1=council>.
- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act). Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.
- Valticos, Nicolas. “The Role of the ILO: Present Action and Future Perspectives.” In *Human Rights: Thirty Years after the Universal Declaration*, edited by B. G. Ramcharan, 211–32. The Hague: Martinus Nijhoff, 1979.
- Welch Jr., Claude C. *NGOs and Human Rights: Promise and Performance*. Philadelphia: University of Pennsylvania Press, 2000.
- Westbrook, David, and Amy Berquist. “Extraordinary Rendition: A Human Rights Analysis.” *Human Rights Journal* 19 (2006):123.
- Westbrook Mary T., Varoe Legge, and Mark Pennay. “Attitudes Towards Disabilities in a Multicultural Society.” *Social Science & Medicine* 36, no. 5 (1993): 615–723.
- Wheatley, Steven. “A Democratic Rule of International Law.” *European Journal of International Law* 22 (2011): 525.
- Williams, Walter L. *The Spirit and the Flesh: Sexual Diversity in American Indian Cultures*. Boston: Beacon Press, 1986.
- World Trade Organization (WTO). Marrakesh Agreement Establishing the World Trade Organization. Art. V (2). In *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

- Zakaria, Fareed. "Fareed's Take: Egypt Still Is Not Free." *Global Public Square*, CNN, May 22, 2011.
- Zeleny, Jeff. "Obama Calls for 'Civility' at Prayer Breakfast." *New York Times*, last modified February 4, 2010. <http://thecaucus.blogs.nytimes.com/2010/02/04/obama-calls-for-civility-at-prayer-breakfast/>.

INDEX

- actors (human rights)
 categories, 5
 proliferation, 8, 23–24, 73–74
- Africa
 anticolonial struggle, 14, 79
 civil societies, 83–84
 contribution to UDHR, 19, 112
 internally displaced persons, 28–34
 in western media, 118–119
 relationship to INGOs, 93–94
 sexuality, 152, 154–156
 stance towards the ICC, 48
 women's rights, 159
- African Charter on Human and Peoples' Rights, 36, 61, 67, 95
- African Charter on the Rights and Welfare of the Child, 78
- African Charter on the Rights of Women in Africa, 78
- African Union, 32, 72, 72, 85, 159
- Alford, William, 171
- Al-Qaeda, 48, 62, 141. *See* terrorism
- Al-Shabaab, 62. *See* terrorism
- Alston, Philip, 17, 36, 84, 87, 91, 99, 167
- Alvarez, Jose, 120
- American Anthropological Association (AAA), 17–18, 58
- American Civil Liberties Union (ACLU), 89–90
- American exceptionalism, 49, 55
- Amnesty International (AI)
 as an INGO, 90–93
 economic, cultural, and social rights, 143–146, 173–174
- Declaration on Human Rights
 Defenders, 38
 relationship with the global south, 115–117, 128
 response to terror, 49
 sexual orientation, 151. *See* sexual orientation
 torture, 96. *See* torture
 the western perspective, 56–57, 65–66, 68, 121, 179
- Anderson, Kenneth, 123
- Angola, 70
- An-Na'im, Abdullahi Ahmed, 18, 55, 87, 160
- Annan, Kofi, 38
- anticolonialism, 13–15, 140. *See* colonialism; decolonization
- Anti-Homosexual Bill, Uganda, 153.
 See Bahati Bill
- Arab Spring, 4–5, 46, 53–54, 67, 113, 168
- Bahati Bill, 153. *See* Anti-Homosexual Bill, Uganda
- Beijing Platform for Action, 159–160
- Bretton Woods Institutions, 67, 165
- British Anti-Slavery Society, 84
- Buergenthal, Thomas, 87
- Bush, George W. (U.S. President), 49–51, 141, 160–161
- capitalism, 4, 6, 133–134, 176
- Carter, Jimmy (President), 50
- Cassese, Antonio, 17, 57, 168, 179
- Center for Economic and Social Rights, 90, 176

- Chang, P.C., 18
- Charities and Societies Proclamation Law, 83
- Charter of the Fundamental Rights of the European Union, 157
- China, 5, 28, 21, 42, 48, 51, 54, 69, 71, 73, 83, 113–114, 120, 125, 162, 165
- Chinkin, Christine, 85, 100–101
- Clinton, Bill (U.S. President), 50
- Code of Conduct of Law Enforcement Officials, 96
- Cold War, 45–48, 59, 91, 113, 132–133, 143–144, 166, 171, 176–177
- collective rights, 61, 163, 204
- colonialism, 4, 14–16, 57–59, 79, 100, 139. *See* anti-colonialism; decolonization
- communism, 59, 119, 177
- Convention against Torture, 1, 6, 41, 71, 79, 96, 102. *See* torture
- Convention on Disabilities, 149–151, 193. *See* disabilities
- Convention on the Elimination of Discrimination against Women. *See* discrimination against women
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, 103–104, 122, 164. *See* land mines
- Convention on the Rights of Migrant Workers and Their Families, 41
- Convention on the Rights of the Child (CRC), 1, 61, 86, 102–105, 129, 132, 164
- Coomarasawamy, Radhika, 101
- Costa Rica, 71–72, 102, 116, 120, 142, 163
- Council of Europe, 77, 85, 95, 127, 159, 161
- Cox, Larry, 117
- customary law, 20, 40
- death penalty, 51, 67, 127, 135, 153, 157
- decolonization, 20, 59, 162, 168, 178. *See* anti-colonialism; colonialism
- Demand Dignity Campaign, 145
- democracy, 8, 19, 24, 27, 49–50, 54, 57, 60–61, 63, 74, 89, 95, 111–112, 119–121, 124, 145, 167–180
- Democratic Party, 60, 136
- Democratic Republic of Congo, 28, 52, 67, 84, 112
- Deng, Francis, 29–34, 70
- dependency theory, 166, 212
- disabled persons, 2, 141, 147–151, 163, 207
- discrimination against women, 41–45, 57, 68, 100, 129, 159–160
- Donnelly, Jack, 172
- Eurocentrism, 55, 78, 164, 173, 179–180
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 79
- European Court of Human Rights, 127, 151, 154
- European Social Charter, 60
- European Union, 33, 74, 120, 127, 157
- Ford Foundation, 88, 92, 117
- Fox, Vicente (Mexican President), 40, 149
- free market, 59–60, 69, 88, 90, 127, 133–134, 165–166, 173, 176, 180
- gay rights, 2, 63, 66, 120, 141, 151–158. *See* homophobia; homosexuality
- Genocide Convention, 44, 76
- Glendon, Mary Ann, 167–168
- global elites, 18
- global forces
- borderlessness, 4, 68
 - erosion of patriotism, 4
 - global calamities, 5
 - withering away of the state, 5
- Global IDP Project, 34

- global north,
 definition, 185
- global south
 definition, 185
- globalization, 1, 53, 85, 92, 109, 117,
 145, 147, 163, 169, 177, 179
- Guantanamo Bay, 50
- Guiding Principles on Internal
 Displacement, 28, 30, 69, 126
- Henkin, Louis, 87, 166–167, 172, 174
- homophobia, 67, 152, 155–157. *See* gay
 rights; homosexuality
- homosexuality, 40, 121, 151–158. *See*
 gay rights; homophobia
- human citizenship, 2, 3
- human dignity, 2, 4, 10–11, 15, 26,
 47, 55–57, 79, 111, 140–141, 157,
 170, 175, 177, 183
- Human Rights Campaign Fund, 158
- Human Rights First, 35, 38, 47, 90
- Human Rights Watch, 38, 47, 56–57,
 66, 87, 90, 104, 115–117, 122–
 124, 128, 143–146, 173, 179, 189
- Huntington, Samuel, 170
- India, 14, 18, 21, 54, 57–58, 66, 69,
 71, 73, 113, 120, 145, 162, 183
- individual rights, 11, 59, 60, 134, 171
- individualism, 65, 66, 116, 145
- internally displaced persons (IDPs),
 28–34, 70, 79, 126, 132
- International Commission of Jurists,
 90, 96
- International Committee of the Red
 Cross, 70, 84, 104
- International Convention on the
 Elimination of all Forms of Racial
 Discrimination, 61, 136
- International Convention on the
 Suppression and the Punishment
 of the Crime of Apartheid, 61
- International Court of Justice, 16, 44,
 87
- International Covenant on Civil and
 Political Rights (ICCPR), 44, 47, 49, 59–62, 84, 89,
 131–137, 148, 151, 168–171, 178
- International Covenant on Economic,
 Social and Cultural Rights
 (ICESCR), 47, 49, 59–60, 62, 76,
 90, 131–137, 144, 146–147, 149,
 158, 168, 175–178
- International Criminal Court (ICC),
 48, 51, 101, 108, 132, 163
- International Criminal Tribunal for
 Rwanda, 116, 119
- International Criminal Tribunal for the
 Former Yugoslavia, 17, 119
- International Labor Organization, 11,
 14, 95. *See* labor movement
- International Monetary Fund, 114
- Jilani, Hina, 38
- Kälin, Walter, 45, 126
- Kato, David, 66
- Kennedy, David, 172–173
- Kennedy, John F.
 President, 50, 56
 School of Government at Harvard
 University, 173, 56
- Kenya, 14, 50, 68, 92, 113, 116, 153,
 156
- Kenya Human Rights Commission, 68,
 92, 116
- Khan, Irene, 65–66, 116, 145
- Klare, Karl, 175
- Kyoto Protocol, 49
- labor movement, 61. *See* International
 Labor Organization
- land mines, 103–104, 122, 164
- League of Nations, 13, 14
- Leary, Virginia, 87, 179
- liberal democratic theory, 171
- liberalism, 3–6, 11, 26, 78, 89, 165,
 168–183
- Lindqvist, Bengt, 149
- Locke, John, 11, 169
- Malik, Charles, 18, 197

- Martin, Ian, 173–174
 Martinez Cobo, Jose, 98
 Marxism, 166
 Middle East, 46, 48, 53, 57, 71, 83, 113, 120
 Moyn, Samuel, 15, 140
 Mugabe, Robert, 156
 multiculturalism, 179
 Mutunga, Willy, 92, 116

 National Association for the Advancement of Colored People (NAACP), 85, 89–90
 Neier, Aryeh, 143
 New Deal, 60
 New International Economic Order, 121
 Norway, 67, 102, 115
 Norwegian Refugee Council, 29, 33

 Obama, Barack Hussein (U.S. President), 50–51, 60, 100, 151, 153, 161
 Odinkalu, Chidi-Anselm, 93
 Oloka-Onyango, Joe, 68–69
 Optional Protocol for the Covenant on Economic, Social and Cultural Rights, 135
 Optional Protocol to the Torture Convention, 69. *See* torture
 Organization of American States, 74, 77, 85, 95, 159
 Oxfam, 91, 176

 Physicians for Human Rights, 91, 104, 144, 176
 Political democracy, 89, 120, 167–180
 Pollis, Adamantia, 55
 Pope Francis, 154
 Posner, Eric, 183
 Posner, Michael, 61
 Principles of Medical Ethics, 96–97

 Ramcharan, Bertrand, 18–19, 79–80
 Reagan, Ronald (U.S. President), 177
 refugee law, 29–30

 regional systems, 77–80, 85
 Republican Party, 60, 136, 151
 Reservations
 in treaty ratification, 42–45, 76, 107
 Rome Statute, 48, 51, 101, 108. *See* International Criminal Court (ICC)
 Roosevelt, Eleanor, 18, 49
 Roosevelt, Franklin (U.S. President), 60
 Roth, Kenneth, 56–57, 144, 173
 Rubenstein, Leonard, 144
 Russia, 71, 83, 114, 120, 165. *See* Soviet Union

 Sane, Pierre, 145
 Santos, Boaventura, 166, 183
 Schwab, Peter, 55
 secularism, 176, 180
 Sen, Amartya, 53
 sexual orientation, 61, 113, 120–121, 151–160, 163–164
 Shetty, Salil, 66, 145
 Slavery Abolition Act of 1833, 84
 social democracy, 60, 168
 socialism, 60, 133, 176
 South Africa, 14, 21, 40, 54, 87, 113, 120–121, 139, 142, 146, 148, 151, 154, 164
 South Sudan, 28, 73
 Soviet bloc, 5, 46, 59, 132–136, 177
 Soviet communism, 59
 Soviet republics, 83
 Soviet Union, 5, 133. *See* Russia
 Steiner, Henry J., 17, 36, 84, 99, 170–171, 174
 Sudan, 28, 31, 48, 70, 83, 156

 technology, 1, 4–5, 53, 55
 terrorism, 34, 48–51, 61–62, 141, 160–163
 Third World Approaches to International Law (TWAAIL), 162–163
 torture, 1, 6, 41–42, 48–51, 64, 69, 71, 75, 79, 95–97, 101–102, 107, 114, 128, 132, 141, 146, 146, 161, 163

- treaty making, 1, 40
- Uganda, 48, 66, 115, 121, 153–156
- unalienable—rights, 170
- UNESCO, 116
- United Nations (UN),
 Charter, 9, 15–16, 55, 112, 119, 125, 129, 130–131
 Children's Fund (UNICEF), 103
 Commission on Human Rights, 18–19, 28–39, 45, 58, 74–77, 98–99, 125, 130–133
 Committee on Economic, Social, and Cultural Rights (CESCR), 131, 134–135, 147–149, 157–158
 Committee on the Rights of Persons with Disabilities, 150
 Declaration on Human Rights
 Defenders, 6, 34–37, 63–68, 91, 102, 107–108, 115, 127–132, 163
 Declaration on the Elimination of Violence against Women, 35, 101
 Declaration on the Rights of Indigenous Peoples, 36, 98–99
 Declaration on the Right to Development, 6, 35–37, 53–55, 61, 64, 68–69, 80, 99, 107, 125–126, 143, 147, 163
 Human Rights Committee, 45, 84, 86, 116, 140, 132, 134–137, 150–151, 154, 157
 Human Rights Council, 36, 39–41, 45, 55, 74, 77, 85, 99, 120, 131, 135, 158
 Office of the High Commissioner for Human Rights, 70, 87, 131
 Secretary General on Internally Displaced Persons, 29, 34, 70
 Security Council, 16, 36, 73–74, 85, 94, 114, 119–120
- United States
 constitution, 112
 in the formation of standards, 18, 42, 48–49, 52, 55, 58, 60, 71, 100, 104, 108, 118–125, 134, 141, 148, 151, 154, 148
 role in the world, 5, 15–16, 48–51, 67, 73, 85, 89, 90, 92, 100, 114, 118–125, 133, 136, 139, 161, 165, 168, 171, 177, 179
- Universal Declaration of Human Rights, 8–9, 16, 34, 75, 112, 167, 173–174, 178
- university human rights programs, 181
- Valticos, Nicolas, 11

How are human rights norms made, who makes them, and why? In *Human Rights Standards*, Makau Mutua traces the history of the human rights project and critically explores how the norms of the human rights movement have been created. Examining key texts and documents published since the inception of the human rights movement at the end of World War II, he crafts a bracing critique of these works from the hitherto underutilized perspective of the Global South. Attention is focused on the deficits of the international order and how that order, which is defined by multiple asymmetries, defines human rights in a manner that exhibits normative gaps and cultural biases. Mutua identifies areas of further norm development and concludes that norm-creating processes must be inclusive and participatory to garner legitimacy across various cleavages and divides. The result is the first truly comprehensive critical look at the making of human rights norms and standards and, as such, will be an invaluable resource for students, scholars, activists, and policymakers interested in this important topic.

MAKAU MUTUA is SUNY Distinguished Professor and Floyd H. and Hilda L. Hurst Faculty Scholar at SUNY Buffalo Law School. He is the author of *Kenya's Quest for Democracy: Taming Leviathan* and *Human Rights: A Political and Cultural Critique*.

A volume in the SUNY series, James N. Rosenau series in Global Politics
David C. Earnest, editor

cover photograph by Henri Ismail

SUNY
PRESS

State University of New York Press
www.sunypress.edu

ISBN: 978-1-4334-5939-4

