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## ... And Justice For All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators

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# NOTES

## . . . And Justice For All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators

### ABSTRACT

*With the formation of the Bosnian and Rwandan War Crimes Tribunals, the international community has created a mechanism for the enforcement of human rights law for the first time since the Nuremburg and Tokyo War Trials. The efficacy of these tribunals, however, is in doubt. This Note proposes that only a few human rights are truly universal in nature and can be guaranteed by the international community. Furthermore, the political realities of the international system precludes the use of international tribunals against the more powerful nations of the international community. The Note concludes that by focusing on the human rights that can be protected, and protecting them, a baseline framework for the effective enforcement of human rights can be established from which no nations may deviate.*

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The last few decades have seen a more extended and internationalized conscience in respect to human rights, such that we are confronted with and increasingly forced toward a deeper understanding of what the struggle for human rights means.<sup>1</sup>

## I. INTRODUCTION

In 1993, the United Nations Security Council established an International Criminal Tribunal in the Hague to prosecute war crimes committed in the former Yugoslavia.<sup>2</sup> A year later, a

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1. Adolfo Perez Esquivel, *Afterword*, in THE INTERNATIONAL BILL OF HUMAN RIGHTS 105 (Paul Williams ed., 1981).

2. Roger Cohen, *When the Price of Peace is Injustice*, N.Y. TIMES, Nov. 12, 1995, at A2. The tribunal was created in response to the atrocities committed in Bosnia, as well as war crimes that occurred during the earlier Serb-Croat war.

The former Yugoslavia was composed of six republics: Slovenia, Croatia, Serbia, Montenegro, Macedonia, and Bosnia-Herzegovina. The Bosnian conflict was a war between the three major groups comprising the Republic, the Bosnian Serbs (aligned with Serbia), the Bosnian Muslims, who controlled the Bosnia-Herzegovina government, and the Bosnian Croats (supported by Croatia). Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COMMENTARY 145, 146 (1996).

Both tribunals were created by the U.N. Security Council as Chapter VII entities. The states involved were required to cooperate with the tribunals or face sanctions imposed by the Security Council. David J. Scheffer, *International Judicial Intervention*, FOREIGN POL'Y, Spring 1996, at 40.

The Bosnian Tribunal's jurisdiction is premised on violations of international humanitarian law. Bernard D. Meltzer, "War Crimes": *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 907 (1996). Specifically, the tribunal is investigating the following violations of the Geneva Convention of 1949: 1) "grave breaches" of the Convention (art. 2); violations of the laws or customs of war (art. 3); genocide (art. 4); and crimes against humanity (art. 5). *Id.*

similar war crime tribunal for Rwanda was created.<sup>3</sup> By the time Slobodan Milosevic, Franjo Tudjman, and Alija Izetbegovic, the Presidents of Serbia, Croatia, and Bosnia respectively, met in Dayton, Ohio, in November, 1995, the Hague Tribunal had indicted forty-five Serbs and seven Croats.<sup>4</sup> The indictments included Bosnian Serb leader, Radovan Karadzic,<sup>5</sup> and his military commander, General Ratko Mladic.<sup>6</sup> The magnitude of the indictments increased after the three leaders accepted a draft Constitution for Bosnia that would bar any person under indictment, or convicted by, the International Tribunal for the Former Yugoslavia from becoming President or a member of the Bosnian Parliament.<sup>7</sup> Upon the signing of the Constitution, academics and world leaders immediately began to question whether the Bosnian Serbs would accept the Dayton peace proposal.<sup>8</sup>

The importance of the International Criminal Tribunal in the Hague and the subsequent International Criminal Tribunal for Rwanda lay in the fact that, for the first time, the international community was conducting criminal investigations into human rights abuses by participants who were still involved in an ongoing conflict that the international community was attempting

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3. Betsy Pisik, *Rwandan Official Faces Genocide Charges in Nuremberg-Style Trial*, WASH. TIMES, Nov. 14, 1996, at A14. A six-judge panel was established in Arusha, Tanzania, to try human rights violators that murdered more than an estimated 500,000 Rwandan Tutsi and moderate Hutus in 1994. Elizabeth Neuffer, *Mismanagement and Red Tape Impede Tribunal*, BOSTON GLOBE, Dec. 11, 1996, at A1.

4. Chris Hedges, *War Crimes Tribunal Indicts 6 Bosnian Croats*, N.Y. TIMES, Nov. 14, 1995, at A3.

5. Karadzic was forced to relinquish official power as President of the Bosnian Serb state and head of the Serb Democratic Party in July, 1996. However, though indicted, Karadzic was not turned over to the tribunal. *An Insufficient Solution in Bosnia; Resignation Still Leaves Karadzic too Close to Power*, BUFFALO NEWS, July 20, 1996, at C2.

6. *U.S.-Drafted Bosnia Law Ousts Serb Leader*, USA TODAY, Nov. 7, 1995, at 4A. Survivors of the mass killings in the Bosnian city of Srebrenica claimed that General Mladic personally witnessed mass executions. Anthony Lewis, *Truth and Its Effects*, N.Y. TIMES, Nov. 13, 1995, at A13. As many as 6,000 unarmed civilians may have been killed in Srebrenica, the worst war crime in Europe since World War II. *Id.*

7. BOSNIA-HERZEGOVINA CONST., art. IX, para. 1, 35 I.L.M. 75, 125 (1996). The Constitution as a whole catalogs many human rights to be protected. *Id.* art. II, para. 3. The Constitution also states, "[T]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law." *Id.* art. II, para. 2.

8. See, e.g., Bill Clinton, *Why Bosnia Matters to America*, NEWSWK., Nov. 13, 1995, at 55; Meltzer, *supra* note 2, at 909; Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L LAW 500, 502-04 (1994).

to end.<sup>9</sup> Even as the negotiations in Dayton unfolded, there was increasing pressure on the Hague Tribunal to indict Milosevic himself, the "undisputed authority in Belgrade at the time of the Vukovar siege."<sup>10</sup> However, it was also widely assumed and understood that if peace were to be made it could only be made "with someone who [could] deliver. That man [was] Milosevic."<sup>11</sup> The dilemma that confronted negotiators in Dayton and the Tribunal in the Hague was obvious: Would human rights abusers be given amnesty to bring peace to the Balkans? As President Clinton noted, "We have an urgent stake in stopping the slaughter [and] preventing the war from spreading."<sup>12</sup> However, unlike Nuremburg, the leaders who condoned the atrocities remained in power and had the ability to prolong the conflict.

Central to the Balkan and Rwandan problems, as well as similar future crises involving human rights abuses, is the question of when the international community should demand justice for human rights violations, no matter what the consequences. If the most important human right is the right to live,<sup>13</sup> then the underlying dilemma is clearly defined. Will a greater number of lives be saved by trying war criminals or by

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9. Cohen, *supra* note 2. The only other previous tribunals were at Nuremburg and Tokyo following World War II. Meltzer, *supra* note 2, at 907. Those tribunals took place after the war when the Allied powers controlled Germany and Japan.

10. Cohen, *supra* note 2. Three Serbian officers of the regular Army of Serbia were indicted in early November, 1995, specifically for their involvement in the massacres that took place in Vukovar. Lewis, *supra* note 6.

11. Cohen, *supra* note 2.

12. Clinton, *supra* note 8, at 55. A leading advocate of amnesty for peace in the Balkans, as well as other parts of the world, has been former President Jimmy Carter. Neil A. Lewis, *The Nation: Nuremburg Isn't Repeating Itself*, N. Y. TIMES, Nov. 19, 1995, at E5. Cf. Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 HASTINGS CONST. L.Q. 607, 620 (1995).

13. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810, art. III (1948) [hereinafter *Universal Declaration*]. The first right to be declared in the Universal Declaration is the "right to life." *Id.* See also, *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368, art. 6 (1967) [hereinafter *Civil Law and Political Covenant*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 2, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter *European Convention*]; *American Declaration of the Rights and Duties of Man*, Ninth International Conference of American States, May 8, 1948, O.A.S. Res. 30, O.A.S. Off. Rec. OEA/Ser. L/V/1.4 Rev., art. 1 (1965) [hereinafter *American Declaration*]; *African Charter on Human and Peoples' Rights*, June 27, 1981, Organization of African Unity, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 59 (1982) [hereinafter *African Charter*]. As a practical matter, one must be alive to enjoy the rights enshrined in human rights treaties and conventions.

granting amnesty? If the international community emphasizes the enforcement of human rights by trying violators, wars may be prolonged and despotic regimes may cling to power until the bitter end. If the international community focuses on resolving conflicts, an implicit signal may be sent to the Mladic or Pol Pot of the future that he can get away with genocide.

Bosnia and Rwanda underscore the difficulties of human rights enforcement, especially in light of the fundamental principle governing human rights to save the maximum number of lives possible. This Note attempts to define normative<sup>14</sup> and descriptive<sup>15</sup> frameworks for the application of the Universal Declaration of Human Rights<sup>16</sup> and other human rights accords,<sup>17</sup> based on principles of utility and *realpolitik* to help guide the policymaker and the international jurist in resolving this question.<sup>18</sup>

Section II explains the general arguments for and against the involvement of the international community in the enforcement of human rights. A basic understanding of these contentions is necessary to develop normative and descriptive theories of intervention. Section III addresses the problem of what human rights should be protected. As human rights theory has developed in the post-World War II era, academics and

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14. Normative is defined as "of or pertaining to a norm regarded as correct, as in behavior." RANDOM HOUSE DICTIONARY 600 (2d ed. 1980). A normative framework attempts to describe an ideal system.

15. Descriptive is defined as "the act or method of describing." *Id.* at 238. A descriptive framework attempts to explain the system as it exists.

16. *Universal Declaration*, *supra* note 13.

17. See, e.g., *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st. Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 3, 6 I.L.M. 360 (1967) [hereinafter *Economic and Social Covenant*]; *Civil Law and Political Covenant*, *supra* note 13; *European Convention*, *supra* note 13; *European Social Charter*, Oct. 18, 1961, 529 U.N.T.S. 89 [hereinafter *Social Charter*]; *American Declaration*, *supra* note 13; *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr.2 (Jan. 7, 1970), 9 I.L.M. 673 (1970) [hereinafter *American Convention*]; *African Charter*.

18. In 1998, a U.N. conference on the creation of a permanent world criminal court is scheduled. Lauren Comiteau, *U.N. Plans to Create World Criminal Court*, CHRISTIAN SCI. MONITOR, Dec. 31, 1996, at 7.

Some countries like China, India, and Singapore have criticized the idea. They claim that such a tribunal, to be effective, would violate the principle of sovereignty. Other countries like Canada, Germany, Sweden, and Italy have rejected proposals to grant the court broad powers. The United States has advocated a permanent court, but wants to limit its jurisdiction to violations of international humanitarian law. John M. Goshko, *U.N. Moving Toward Creation of Criminal Court, But Advocates Severe Limits, Backed by U.S., Will Be Imposed on Its Independence*, WASH. POST, Apr. 21, 1996, at A27. This Note assumes that even if a permanent court is established, which is highly unlikely, its jurisdiction would be limited.

practitioners have immersed themselves in exhaustive arguments over the universality of human rights.<sup>19</sup> A generally accepted notion in human rights theory, developed by Karel Vasak, is that there are "three generations"<sup>20</sup> of human rights. This Note will argue that the international community can only protect and enforce the most universal of the first-generation rights,<sup>21</sup> those generally considered to be *jus cogens* norms.<sup>22</sup>

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19. The cultural patterns, ideological underpinnings and developmental goals of non-Western and socialist states are markedly at variance with the prescriptions of the Universal Declaration of Human Rights. Efforts to improve the Declaration as it currently stands not only reflect a moral chauvinism and ethnocentric bias but are also bound to fail.

Adamantia Pollis & Peter L. Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1, 37 (Adamantia Pollis & Peter Schwab eds., 1979). Compare:

[C]ontemporary defenses of universalism range from natural rights arguments to positivism to utilitarianism to social contract theories. Regardless of which form the arguments ultimately take, assertions of the universal nature of such claims tend to rest upon an epistemological assumption about the universality of human reason rather than a metaphysical claim about their correspondence with a reality independent of human understanding. Under such immanent universalist theories, truth is a product of the right functioning of human reasoning. This claim about human knowing, in turn, has the consequence of privileging the thinker, the philosopher, the scientist, or the lawyer in the debate over the meaning of human experience. The truth claims that emerge are normative and are understood as substantially independent of history, individual choices, and human experience. Disagreements over human rights are errors in reason, logical mistakes which can be resolved through better thinking.

Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 94-95 (1996).

20. Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1977, at 29.

"Inspired by the three normative themes of the French Revolution, they are: the first generation of civil and political rights (*liberté*); the second generation of economic, social and cultural rights (*égalité*); and the third generation of newly called solidarity rights (*fraternité*)." Burns H. Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 14 (Richard Pierre Claude & Burns H. Weston eds., 1992).

21. Vasak defines first-generation rights as "civil and political rights." Vasak, *supra* note 20, at 29. Cf. HOWARD TOLLEY, THE U.N. COMMISSION ON HUMAN RIGHTS 21-22 (1987).

Focusing enforcement on the most universal of human rights does not imply that other human rights abuses, such as individual torture, deserve approbation. Rather, the latter are not the types of abuses that the international community can pragmatically address by international tribunals at this stage in the development of international law. See *infra* Part III.B.

22. A *jus cogens* norm is an international norm from "which no derogation is permissible." OPPENHEIM'S INTERNATIONAL LAW 7 (R.Y. Jennings & A. Watts eds.,

Synthesizing the background information presented in Sections II and III, Section IV will introduce a descriptive theory of human rights enforcement based on normative values: the framework of universal principles that "ought" to be protected by the international community through tribunals refined by the realities of the modern international system of nation states. Section IV initially focuses on an ideal world, but the normative values will be refined by principles of utility and *realpolitik* to also project a descriptive theory of human rights enforcement. This descriptive theory analyzes the ability of the international community to currently defend normative values.

Such an analysis is not intended to be an end, but is offered as a point of departure towards an ideal world where every violation of a human right is punished. This transformation will not occur overnight, but will be a gradual process. It is essential for the clarity and efficiency of international human rights law that all nations understand what constitutes the present baseline. As the development of international law and human rights progresses, the excuses inherent in the present system should and will be stripped away until all human rights violations are prosecuted.

## II. THE ARGUMENTS REGARDING WHETHER THE INTERNATIONAL COMMUNITY SHOULD OR SHOULD NOT TRY HUMAN RIGHTS ABUSES

### A. *Why the International Community Should Try Human Rights Abuses*

The main reason for criminally punishing human rights violators is that by doing so the international community will deter future repression.<sup>23</sup> Deterrence is necessary not only to prevent the actions of future violators, but is essential to the functioning of societies based on law.<sup>24</sup> It may be necessary for countries rebuilding themselves after civil war, or after suffering repression or brutality,<sup>25</sup> to criminally punish human rights

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9th ed. 1992) reprinted in LOUIS HENKIN, ET AL., INTERNATIONAL LAW CASES AND MATERIALS 91 (3d ed. 1993).

23. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

24. "Citing Hannah Arendt's view that 'the first step on the road to total domination is to kill the juridical person in man,' David Remnick, the Moscow correspondent for *The Washington Post*, has observed, "Likewise, the first essential step toward liberty is the revival of the legal impulse in man.'" *Id.* (citing L. WESCHLER, A MIRACLE, A UNIVERSE 242 (1990) (quoting Remnick).



abusers as a method of reevaluating their own commitment to the principles of democracy or aiding in their transition to democracy.<sup>26</sup>

If states violate the obligation that they have taken upon themselves as purveyors of the law, the role of the law in society is undermined.<sup>27</sup> International law, as well as any code of justice, depends on a state maintaining its domestic responsibilities to its citizens.<sup>28</sup> As Diane Orentlicher notes:

If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct. This may be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale. Societies recently scourged by lawlessness need look no farther than their own past to discover the costs of impunity. Their history provides sobering cause to believe, with William Pitt, that tyranny begins where law ends.<sup>29</sup>

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25. The potential for human rights abuses increases with domestic instability. Most international conventions and treaties permit states to take the least restrictive measures to repress a "public emergency." See, e.g., European Convention, *supra* note 13, art. 15; Civil Law and Political Covenant, *supra* note 13, art. 4. See also Lawless, 1961 Y.B. Eur. Conv. on H.R. 438 (Eur. Comm'n on H.R.); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 4 (1978).

Even if torture could be shown to be efficient in some cases, it could simply never be permissible . . . Once justified and allowed for the narrower purpose of combating political violence, torture will almost inevitably be used for a wider range of purposes against an increasing proportion of the population . . . The law does not and must not accommodate torture.

AMNESTY INTERNATIONAL, in *TORTURE IN THE EIGHTIES* 4-8 (1984).

26. Orentlicher, *supra* note 23, at 2543.

27. Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425 (1979).

Richard Goldstone has articulated four choices for new democratic governments:

1. To grant immunity or indemnity for past criminal acts;
2. To allow a regular justice system to operate and for ordinary courts to try and sentence any persons proven guilty of criminal conduct prior or subsequent to the transition to democracy;
3. To establish a truth and reconciliation commission or its equivalent in order to enable confessions of guilt for past human rights abuses to be traded for indemnities; and
4. A modified form of truth commission where the most serious offenders remain subject to loss of office or even prosecution.

Goldstone, *supra* note 12, at 609.

28. AMNESTY INTERNATIONAL, *supra* note 25, at 4-7.

29. Orentlicher, *supra* note 23, at 2542.

Advocates of intervention contend that prosecuting violators is an essential and effective tool for assisting a nation in becoming a democracy.<sup>30</sup> If violators are not tried, it may "undermine the legitimacy of a new government and breed cynicism toward civilian institutions"<sup>31</sup> because "law 'is located in our myths and stories as a powerful attribute of legitimate authority."<sup>32</sup>

Because democracies depend on the rule of law, countries beginning to experiment with democracy may find it imperative to pursue human rights violators.<sup>33</sup> Without the knowledge that laws will actually be enforced, no matter who the transgressor is, people in a civilized nation will not be able to fully exercise the economic, civil, and social rights guaranteed to them by the wide assortment of conventions and treaties that apply to most states.<sup>34</sup> If the violators are members of a military regime and there is no enforcement of human rights,<sup>35</sup> the military leaders in charge have effectively decreed that the military can disregard any rule, thereby establishing a military state.<sup>36</sup> "The military's capacity to exercise a veto power over government policies . . . vitiat[es] the sovereignty of the national polity."<sup>37</sup> However, if the political and military leaders who violate human rights are

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30. Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON 89 (1989).

31. Orentlicher, *supra* note 23, at 2543.

32. *Id.* (quoting Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 180 n.7 (1985).

33. *Id.* For example, in Argentina, Raul Alfonsín campaigned on a platform of investigating human rights abuses. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2622 (1991). After assuming office, Alfonsín created a *Comisión Nacional Para la Desaparición de Personas* to investigate human rights abuses. *Id.* at 2623. Carlos Nino concludes that "[g]iven the circumstances, Alfonsín's investigation and prosecution of past human rights abuses held up miraculously well." *Id.* at 2637.

34. Orentlicher, *supra* note 23, at 2543. However, in a number of countries including the Philippines and Chile, truth commissions failed or were limited in their achievements. Goldstone, *supra* note 12, at 612-13 (contrasting successful investigations in Chile with investigations stymied in other countries). Two such documents applicable to virtually all states are the *Universal Declaration of Human Rights* and the *International Comment on Civil and Political Rights*, *supra* note 13.

35. Most human rights violations occur at the hands of the police or by a military regime. See Alejandrom Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283 (1987).

36. Orentlicher, *supra* note 23, at 2543-44. A prime example of this problem is Chile, where General Augusto Pinochet stepped down in 1990 and permitted a transition to democracy, but still maintains considerable power. Sebastian Rotella, *Wealthy Chile Clings to Old Values*, CHI. SUN-TIMES, Jan. 5, 1997, at 63.

37. Orentlicher, *supra* note 23, at 2543-44.

prosecuted, the validity and strength of democratic principles is affirmed.<sup>38</sup>

In summary, the primary reasons for intervening and trying the violations of a previous regime are premised on the belief that it is necessary to review human rights violations, and further, to punish the leaders that committed the evil acts. Without retribution and justice, a society cannot make the difficult transition to democracy.<sup>39</sup> Only by punishing lawbreakers can the populace understand the concept of the "rule of law," and more importantly, believe in the values implicit within the framework that is the modern liberal state.<sup>40</sup> By punishing human rights violators, the international community also sends a strong signal of deterrence to future despots.<sup>41</sup> Only by clear and convincing action will the international community communicate the message that violations and violators will not be tolerated.<sup>42</sup>

### B. *Why the International Community Should Not Try Human Rights Abuses*

The primary arguments against a general rule requiring prosecutions are generally twofold. First, politically charged trials may undermine a nation's transition to democracy.<sup>43</sup> Second, the international community's continued reliance on the principle of state sovereignty<sup>44</sup> precludes widespread implementation of

38. *Id. See, e.g.,* Nino, *supra* note 33. Examples also include the Danish and Australian prosecution of Nazi collaborators, and the South African truth commission. Goldstone, *supra* note 12, at 609-10, 613-14.

39. Orentlicher, *supra* note 23, at 2543. Goldstone emphasizes the need for acknowledging crimes committed. Goldstone, *supra* note 12, at 615. Goldstone contends that it is only with acknowledgment that the process of reconciliation can begin. *Id.*

40. Orentlicher, *supra* note 23, at 2543.

41. *Id. See also* D'Amato, *supra* note 8, at 504.

42. D'Amato, *supra* note 8, at 504. *See also Symposium, Transitions to Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965, 1044 (remarks of Nigel Rodley), 1054 (remarks of Diana Orentlicheek) (1990) [hereinafter *Transitions to Democracy*].

43. Orentlicher, *supra* note 23, at 2544. Latin American countries in particular have found trials to be problematic. Uruguay, Argentina, and Chile all enacted amnesty laws because of the fear of military reprisal. Goldstone, *supra* note 12, at 611-13.

44. The predominant ordering logic since the Peace of Westphalia has been associated with the 'will' of the territorial sovereign state. The government of a state has been its exclusive agent with respect to formulating its will in external relations. The juridical framework of relations worked out in the West has been gradually generalized to apply throughout the globe.

human rights tribunals, generally under the precept of preserving law and order.<sup>45</sup> Countries emerging from civil war are often fragmented and on the verge of disintegration.<sup>46</sup> Any attempt to prosecute the violations of a previous regime would further fracture the remaining stability of the nation, sending it back into conflict or allowing the rise of a new despot.<sup>47</sup> Given the possibility of such turmoil, the best policy may be to emphasize peace at all costs, and granting amnesty to violators of a previous regime under a policy of reconciliation.<sup>48</sup> Some countries, like Chile and South Africa, have permitted the departing regime or military government to retain considerable power after their official departure from power. Attempts at prosecuting human rights violators may undermine the new government's authority<sup>49</sup> or provoke unrest.<sup>50</sup> In a number of countries, "security forces have retained modest power relative to [an] elected government, [and] prosecution[s] may induce the military to 'close ranks'."<sup>51</sup> In situations like these, "[P]rosecutions could reinforce the military's propensity to challenge democratic institutions."<sup>52</sup>

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45. LEO KUPER, *The Sovereign Territorial State: The Right to Genocide*, in GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 161 (1981).

46. Obvious examples include Chile, in the post-Pinochet era, and Cambodia after the overthrow of the Khmer Rouge. Probably the most powerful example of the difficulty in assessing culpability is that of the German Democratic Republic (the former East Germany). After the reunification with the Federal Republic of Germany and the opening of the *Stasi* files, it was estimated that 250,000 people had served the brutal secret police at some point in time. Roberto Fabricio, *Germany and the Ghosts of Stasi*, J. COM., Aug. 28, 1995, at A10. *Stasi* informers included Henry Schramm, leader of the West German Green Party, and Dieter Stein, the Interior Ministry official given responsibility for dismantling the secret police. Ray Moseley, *Legacy of Secret Police Haunts East Germany*, CHI. TRIB., Sept. 28, 1990, at C18.

47. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON 37-38 (1989).

48. *Id.* See also *Transitions to Democracy*, *supra* note 42, at 1043 (remarks of the Honorable Didier Opertti); Nino, *supra* note 33, at 2620.

49. See Orentlicher, *supra* note 23, at 2544-46.

50. Dissatisfaction with prosecutions of military officers for past human rights violations was a prominent factor in three rebellions against the government of Argentine President Raul Alfonsín. See Shirley Christian, *Argentine Departs, Democracy Hardly Bankrupt*, N.Y. TIMES, July 8, 1989, § 1, at 2.

51. Orentlicher, *supra* note 23, at 2545. "In a number of the Central American countries and the smaller and less institutionalized South American countries, there is a dual power structure—civilian and military, co-existing uneasily, side-by-side—with the relative balance of power between them being renegotiated on virtually a daily basis." *Transitions to Democracy*, *supra* note 42, at 1024 (remarks of Professor Howard J. Wiarda).

52. Orentlicher, *supra* note 23, at 2545; *Transitions to Democracy*, *supra* note 42, at 1024. Three political assassinations ended the public debate initiated

Given the relative instability of some of these nations, some commentators argue that the transition to democracy is best served by not prosecuting human rights violators.<sup>53</sup> These arguments are based largely on the claim that "transitional societies may not yet possess the attributes of a viable democracy."<sup>54</sup> New governments may lack the legitimacy or the power to challenge former despots, and the international community should not press these nations to act as full-fledged democracies when the process has only begun.<sup>55</sup> If a conflict is still in progress, its cessation at all costs should be the primary goal of the international community and the principals within the nation.<sup>56</sup>

This argument advocates for the lesser evil. A fragile government must be wary of instituting prosecutions because the violators may attempt to overthrow the government or continue conflicts. These actions may cause more harm than the ultimate good they achieve of prosecuting a few individuals.<sup>57</sup>

Another argument often asserted is that the principle of state sovereignty precludes any widespread implementation of international human rights tribunals.<sup>58</sup> This concept is premised on the argument that any alleged abuses were not a violation of the nation's duties under international conventions<sup>59</sup> or within the public emergency exceptions of such conventions.<sup>60</sup> As Leo Kuper states:

The major and important contribution of the United Nations has been in the provision of humanitarian relief for the survivors of the genocidal conflicts . . . [The] United Nations is not a humanitarian,

by the Chilean National Commission for Truth and Reconciliation. Goldstone, *supra* note 12, at 612.

53. Alfred Stepan, *Paths Toward Redemocratization: Theoretical and Comparative Considerations*, in *TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES* 64-68 (G. O'Donnell et al. eds., 1986).

54. Orentlicher, *supra* note 23, at 2545.

55. See *Transitions to Democracy*, *supra* note 42, at 1026 (remarks of Professor Howard J. Wiarda).

56. Orentlicher, *supra* note 23, at 2545.

57. Orentlicher, *supra* note 23, at 2545. Cf. *Transitions to Democracy*, *supra* note 42, at 1056 (remarks of Diana Orentlicher) ("[A] failure to punish any of the past violations would undermine the deterrence objectives underlying the general duty to punish. If the new government established a wholesale impunity for past violations of fundamental rights committed on a vast scale, its action would . . . have the effect of tolerating or condoning the past violations and thereby encouraging similar ones.")

58. KUPER, *supra* note 45, at 161.

59. See, e.g., European Convention, *supra* note 13, art. 15 ("In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention. . .").

60. KUPER, *supra* note 45, at 161.

but a political, organization, and its humanitarian goals are at the play of political forces, pressure groups, and blocs, in an arena where delegates pursue the divisive interests of the states they represent. Added to this, its ideological commitment to the protection of the sovereignty of the state, with the corollary of nonintervention in its domestic affairs, stands in the way of effective action. . . . And above all, it is the rulers of the states of the world who gather together at the United Nations, and it is, though not exclusively, the rulers who engage in [human rights abuses].<sup>61</sup>

The emphasis on state sovereignty is not just a Western concept, but one that all nations accentuate, including Communist and Third World states.<sup>62</sup>

An important corollary to sovereignty is the right to self-determination.<sup>63</sup> "The right to self-determination, to freedom from alien subjugation and exploitation, was an inspiring, crusading call in the movement for decolonization."<sup>64</sup> Many less-developed countries now use this right to justify any actions they take within their border.<sup>65</sup> Furthermore, most human rights treaties permit some derogation from the text in the state of a public emergency.<sup>66</sup> Thus, any human rights violations that

61. *Id.* at 175.

62. *Corfu Channel (United Kingdom v. Albania)*, 1949 I.C.J. 39, 43 (Dec. 15) (Individual opinion of Judge Alvarez) ("Some jurists have proposed to abolish the notion of the sovereignty of States, considering it obsolete. That is an error. This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted.").

63. *See, e.g., United Nations Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations*, U.N. G.A.O.R., 25th Sess., Supp. 28, at 121, U.N. Doc. A/Res. 2625 (XXV) (1970).

Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

*Id.*

64. *KUPER*, *supra* note 45, at 182.

65. *Id.* at 182-83.

66. *See, e.g., European Convention*, *supra* note 13, art. 15 (states are permitted to take measures "required by the exigencies of the situation"); *American Convention*, *supra* note 17, art. 27 ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation . . .").

transpire are touted as actions by the state to maintain law and order.<sup>67</sup>

In conclusion, critics of international intervention to try human rights violators first argue that societies beginning the process of becoming a democracy may not be stable enough to withstand the harsh effects of a complete catharsis.<sup>68</sup> Second, they argue that principles of state sovereignty and self-determination do not permit the international community to systematically address human rights abuses at the international level.<sup>69</sup> They claim that any attempt by the world community to universally punish human rights violators, through the United Nations or a World Court, would be rebuffed if it appeared that the elemental concepts of sovereignty or self-determination were being undermined.

### III. WHICH HUMAN RIGHTS ARE UNIVERSAL ENOUGH TO DESERVE PROTECTION

#### A. *The Universal Declaration of Human Rights*<sup>70</sup>

The universal emphasis on delineating human rights<sup>71</sup> is primarily a modern phenomenon<sup>72</sup> in response to the worldwide

67. KUPER, *supra* note 45, at 161. See also *Lawless*, *supra* note 25; *Ireland v. United Kingdom*, *supra* note 25. In *Ireland v. United Kingdom*, the European Court of Human Rights found that hooding, wall-standing, subjection to noise, and deprivation of food and drink was not torture. *Id.* The Court did find that these actions constituted inhuman and degrading treatment in violation of Article 3 of the European Convention. *Id.*

In *Lawless* the European court stated that two elements needed to be present for an emergency:

First, the emergency must be nation-wide in its effects, so that however severe the local impact of an emergency may be, it will not, in the absence of that condition, be a 'public emergency' in the sense of paragraph (1) [of Article 15]. Secondly, the threat must be to organized life, which suggests that the emergency does not have to be one in which 'the life of the nation' as such is threatened with extinction, but one in which there is such a breakdown of order of communications that organized life cannot, for the time being, be maintained.

*Lawless*, *supra* note 25.

68. Orentlicher, *supra* note 23, at 2544.

69. KUPER, *supra* note 45, at 161.

70. *Universal Declaration*, *supra* note 13.

71. Human rights have five main attributes:

First, regardless of their ultimate origin or justification, human rights are understood to represent individual and group demands for the shaping and sharing of power, wealth, enlightenment, and other cherished values

repulsion of the Nazi atrocities brought to light at the International Military Tribunal at Nuremburg.<sup>73</sup> The Universal Declaration of Human Rights was unanimously adopted by the General Assembly of the United Nations on December 10, 1948,<sup>74</sup> as the first international vessel to combine the primary political and civil rights of various states and legal systems.<sup>75</sup> Though not a treaty or a convention, the Universal Declaration "has acquired a status juridically more important than originally intended."<sup>76</sup>

The civil and political rights expounded upon in the Universal Declaration were subsequently incorporated into the

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in community process, most fundamentally the value of respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other values.

Second, reflecting varying environmental circumstances, differing worldviews, and inescapable interdependencies within and between value processes, human rights refer to a wide continuum of value claims ranging from the most justiciable to the most aspirational. . . .

Third, if a right is determined to be a human right it is quintessentially general or universal in character, in some sense equally possessed by all human beings everywhere, including in certain instances even the unborn . . . human rights extend, in theory, to every person on Earth without discriminations irrelevant to merit.

Fourth, most assertions of human rights . . . are qualified by the limitation that the rights of any particular individual or group in any particular instance are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest . . . human rights are sometimes designated *prima facie* rights, and it makes little or no sense to think or talk of them in absolutist terms.

Fifth . . . human rights are commonly assumed to refer in some vague sense, to "fundamental" as distinct from "nonessential" claims or "goods" . . . the tendency, in short, is to de-emphasize or rule out "mere wants."

Weston, *supra* note 20, at 17-18.

72. Historically, human rights were perceived as the rights of nationals of states—an extension of the right of the state itself. The modern conception of individual rights came in the wake of World War II. Louis Henkin, *The Internationalization of Human Rights*, in *INTERNATIONAL LAW: CASES AND MATERIALS* 596, 596-97 (Louis Henkin et al. eds., 3rd ed. 1993).

73. Weston, *supra* note 20, at 22. In addition to being charged with war crimes, the Nazi officials tried at Nuremburg were charged with "crimes against humanity." *Id.* The Yugoslav and Rwandan tribunals also have jurisdiction over crimes against humanity. Scheffer, *supra* note 2, at 34, 40.

74. Weston, *supra* note 20, at 25.

75. *Id.* Cf. Douglas L. Donoho, Book Review, 85 *AM. J. INT'L L.* 416, 417 (1991) (reviewing ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS, UNIVERSALISM VERSUS RELATIVISM* (1990)) ("Renteln challenges what she describes as a presumption of universality in current human rights thinking by demonstrating the western origins of many rights set forth in the Universal Declaration. . . . The most important aspect of Renteln's discussion here is her . . . observation that it is shortsighted and perhaps ethnocentric simply to presume the universality of current international norms, given the array of divergent perspectives on international human rights.").

76. Weston, *supra* note 20, at 25.



International Covenant on Civil and Political Rights.<sup>77</sup> Additional rights were added, including "the right of all peoples to self-determination and the right of ethnic, religious, or linguistic minorities to enjoy their own culture, to profess and practice their own religion, and to use their own language."<sup>78</sup>

The Universal Declaration is generally recognized as the authoritative articulation and enumeration of the essential human rights of individuals. Since the Universal Declaration and the International Covenant on Civil and Political Rights, the rights of people to self-determination and to "economic self-determination" have been formulated by the international community and standardized in conventions and covenants.<sup>79</sup> Over the last fifty years, there have also been suggestions of an additional "generation" of rights including the elimination of racial discrimination,<sup>80</sup> elimination of religious discrimination,<sup>81</sup> elimination of discrimination against women,<sup>82</sup> and other conventions and protocols greatly expanding the concept of "human rights."<sup>83</sup>

### B. Cultural Relativism

Expansion of human rights has met with resistance as governments often point to local or regional cultural traditions as a valid basis for not enforcing or complying with various treaties and protocols.<sup>84</sup> Cultural relativism is an offshoot of modern moral philosophy which emphasizes the concept that different states have either different conceptions of right and wrong<sup>85</sup> or

77. Civil Law and Political Covenant, *supra* note 13. Most of the rights explicated in the Universal Declaration were incorporated into the Civil and Political Covenant, which is also used to understand the Universal Declaration more fully. Weston, *supra* note 20, at 25.

78. Civil Law and Political Covenant, *supra* note 13, art. 2(1).

79. See, e.g., *Economic and Social Covenant*, *supra* note 17; *European Convention*, *supra* note 13; *American Convention*, *supra* note 17; *African Charter*, *supra* note 13.

80. See, e.g., *International Convention on the Elimination of All Forms of Racial Discrimination*, Mar. 7, 1996, 660 U.N.T.S. 195.

81. See *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc.A/RES/36/55 (1981).

82. See *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. No. A/34/180 (1979).

83. See, e.g., *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989).

84. Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 869-70 (1985).

85. *Id.* at 870-71. Many non-Western states have complained that the rights in the major human rights conventions and protocols emphasize Western

subscribe to "metaethical philosophy" which denies the possibility of discovering or articulating an absolute moral truth.<sup>86</sup> Cultural relativism can be defined "as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence of civil and political rights enjoyed by individuals in a given society."<sup>87</sup> Local communities practice unique customs and value ideals specific to the community.

Many contemporary situations exemplify the tension between domestic cultural imperatives and international norms: for example, mutilation and flogging as criminal punishment, the circumcision of women; the subjugation of women, and various authoritarian methods of government are all topics upon which international law and local custom diverge. All of these contemporary practices, while clearly unlawful by international standards, are defended by some as being required or permitted by cultural traditions.<sup>88</sup>

Cultural relativists argue that sovereignty and self-determination require the international community to practice tolerance and reject notions of normative standards.<sup>89</sup> Since no central, institutionalized organs adjudicate and enforce "world" opinions on human rights, there can be no common, singular basis of interpretation and understanding of subjective concepts

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rights and demonstrate a bias towards Western political philosophy. Higgins, *supra* note 19, at 93.

Generally speaking . . . cultural relativists are committed to one or both of the following premises: that knowledge and truth are culturally contingent, creating a barrier to cross-cultural understanding; and that all cultures are equally valid. Combined with the empirical observation of cultural diversity worldwide, these two premises lead to the conclusion that human rights norms do not transcend cultural location and cannot be readily translated across cultures.

*Id.* at 95.

86. See, e.g., FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 9-12 (1888) (Walter Kaufmann trans., Vintage Books 1996). "There are no moral phenomena at all, but only a moral interpretation of phenomena." *Id.* at 85.

87. Tesón, *supra* note 84, at 870. Cf. Tyrer, 26 Eur. Ct. H.R. (ser. A) 4 (1978). The European Court of Human Rights rejected the notion that the Isle of Man could inflict corporal punishment as a "local requirement" exception to Article 63(3) of the European Convention. *Id.* at 18.

88. Tesón, *supra* note 84, at 870-71 n.10. Cf. *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 82, art. 2 ("States Parties condemn discrimination against women in all its forms."); see also *Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985).

89. Tesón, *supra* note 84, at 870-71 n.10.

such as "human rights."<sup>90</sup> Furthermore, the primary principles governing the relations of states—sovereignty and self-determination—preclude the international community from interfering with the governance choices of local populations.<sup>91</sup> Taken to the extreme, the theory contends that people have the right to create whatever type of government they choose, no matter how repressive, and protests by other nations should have no bearing on the internal preferences of the state.<sup>92</sup>

Proponents of cultural relativism argue that the absence of absolute norms in the interpretation of human rights presents a legal defense to any claims made against the state based on an interpretation of a convention or treaty.<sup>93</sup> Thus, governments may regulate their citizens in a manner that greatly varies from the core meanings of international human rights law by altering any human rights codes to conform to local cultural traditions.

Cultural relativism has been primarily advocated by non-Western countries.<sup>94</sup> These states argue what British philosopher Karl Popper maligned as "the conspiracy theory of human rights."<sup>95</sup> Popper denigrates non-Western nations' commitment to human rights by asserting that these nations claim that:

[H]uman rights are a Machiavellian creation of the West calculated to impair the economic development of the Third World. Starting from the Marxist assumption that civil and political rights are "formal" bourgeois freedoms that serve only the interests of the capitalists, the conspiracy theory holds that human rights serve the same purpose in the international arena. It sees them as instruments of domination because they are indissolubly tied to the right of property, and because in the field of international economic relations, the human rights movement fosters free and unrestricted trade, which seriously hurts the economies of Third World nations[.] . . . [In their view,] human rights advocacy amounts to moral imperialism. In short, the effect, if not the design of such an exclusive political preoccupation is to leave the door open to the

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90. See J. S. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L. REV. 609, 609-15 (1979).

91. Tesón, *supra* note 84, at 880-881. See also *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

92. Tesón, *supra* note 84, at 881-83.

93. *Id.* at 877. See also *supra* note 87.

94. Tesón, *supra* note 84, at 871. See also *supra* note 17.

95. KARL POPPER, 2 *THE OPEN SOCIETY AND ITS ENEMIES* 94 (5th ed. 1966).

most ruthless and predatory economic forces in international society.<sup>96</sup>

Cultural relativism is a powerful argument for the non-uniformity of application of human rights law. Western nations contend that the use of the argument is an excuse for nations to avoid conforming with their international obligations.<sup>97</sup> Non-Western nations respond that the emphasis on human rights is a mechanism by which Western nations exploit less developed countries and is simply another form of Western imperialism.<sup>98</sup> The ultimate effect of cultural relativism is to limit the number of human rights that truly have a universal application.

### C. *Human Rights Regimes in Liberal, Socialist, and Third World Regimes*

Related to the concept of cultural relativism is the theory that different political and social *regimes* value certain human rights over others.<sup>99</sup> Though somewhat facile, this framework is best analyzed from the three main political ideologies dominant in the modern world: the neoliberal regimes of the West, which emphasize individual and economic freedom; socialist states which accentuate social harmony and unity; and the loosely grouped nations of the Third World, which place importance on group identity.<sup>100</sup>

Western notions of human rights are derived from an individualistically oriented philosophy premised on economic rights.<sup>101</sup> As articulated by Hobbes and Locke, the liberal, capitalistic society is a formation of groups of individuals contracting together to form a nation. According to this contract, individuals relinquish some rights to protect other, more important rights.<sup>102</sup> However, some rights are "inalienable" and can never be disavowed or contracted away.<sup>103</sup> Critics of the Western tradition argue that:

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96. *Id.*

97. Tesón, *supra* note 84, at 896.

98. *Id.* at 896-97.

99. Adamantia Pollis, *Human Rights in Liberal, Socialist, and Third World Perspective*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 146 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992).

100. *Id.* at 146-52. The first generation of rights embodies Western ideals and influenced the development of the Universal Declaration and Civil and Political Covenant. See *supra* note 13. The African Charter includes the idea of the rights of "peoples." See African Charter, *supra* note 13, art. 19-24.

101. Pollis, *supra* note 99, at 146-48.

102. THOMAS HOBBS, LEVIATHAN 189-201 (Penguin Books 1984) (165); JOHN LOCKE, TWO TREATIES OF GOVERNMENT 122-28 (Hafner 1947) (1690).

103. *Id.*

Political power . . . was to be attained and maintained through a representative political system grounded in the exercise of individual civil and political rights . . . [T]raditional communal bonds, albeit hierarchically structured, were severed and replaced by atomized individuals . . . [T]he exercise of inalienable civil and political rights among the property-less, including the individual freedom of choice that is central to the exercise of rights, often were inoperative. But the disparity of economic and political power between those who owned the means of production and those who did not and the inequalities between parties to a contract were developments that were ignored by the modern political philosophers and the classical economists.<sup>104</sup>

For Socialist thinkers, this inequality of bargaining power between individuals made the whole regime illegitimate.<sup>105</sup> Marx found the Hobbesian notion of the "state of nature"<sup>106</sup> troubling and argued instead that communities that antedated modern states lived in a form of primitive communism.<sup>107</sup> Socialist states contend that the civil and political rights defended by the neoliberal, capitalist states are "bourgeois"<sup>108</sup> rights that result from the dominance of capitalism in the formulation of human rights conventions. These rights serve only the capitalists and not the laborers—there is nothing fundamental about the "rights" promulgated by this system.<sup>109</sup>

These regimes believe that the only fundamental rights of people are the "material conditions of existence," such as food, clothing, and work.<sup>110</sup> The socioeconomic struggles of individuals, defined within the framework of "class struggle," is

104. Pollis, *supra* note 99, at 147.

105. Friedrich Engels, *Excerpt from The Origin of the Family, Private Property and the State*, in KARL MARX & FRIEDRICH ENGELS: BASIC WRITINGS ON POLITICS & PHILOSOPHY 392-94 (Lewis S. Feuer ed., 1959) (1884). Marxist thought is predicated on class struggles. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY 12 (International 1983) (1848) [hereinafter THE COMMUNIST MANIFESTO]. Because the bourgeoisie control the means of production, they have the means to create a world in their image. *Id.* at 19.

106. See Hobbes, *supra* note 102, at 189-201.

107. Pollis, *supra* note 99, at 149. "It was a communal existence characterized by equality among all, an existence in which land, animals, and tools were shared. The accumulation of individual wealth, private property, individual ownership of the means of production, and class differences—all these were later stages in historical development, as were individual rights." *Id.*

108. "From the serfs of the Middle Ages sprang the chartered burghers of the earliest towns. From these burgesses the first elements of the bourgeoisie were developed." THE COMMUNIST MANIFESTO, *supra* note 105, at 13.

109. Pollis, *supra* note 99, at 150. The only rights that exist are legally premised ones granted by the state to fulfill obligations to the state. *Id.*

110. *Id.* See generally Karl Marx, *Excerpts from Capital: A Critique of Political Economy*, in KARL MARX & FREDERICK ENGELS: BASIC WRITINGS ON POLITICS & PHILOSOPHY 133-67 (Lewis S. Feuer ed., 1959); Friedrich Engels, *Socialism: Utopian and Scientific*, in KARL MARX & FREDERICK ENGELS: BASIC WRITINGS ON POLITICS & PHILOSOPHY 68-111 (Lewis S. Feuer ed., 1959).

what is important. One's ability to achieve self-fulfillment is defined within the context of one's place in the greater society;<sup>111</sup> the rights of individuals are defined in relation to each other by the general concept of communistic societies of production according to ability and distribution based on need.<sup>112</sup>

Marx argued that the ideal society envisioned by Communists would be devoid of the tensions inherent in societies with different socioeconomic classes.<sup>113</sup> He claimed that in a Communist state, "harmony reigns and the capitalist-generated antagonisms between the individual and society disappear. Individual freedom—that is, the full exercise of capabilities and the fulfillment of needs—is contingent on a unity and harmony among society's members, and between them and nature."<sup>114</sup> Thus the purpose of the state is to provide the basic economic and social needs of the individual. It is the provision of these needs that constitute the basis of Socialist human rights.<sup>115</sup>

The regimes loosely referred to as Third World states,<sup>116</sup> or less developed countries, generally "view their personhood in terms of their group identity."<sup>117</sup> People in this amalgamation of states are more likely to define their individual identity within the context of the group.<sup>118</sup> Of course, different regions have unique traditions and differing social patterns, but states in this group generally view "inherent individual rights, rooted in notions of 'freedom of (civil or political rights) or 'freedom from' (economic, social or cultural rights) [as] meaningless concepts."<sup>119</sup>

The common experience of the less developed group of nations was one of colonialism, the subjugation of the national

111. Socialist states accept the principles of civil and political rights, but only as secondary to economic and social rights. Western states have generally placed a secondary importance to social and economic rights after civil and political rights. Pollis, *supra* note 99, at 150.

112. See THE COMMUNIST MANIFESTO, *supra* note 105, at 51-53.

113. Marx contended that after the proletariat organized itself and became the ruling class, sweeping away "the old conditions," the class antagonisms inherent in the old structures would cease to exist. *Id.* at 53.

114. Pollis, *supra* note 99, at 149.

115. *Id.* at 150.

116. "The expression 'Third World,' inclusive of such diverse areas as Africa, Asia, the Middle East, and Latin America, is descriptive of their common economic underdevelopment, their dependence on the Western industrialized states and formerly the Soviet Union, and their struggle to attain nationhood and economic modernization. . . . [The] term obscures the significant differences that are to be found among the countries in question." *Id.* at 152.

117. *Id.* This communitarian instinct is most notable in Articles 19-24 of the African Charter which recognize the rights of "peoples." African Charter, *supra* note 13, at 62-63.

118. See E. J. M. Zvobgo, *A Third World View*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 90-106 (Donald P. Kommers & Gilbert D. Loescher eds., 1979).

119. Pollis, *supra* note 99, at 152.

will by a foreign power.<sup>120</sup> These nations were subject to economic exploitation, repression of the populace and local customs, and strict political rule which had less value for the native population than the colonial rulers.<sup>121</sup> The colonialists did not transmit ideas to the colonies such as individual respect, nor did they entertain for the natives values such as liberty or freedom.<sup>122</sup> Thus the modern Western emphasis on individual human rights, in particular the civil and political rights, has not been given much credence.<sup>123</sup> These views are reflected in the African Charter on Human and Peoples' Rights.<sup>124</sup> The African Charter contains fewer restrictions on the use (and abuse) of state power than most international human rights instruments.<sup>125</sup> In addition, though a number of individual rights are listed,<sup>126</sup> the rights of "peoples" are also listed.<sup>127</sup>

In conclusion, the importance of distinct human rights has context within the greater political regime. Western states favor the civil and political rights, socialist states favor economic and social rights, and Third World regimes favor group rights. Any application of human rights on a universal basis must take into account the differences between states' interpretations of these rights.

#### D. *Synthesizing the Framework*

Starting with the expansive notions of rights articulated in the Universal Declaration,<sup>128</sup> the human rights that can be protected on a systematic level must take into account theories of cultural relativism<sup>129</sup> and the various political regimes<sup>130</sup> that exist in the international community. What is quickly apparent is that there is only a small number of truly universal ideals—those which all societies share, despite varying cultural or political beliefs.

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120. *Id.* at 153.

121. *Id.*

122. *Id.*

123. *Id.* See also *supra* part II.B (describing the concept of the conspiracy theory of human rights). This idea argues that human rights are promulgated by Western nations to maintain a moral imperialism and an economic system balanced in their favor.

124. African Charter, *supra* note 13. No such regional human rights charter exists in Asia or the Middle East.

125. Pollis, *supra* note 99, at 153.

126. African Charter, *supra* note 13, arts. 2-17.

127. *Id.* arts. 19-22.

128. *Supra* note 13.

129. See *supra* Part II.B.

130. See *supra* Part II.C.

The primary human right that can be protected in all situations by the international community is the right to life. Articulated in all human rights treatises,<sup>131</sup> all societies and regimes agree that the most fundamental right is the right of existence. An extension of this concept produces the conclusion that genocide is an extreme violation of human rights.

More difficult to validate are anti-torture and anti-rape rights.<sup>132</sup> If the right of the individual is simply an extension of the group, the group can abuse one of its own based on relative cultural norms.<sup>133</sup> In addition, the question of what exactly is torture is problematic in all societies including the liberal Western regimes.<sup>134</sup> However, all groups and societies pay homage to this norm,<sup>135</sup> in part because excessive corporal punishment can easily lead to the loss of life.<sup>136</sup>

Another universally articulated norm is the prohibition against slavery.<sup>137</sup> Similar to the problem of anti-torture provisions, this norm has interpretation problems. Socialist countries would argue that the plight of many urban laborers in the West is slavery.<sup>138</sup> Again, though there may be interpretative difficulties, the international community as a whole accepts that

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131. See, e.g., *Universal Declaration*, *supra* note 13, art. 3 ("everyone has the right to life"); African Charter, *supra* note 13, art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.").

132. The following discussion will assume that rape is a form of torture and subsumed within the concept of torture.

The U.N. Tribunals for Yugoslavia and Rwanda have decided that mass rape is a form of genocide. See *U.S. Announces Grant for Mass-Rape Trials*, AGENCE FRANCE-PRESSE, Oct. 11, 1996, available in 1996 WL 12156051. Eight Bosnian Serbs were indicted for organized mass rape by the tribunal on June 27, 1996. *8 Serbs, 9 Croats Indicted; War Crimes Panel Also Seeks Karadzic's Arrest*, CHI. TRIB., June 28, 1996, at 12. These mass rapes allegedly took place on orders from Bosnian Serb leaders. *Mass Rape in Bosnia Took Place on Orders From Above*, DEUTSCHE PRESSE-AGENTUR, July 2, 1996 available in LEXIS, World Library, DPA File. Men were also sexually abused. *Id.*

133. Pollis, *supra* note 99, at 153.

134. The European Court of Human Rights found, in *Ireland v. United Kingdom*, *supra* note 25, that the use of military police and the interrogation techniques of hooding, wall-standing, subjection to noise, deprivation of food, sleep, and drink, did not constitute torture.

135. Zvobogo, *supra* note 118, at 100-03.

136. *Id.*

137. See *Universal Declaration*, *supra* note 13, at 73, art. 4 ("No one shall be held in slavery or servitude[.]"); African Charter, *supra* note 13, art. 5 ("All forms of exploitation and degradation of man particularly slavery, slave trade . . . shall be prohibited").

138. THE COMMUNIST MANIFESTO, *supra* note 105, at 23.



this is a norm of the human race and transgressions should be punished.<sup>139</sup>

These are the only universally agreed upon norms that can be protected through international mechanisms. Other values and rights that may be agreed upon universally—for example, the right to freedom of religion—cannot be enforced by the international community because of pragmatic considerations. It would be difficult to prove such violations and they would be even harder to redress.<sup>140</sup>

#### IV. A DESCRIPTIVE THEORY INCORPORATING NORMATIVE VALUES

The only human rights that the international community can prosecute as a whole are violations of the right to life, genocide, torture, and slavery. The international community needs to enforce these ideals whenever violations occur because these are the principal rights of all people throughout the world, regardless of the cultural or political regime to which they belong. These are the rights that all people agree are the most important for each individual human being devoid of whether one's sense of being is defined as an individual or through a group.

The international community needs to enforce these rights because only by criminal punishment will human rights abusers be effectively punished for past actions and deterred from future repression.<sup>141</sup> For the deterrence factor to be effective,<sup>142</sup> the violator must believe and respect that the law is not merely words on paper, but an obligation, that if not met, will result in sanctions or penalties.<sup>143</sup> Furthermore, intervention and prosecution are effective devices in aiding nations and societies in the transition from an authoritarian or despotic regime to a democratic one valuing the rights of each individual.<sup>144</sup> Prosecutions may be a necessary step towards the creation of a democratic state—because by demonstrating that no one is above

139. For example, though Article 4(1) of the Civil Law and Political Covenant permits a suspension or breach of the Covenant in times of public emergency, no derogation is permitted from Article 8(1) which prohibits slavery. Civil Law and Political Covenant, *supra* note 13.

140. This does not mean that other violations should not be prosecuted. It only means that the international community cannot institute tribunals and prosecute violators as was done at Nuremburg. Enforcement would need to be done by the people themselves, a subsequent regime or at a regional level, where neighboring nations would share beliefs and ideologies.

141. *Transition to Democracy*, *supra* note 42, at 1056.

142. Effective being defined in this Note as stopping future human rights violations.

143. See generally D'Amato, *supra* note 8, at 503-05.

144. Malamud-Goti, *supra* note 30, at 89.

the law, legitimacy is accorded to the institutions of the state providing the people with a belief in the functioning of the state.<sup>145</sup>

However, this normative ideal is strictly confined by the primary directive or ordering that exists in the modern world: state sovereignty and self-determination.<sup>146</sup> All regimes throughout the world—Western liberal democracies, socialist nations (or nations in transition from socialism), and less developed nations—value sovereignty as one of the most important ideals of the international community.<sup>147</sup> States will not enforce “minimal” transgressions of the international law of human rights for fear that they too will be held accountable.<sup>148</sup> States often decry the actions of other states, but will not take organized action against a rogue regime.<sup>149</sup>

Thus, it is possible to say that the international community should investigate and prosecute all violations of the universal rights of life, anti-torture and anti-slavery. Ideally, someday, the world community will be able to appropriately deal with every transgressor.<sup>150</sup> This normative ideal must be refined to accurately describe how the world community actually deals with human rights violations: a descriptive theory premised on normative values. Such a theory must be premised on the tools that the policymaker uses in making decisions in the international arena: utility principles and *realpolitik*.<sup>151</sup>

#### A. Utilitarian Principles

Utilitarianism, in its broadest definition “comprises all consequence theories of ethics, premised on the principle that the rightness or moral worth of any action depends on the overall

145. Orentlicher, *supra* note 23, at 2543.

146. KUPER, *supra* note 45, at 161.

147. Falk, *supra* note 44, at 33.

148. *Id.*

149. *Id.*

150. This could only be done with a judicial system that has enforcement capabilities. Tom J. Farer, *The United Nations and Human Rights: More Than a Whimper, Less Than a Roar*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTIONS 229, 230-31 (Richard Pierre Claude & Burns H. Weston eds., 1992).

151. Both utilitarianism and *realpolitik* are organizational philosophies offering explanations for the results of actions. JOHN STUART MILLS, UTILITARIANISM ii (10th ed. 1888); HANS J. MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 3 (1985) [hereinafter POLITICS AMONG NATIONS]. A descriptive framework is an attempt to explain the world as it is, not necessarily as it should be. The focus of the descriptive framework is also on consequences, readily permitting the application of consequence theories.

*Realpolitik* is also referred to as political realism. It “aims at the realization of the lesser evil than of the absolute good.” POLITICS AMONG NATIONS, *supra* at 4.

goodness of its consequences."<sup>152</sup> The primary principle of utilitarianism states that "the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action."<sup>153</sup> John Mills further refined the definition to that "creed which accepts as the foundation of morals *utility*, or the *greatest happiness principle* . . . that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."<sup>154</sup> The principle of utility focuses on welfare "secured to all mankind."<sup>155</sup> The duty of the politician is to promulgate only those laws that are necessary to deter the greatest number of individuals from acting detrimentally to the general welfare.<sup>156</sup> Utilitarianism is focused on results, implying that "motive has nothing to do with the morality of the action."<sup>157</sup> There is no nobility to self-sacrifice unless it leads to consequences that maximize utility.<sup>158</sup> Thus, utilitarianism ultimately assumes: "(1) that the ends or values of policies can be compared by a common measure of expected utility (also called happiness, satisfaction, or welfare) and (2) that the best policy or set of policies is that which maximizes the total expected utility."<sup>159</sup>

Principles of utility are formulated on a strict cost-benefit analysis.<sup>160</sup> Critics of utilitarianism argue that cost-benefit analysis is either inappropriate or unable to make the moral choices involved in the loss of life or the torturing of innocent persons.<sup>161</sup> However, the underlying principles of utilitarianism are attractive to the policymaker because they offer a relatively

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152. Utilitarianism is teleological in analysis, focusing on ends and not the means. MILLS, *supra* note 151, at ii.

153. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION i (1907).

154. MILLS, *supra* note 151, at 3 (emphasis in original).

155. *Id.* at 4.

156. BENTHAM, *supra* note 153, at ii. Based on this concept, human rights enforcement policies should be premised on maximizing the number of lives that can be saved. In some cases, this may require the use of truth commissions or granting general amnesty.

157. *Id.*

158. *Id.*

159. *Policy Analysis: Introduction*, in ETHICS & POLITICS: CASES AND COMMENTS 139 (Amy Gutmann & Dennis Thompson eds., 1990). The various forms of policy analysis include cost-benefit, cost-effective, and risk-benefit analysis. *Id.* at 139. The moral foundation of these concepts is utilitarianism. *Id.*

160. *Id.* at xiv. "Politicians must employ only those means that maximize benefits to all people who are affected by their use." *Id.* Since human rights enforcement is an attempt to maximize benefits to the world, this limits the means available to the policymaker.

161. *Id.* at xiv.

easy guide for hard choices: the maximizing of the public good.<sup>162</sup> Furthermore, as utilitarians note, there is no better principle than cost-benefit analysis by which public officials can make the policy choices among competing ideas.<sup>163</sup>

### B. *Realpolitik*

*Realpolitik*, also called political realism,<sup>164</sup> asserts that the defining concept in the "landscape of international politics is the concept of interest defined in terms of power."<sup>165</sup> States attempt to maximize their power,<sup>166</sup> and the strong wield the maximum power.<sup>167</sup> The political realist "aware of the moral significance of political action . . . is also aware of . . . successful political action. [The political realist] is unwilling to gloss over and obliterate that tension and thus to obfuscate both the moral and the political issue by making it appear as though the stark facts of politics were morally more satisfying than they actually are, and the moral law less exacting than it actually is."<sup>168</sup>

Power is wielded at the international level by nation-states depending on a number of different factors including geography, natural resources, industrial capacity, military preparedness, population, national character, and national morale.<sup>169</sup> Those nation-states such as the United States, the former Soviet Union, and the People's Republic of China, which are endowed with more of these factors than other states, can be labelled as "world powers."<sup>170</sup> Two primary points can be derived from *realpolitik*: 1) a nation's policies do not necessarily reflect conventional notions of "morality," but instead may be advocated to enhance a nation's

162. *Id.* Furthermore, as the discussion on cultural relativism indicated, it is difficult to find norms that are applicable across all cultures. See *infra* part II.B. In a world of cultural moralism, even if the policymaker wanted to make moral choices, the policymaker may not be able to because there is no single moral option.

163. *Id.*

164. *POLITICS AMONG NATIONS*, *supra* note 151, at 5.

165. *Id.*

166. *Id.* at 31.

167. *Id.* at 5. Since interest is defined in terms of power, a nation wields its power to maximize its interests.

168. *Id.* at 12.

169. *Id.* at 127-53. Morgenthau and Thompson categorize these factors as either "stable" or "subject to change." *Id.* at 127. They contend that geography, natural resources, industrial capacity, and military preparedness are more stable than the other categories. *Id.* at 128-153. "The relative influence of the different factors upon national power must be determined with regard to all nations that compete with each other in the field of international politics." *Id.* at 171-72.

170. See generally *id.* at 127-53.

power; and 2) to paraphrase George Orwell, some states are more equal than other states.<sup>171</sup>

### C. *Synthesis*

First, the principles that can be drawn from utilitarianism are that the greatest good must be maximized,<sup>172</sup> and a cost-benefit analysis must be performed to discover the best policy to be taken.<sup>173</sup> The maximization of social utility includes the good of *future generations*.<sup>174</sup> Second, the principles that can be drawn from *realpolitik* are that moral choices are not necessarily consistent with conventional mores,<sup>175</sup> and when decisions are being formulated, some states are stronger and more important than others in the international community.<sup>176</sup>

In applying the universal normative values of human rights—that the goal of the international community is to protect lives and prohibit torture and slavery—to these principles, one can derive a descriptive theory of normative values. To maximize these values, not only for the present population of the world, but for future generations, the international community must perform a cost-benefit analysis as to when and where tribunals can be used.

First, such a cost-benefit analysis must take into account the scope of the atrocities. For example, in a domestic parallel, the U.S. federal government does not prosecute jay-walkers, but a local municipality might. Though every act of torture or unlawful killing is contrary to the concept of human rights, the world cannot step in and react, but must leave such disciplinary actions to the sovereign state. It would be neither cost-effective nor efficient for an international tribunal to try every such case. Thus, the international community can only enact tribunals when atrocities occur on a wide scale such as genocide, mass torture or rape, or systematic slavery.

Second, any such analysis must take into account the power of the state, its condition, or both. It is important to note that the only tribunals that have been organized by the international community have been Nuremburg, when the German state ceased to exist and was being run by Great Britain, France,

171. See GEORGE ORWELL, *ANIMAL FARM* 112 (1946). Orwell's famous statement posits that "some animals are more equal than others[.]" *Id.* Similarly, though all entities in the international system are sovereign "nations," all "nations" are not equal.

172. MILLS, *supra* note 151, at 3.

173. *Policy Analysis*, *supra* note 159, at 139.

174. See generally *id.* at xi-xiv.

175. *POLITICS AMONG NATIONS*, *supra* note 151, at 12.

176. *Id.* at 127-53.

United States, and the former Soviet Union;<sup>177</sup> Bosnia, where a horrendous civil war destroyed all aspects of the nation-state;<sup>178</sup> and Rwanda, a country that teetered on the edge of complete self-destruction.<sup>179</sup>

There is also the greater problem of state sovereignty. No state is willing to sanction, at the present time, the use of tribunals against another state if such a mechanism could then be used against it. Tribunals will only be effective, and will only be permitted, when the offending state has ceased to exist or when the offending nation is such an international pariah that any arguments used to implement action against a rogue state can be distinguished.

The principles set forth in this Note are implicated in the creation of the Tribunals in Rwanda and Bosnia. First, these nation-states had effectively ceased to exist when the Tribunals were created,<sup>180</sup> negating concerns about sovereignty. Secondly, both Tribunals were created to respond to the charges of genocide and mass torture and rape.<sup>181</sup> These are not commonplace charges of human rights abuses but are the most important concepts protected by human rights instruments.<sup>182</sup> Finally, from a realpolitik perspective, neither Bosnia nor Rwanda are superpowers. Neither country was, or is going to be in the near future, a country able to wield a great deal of power in international politics.

Critics will immediately question the utility of this framework. They will argue that only the weak or destroyed will be affected and that there will be no change in the implementation of international human rights. There are two responses. First, if this framework is implemented today, all states will know that there is a baseline that the international community will never fall below. The development of effective enforcement procedures is not precluded, but assured. As the nations of the world realize that the present system is ineffective, change will only strengthen the baseline structure. In addition, it presents a clear and convincing commitment on the part of the nations of the world that action will be taken in specific situations, adding to the overall deterrence of the system.

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177. See INTERNATIONAL LAW: CASES AND MATERIALS 879 (1993) (Louis Henkin et al. eds., 3rd ed. 1993).

178. Even so, peacekeepers have been reluctant to arrest human rights violators for fear of reprisal. Elizabeth Neuffer, *Elusive Justice it Will Take an International Court to Deter War Criminals*, BOSTON GLOBE, Dec. 29, 1996, at D1.

179. See Christopher J. Dodd, *Needed: a Permanent War-Crimes Tribunal*, CHRISTIAN SCI. MONITOR, Dec. 16, 1996, at 19.

180. See Neuffer, *supra* note 178, at D1; Dodd, *supra* note 179, at 19.

181. Cohen, *supra* note 2, at A2; Neuffer, *supra* note 3, at A1.

182. See *supra* Part III.

Second, this system in no way precludes individual nations from taking further action against violators including economic and diplomatic sanctions or any other technique used to coerce other states. It also does not preclude any action taken by regional courts and organizations. Again, it simply creates a clear, bright-line standard by which all future violations can be judged.

#### V. CONCLUSION

The present state of human rights enforcement is unclear. Though the Bosnian and War Crimes Tribunal could be a step in the right direction towards effectively implementing human rights treaties and conventions, they may be ineffective or nothing more than anomalies. The international community must implement a bright-line baseline standard for the whole world as to when tribunals *will be* established. Such a standard must take into account the realities of world politics as well as questions of cost and efficiency. Additionally, only some human rights values qualify as truly universal. The enforcement of human rights that may not be universal should not be inflicted upon weaker societies and nations. The only normative human rights values, at the present time, are the right to life, and freedom from torture and slavery. These values should be protected by the international community whenever abused by rogue nations or when the internal structure of a nation has collapsed. This framework does not preclude action by individual states or regional compacts.

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