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Conceptions of International Peace and Environmental Rights: "The Remains of the Day"

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> But increasingly we are beginning to recognize a different commonage, a common heritage not in the earth's resources but in the earth itself and in the global environment. . . . Might global danger require a new conception of commonage, one that supports international regulation that is not only extraterritorial, one that cannot wait on universal enlightenment to bring universal consent to what may be essential?
>
> Louis Henkin[1]

INTRODUCTION

The international legal system is reinventing itself in the aftermath of the Cold War.[2] The United States is in the process of shaping a

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1. Louis Henkin, *International Law: Politics, Values and Functions* 216 RECUIL DES COURS 1, 348 (1989).

2. Symposium, *After the Cold War: International Law in Transition*, 32 HARV. INT'L L.J. 321 (1991). For an account of the collapse of the Soviet Union see Serge Schmemann, *Declaring Death of Soviet Union, Russia and 2 Republics Form New Commonwealth*, N.Y. TIMES, Dec. 9, 1991, at A1. For thoughtful analyses, see Graham Allison & Robert Blackwill, *America's Stake in the Soviet Future*, 70 FOREIGN AFF., Summer 1991, at 77; Seweryn Bialer, *The Death of Soviet Communism*, 70 FOREIGN AFF., Winter 1991-1992, at 166. *See generally* ROBERT CULLEN, TWILIGHT OF EMPIRE: INSIDE THE CRUMBLING SOVIET BLOC (1991); VLADISLAV KRASNOV, RUSSIA BEYOND COMMUNISM (1991).

The end of the Cold War permitted the unprecedented coalition during the Gulf War. *See* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L. L. 63 (1991); Alvin Z. Rubinstein, *New World Order or Hollow Victory?*, 70 FOREIGN AFF., Fall 1991, at 53; Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L. L.

new leadership role for itself in the emerging world order. The International Covenant on Civil and Political Rights,[3] in limbo since it was signed by President Carter in 1977,[4] was ratified in April 1992.[5] In a similar breakthrough, the United States signed the Charter of Paris for a New Europe in 1990, expressly affirming in an international instrument that "every individual has the right . . . to enjoy his economic, social and cultural rights."[6]

Are we ready to renew and expand our commitment to international human rights?[7] Will we focus instead on the role of "world policeman," working with and through the United Nations to maintain peace, or at least to contain conflict?[8] We might even try to

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452 (1991); Symposium, *The Iraqi Crisis: Legal and Socio-Economic Dimensions*, 15 S. ILL. U. L.J. 411 (1991).

A separate development, the economic unification of Europe, also has implications for the international system. *See, e.g.*, Council Directive 88/361 of 24 June 1988 for the Implementation of Article 67 of the Treaty, 1988 O.J. (L 178) 5 (Free Movement of Capital Directive); Council Decision 88/591, 1988 O.J. (L 319) 1 (establishing a court of First Instance of the European Communities); John T. Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455 (1991); Alan Riding, *Europeans Agree on a Pact Forging New Political Ties and Integrating Economies*, N.Y. TIMES, Dec. 11, 1991, at A1. *See generally*, JOHN PINDER, EUROPEAN COMMUNITY: THE BUILDING OF A UNION (1991); ALPO M. RUSI, AFTER THE COLD WAR: EUROPE'S NEW POLITICAL ARCHITECTURE (1991); RENÉ SCHWOK, U.S.-EC RELATIONS IN THE POST COLD WAR ERA (1991); Gregory F. Treverton, *The New Europe*, 71 FOREIGN AFF., America and the World 1991-1992, at 94.

3. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); *see infra* notes 54, 58-61 and accompanying text.

4. *President Carter Signs Covenants on Human Rights*, 77 DEP'T ST. BULL. 587 (1977).

5. 138 CONG. REC. S4781-84 (daily ed. Apr. 2, 1992)(Senate Executive Session on the International Covenant on Civil and Political Rights).

6. Charter of Paris for A New Europe, Nov. 21, 1990, 30 I.L.M. 190. As Professor Damrosch observed, instruments like the United Nations Charter are generally considered "political" rather than "legal" undertakings. Lori Fisler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2319 (1991).

7. *See* Jimmy Carter, *Keynote: The United States and the Advancement of Human Rights Around the World*, 40 EMORY L.J. 723 (1991); *cf.* Brenda Cossman, *Reform, Revolution or Retrenchment? International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L.J. 339 (1991)(considering possibility of renewed commitment to human rights on the international level).

Such a commitment necessarily implies an endorsement of the values which shape international human rights, particularly a deep respect for "human dignity." For a comprehensive and richly contextualized description of human dignity, *see* MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 367-449 (1980).

8. *See generally* Symposium, *The Use of Force in the Post-Cold War Era*, 20 DENV. J. INT'L L. & POL'Y 1 (1991); Louis Henkin, *Law and War After the Cold War*, 15 MD. J. INT'L L. & TRADE 147 (1991); Nicholas Rostow, *The*

pull up the drawbridge. It may be argued that our own survival—or at least our own standard of living[9]—is too much at risk to take on global problems, especially the overwhelming social and economic problems of the Third World.

There are difficult choices to be made and the absence of a clear consensus begs for fresh perspectives. As the United States considers the awesome responsibilities of world leadership, we would do well to ask ourselves where it is we hope to lead—what kind of world and what kind of future do we want for ourselves and for our children? It is time to reflect, to question, and to rigorously examine the normative underpinnings of the international system.[10]

After World War II, the world powers signed the United Nations Charter and the Universal Declaration of Human Rights. The two stand as an unequivocal denunciation of the atrocities of the war—a resounding, "Never again!" Never again would the world permit such a war; never again such violations of human rights. Peace and human rights are at the very foundation of modern international law.

The historical linkage between human rights and peace is obvious, but the conceptual as well as the practical linkage between them remains unclear.[11] This Article is a preliminary exploration of the

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International Use of Force After the Cold War, 32 HARV. INT'L L.J. 411 (1991). Some commentators have argued that this might include intervention to support struggling democracies. For concise summaries of those arguments, and their refutations, by the leading international scholars in the field, see LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 111-223 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

9. *See* Alan Tonelson, *What is the National Interest?*, THE ATLANTIC MONTHLY, July 1991, at 35, 37 ("Internationalism . . . has led directly to the primacy of foreign policy in American life and to the consequent neglect of domestic problems . . . .").

10. *See* Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U.J. INT'L L. & POL. 601, 603 (1990). Franck compares this post-Cold War moment to 1787, when, as Professor David Richards observed, a "'sense of challenge and opportunity fired the founders to initiate with the American people a great collective democratic deliberation on constitutionalism. . . .' Such a great collective democratic deliberation should now be going on in the world." *Id.* at 603 (quoting DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 20 (1989)). Similarly, Mark Janis has stated, "Now is the time to . . . modify [international law's] contemporary conceptions, both in its basic theory and in its practice." Mark W. Janis, *International Law?*, 32 HARV. INT'L L.J. 363, 364 (1991).

11. As Professor Sohn pointed out, "It is an axiom that there is a connection between [them], but it has not been investigated in depth." Letter from Louis B. Sohn, Professor of Law, University of Georgia (Jan. 8, 1991) (on file with the author). The linkage is often noted in passing. As Professor Schachter recently observed, for example, "economic and social deficiencies . . . contribute to internal tensions and to interstate conflict." Schachter, *supra* note 2, at 473.

Efforts to understand this relationship may be increasing. *See, e.g.*, Jimmy Carter, *The Greatest Human Rights Crime: War*, 13 HAMLINE L. REV. 469 (1990).

relationship between our conceptions of peace and human rights, using environmental rights[12] as a case study. My basic thesis is that there is a fundamental tension between "peace" and "human rights"—a tension deriving less from any inherent normative conflict than from their respective (and complementary) spheres of influence in the political world. Since "peace" addresses the conduct of states in their external relations with other states, it is necessarily governed by universal standards, i.e., standards established and shared by all sovereign states. Human rights law,[13] in contrast, focuses on the conduct of states towards their own people. Although human rights norms are framed in terms of universal standards, domestic enforcement is shaped by local culture and circumstances.[14]

For discussions of "humanitarian intervention," or the use of force to protect human rights, see, for example, FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L. L. 516 (1990); Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 8, at 215; Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 8, at 185; Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 8, at 202; James A.R. Nafziger, *Self-determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9 (1991). For some preliminary thoughts on the linkage between economic rights and peace, see Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 MICH. J. INT'L. L. 144 (1991).

Professors MacDougal and Chen and the late Professor Lasswell have argued in a vast body of work that these conceptions are necessarily intertwined, both with each other and with other constituent dimensions of "world order." *See, e.g.*, MCDOUGAL ET AL., *supra* note 7.

Some international instruments explicitly establish a linkage. The 1977 Protocols to the Geneva Convention, for example, prohibit "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 35, U.N.T.S. 3, 21 (entered into force Dec. 7, 1978).

For a graphic account of the impact of the Persian Gulf War on the environment, see Nicholas A. Robinson, *International Law and the Destruction of Nature in the Gulf War*, 21 ENVTL. POL'Y & L. 216 (1991).

12. Environmental rights often have been referred to as "third generation" human rights. In the now classic formulation, "first generation" civil and political rights correspond to the French Revolution's "liberté," "second generation" economic and social rights correspond to "égalité," and "third generation" collective rights to "fraternité" or "solidarité." Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 441 (1981).

13. As used in this Article, "human rights" refers to the familiar civil, political, economic, social, and cultural rights set forth in the International Bill of Rights. *See infra* notes 54-55 and text accompanying notes 50-72.

14. I am not suggesting that domestic adulteration is acceptable practice

Environmental rights partake of both regimes, although the case for considering them "human rights"[15] is probably stronger. Like other human rights, environmental rights have been tailored to local conditions and require intrastate enforcement. Like peace, however, environmental rights demand agreed upon norms and effective interstate implementation. To be fully realized, environmental rights require not only considerable coordination, but fundamental coherence between the interstate and intrastate regimes, a coordination and a coherence that has never before been achieved or even attempted.[16]

This Article compares the pressures that have produced international regimes dealing with peace, human rights in general, and environmental rights in particular. It also considers the concessions each regime has had to make to state sovereignty.[17] Why have

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under the human rights treaties. Many of the states that are parties to those treaties file reservations to the "universal standards" or objections to the reservations of other states. *See, e.g.*, *infra* notes 127-28. Nor is there scholarly agreement as to the range of permissible variation. *See generally* Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984)(considering competing claims of relativism and universalism); Alison D. Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUM. RTS. Q. 514 (1985)(pointing out common assumptions and pitfalls of universalism). As a practical matter, however, it is generally recognized that states are loathe to judge others, lest they be judged. *See infra* note 74.

In Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5), the International Court of Justice noted that "all States . . . have a legal interest in [the protection of] . . . the basic rights of the human person, including protection from slavery and racial discrimination" and held that all states accordingly could bring a claim when "obligations *erga omnes*" were violated. To date, however, no state has sought to rely on *Barcelona Traction* for this principle. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 531 n.2 (2d ed. 1987) [hereinafter HENKIN ET AL., INTERNATIONAL LAW]; *see also infra* note 33.

15. For a brief history of efforts to establish environmental rights as human rights, see Melissa Thorme, *Establishing Environment As a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 303-05 (1991); *see also infra* text accompanying notes 110-12 (discussing human rights and the environment); *cf. infra* text accompanying notes 94-95 (discussing environment as a security issue).

16. Whether peace and other human rights similarly require such coordination and coherence to be fully realized is a more profound question that is beyond the scope of this Article.

As Sir Geoffrey Palmer hopefully observed, "The extraordinary changes in world order that have recently taken place must surely increase the chances of achieving change in the methods of making international environmental law." Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L. L. 259, 259 (1992).

17. As the International Court of Justice pointed out in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), "the whole of international law rests [on the fundamental principle of state sovereignty]." *See generally* Walter F. Mondale, *Human Rights and the Environment: Facing a New World Order*, 16 VT. L. REV. 449 (1992).

sovereign states, often at considerable risk and expense, pledged to promote peace, human rights, and environmental rights? What explains the sustained commitment to norms once dismissed as hortatory and now recognized as enforceable[18] law?[19] Equally important, what are the concessions, or accommodations, to state interests that have been necessary to achieve this consensus? My purpose here is not to undertake a comprehensive study, but to provide the general reader with both a conceptual overview of these three distinct but

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18. Those skeptics who still doubt the "enforceability" of international law might recall Louis Henkin's oft-quoted observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979)(emphasis omitted). In addition to the "horizontal sanctions" arising from a shared and fundamental, albeit imperfect, respect for international law, enforcement may be obtained through the International Court of Justice. *See* Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891 (1990). *But see* Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation and Non-Performance*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 288, 293-97 (Lori Fisler Damrosch ed., 1987)(citing cases showing decline in states' willingness to accept the authority of the court). The United Nations Security Council also enforces international law. *See, e.g.*, S.C. Res. 687, U.N. SCOR, 44th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991). For conceptual descriptions of "enforcers" in international law and their limitations, see W. Michael Reisman, *Sanctions and Enforcement*, *in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS 381, 413-20 (1981).

It is generally recognized that domestic courts remain the most important enforcers of international law. *See infra* note 88. For an overview of the ways in which human rights law has already affected domestic jurisprudence, see Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983). Some commentators have suggested future possibilities for domestic enforcement of international human rights law. *See, e.g.*, Farooq Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?*, 5 HUM. RTS. Q. 68, 69 (1983)(suggesting that the Tenth Circuit's reliance on international norms in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), "usher[ed] in new vistas for the domestic protection of internationally recognized human rights" through incorporation into federal common law); Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 233 (1985). *But see* Linda Greenhouse, *High Court Backs Seizing Foreigner for Trial in U.S.*, N.Y. TIMES, June 16, 1992, at A1 (Mexican citizen, kidnapped by the United States government in what Justice Stevens characterizes as "a flagrant violation of international law," may nonetheless be tried in the United States) (quoting United States v. Alvarez-Machain, 112 S. Ct. 2188, 2203 (1992) (Stevens, J., dissenting)).

19. This development is often discussed in terms of a progression from "soft" to "hard" law. Adherence to various hortatory declarations has historically been obtained through such a process. The Treaty on Principles Governing States in the Exploration and Use of Outer Space, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, for example, originated in "soft" accession to general principles. *See generally*, C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

related regimes and an analytic framework in which to compare them. I conclude that we must recognize and transcend the limitations of the peace and human rights regimes if we are to develop effective international environmental law.

I. PEACE[20]

A. Impetus for Acceptance

The prohibition of the use of force in the United Nations Charter represents a substantial limitation on traditional conceptions of state sovereignty. International law has historically been understood as the law of nation states—the rules agreed upon by the nations of the world to govern their dealings with one another. Under international law each state is recognized as autonomous and sovereign; none is subject to the authority of another. The only recognized limitations on state sovereignty were those to which the state itself acquiesced, either explicitly in a treaty or through consistent custom.

Historically, waging war was a sovereign prerogative.[21] It might be disapproved, it might have tremendous political costs, but it was

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20. For present purposes, "peace" may be understood as it is used in the *Declaration on the Right of Peoples to Peace*, G.A. Res. 11, U.N. GAOR, 39th Sess., Supp. No. 51, at 22, U.N. Doc. A/39/51 (1985), which provides in pertinent part that the right to peace "demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations." Article I of the United Nations Charter provides that the purposes of the United Nations include:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
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> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

U.N. CHARTER art. 1.

This definition is concededly rather arid and legalistic. For those craving more philosophical treatments, see, for example, HANNAH ARENDT, THE HUMAN CONDITION (1958); NICCOLO MACHIAVELLI, THE DISCOURSES (Max Lerner ed., 1950); THE REPUBLIC OF PLATO (Allan Bloom trans., Basic Books 1968).

21. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE 14-50 (1981). For a description of "just war" prior to the Peace of Westphalia in 1648, see MALCOLM SHAW, INTERNATIONAL LAW 539-41 (1986). War could be—and was—declared to seize territory, to redress an insult, for the glory of God, or merely on a whim. *See generally* FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES (1975); MICHAEL WALZER, JUST AND UNJUST WARS (1977).

not generally considered *illegal* under international law until the Kellogg-Briand Pact in 1928.[22] Even with the recognition of a legal prohibition against war, it was another twenty years before legal structures or mechanisms for averting war were devised.[23] It took the devastation of World War II to convince the world powers that limits had to be imposed for the security, even the survival, of all states in a nuclear age. "Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,"[24] nation states banded together to prohibit the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[25] The United Nations Charter represented a significant concession on the part of sovereign states. It also represented their collective acknowledgement of a preemptive common objective—mutual survival. The urge to punish a competitive neighbor, to seize particularly attractive territory, or even to protect the state from a real political or economic threat was not worth the risk of annihilation. As Professor Henkin has explained, "Peace was the paramount value. . . . Peace was more important than progress and more important than justice."[26]

B. Concessions to State Sovereignty

While the United Nations Charter's prohibition on the use of force represents a major restraint on hitherto unfettered sovereign

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22. General Treaty for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

> Article I
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> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
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> Article II
>
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Id. at 2345-46, 94 L.N.T.S. at 63.

23. The Covenant of the League of Nations provided for resort to "pacific settlement" before going to war. *See* LEAGUE OF NATIONS COVENANT arts. 12-16. While this scheme was intended to deter war, it did not purport to enforce a legal prohibition against it: "War, as such, was not made illegal but only where begun without complying with the requirement." HENKIN ET AL., INTERNATIONAL LAW, *supra* note 14 at 668-70 (quoting D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 15-16 (1963)).

24. U.N. CHARTER pmbl.

25. U.N. CHARTER art. 2, para. 4.

26. Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 38-39 (1989).

states, two important limitations make this prohibition acceptable. First, carefully crafted exceptions permit the state to use force if necessary for its own self-defense or at the request of a friendly state which has been attacked ("collective self-defense").[27] Thus, the use of force in response to a prior *unlawful* use of force is permitted under the Charter.[28]

Second, and equally important, the prohibition only applies to the interstate use of force. Article 2(4) of the Charter by its terms only restricts armed conflict between different sovereign states.[29] Civil wars,[30] even the harshest suppression of domestic insurgents or minority populations, are regarded more as internal matters than as appropriate subjects of international intervention.[31] Sovereign states retain their right to use force internally to protect themselves against "domestic" threats to their own security. The notable exception, of course, is that states cannot use force if in doing so they violate human rights.[32] The international community, however, remains reluctant to intervene in—or even criticize—another state's "internal policies."[33]

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27. U.N. CHARTER art. 51.

28. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 905 (1987) (Unilateral Remedies); *see also* David R. Penna, *The Right to Self-Defense in the Post-Cold War Era: The Role of the United Nations*, 20 DENV. J. INT'L L. & POL'Y 41 (1991).

29. *See also Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

30. *See* Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903 (1992); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641-45 (1984).

31. *See* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991); Damrosch, *supra* note 11; Kartashkin, *supra* note 11; Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281 (1991).

32. The Security Council is considering appropriate limits on the right to use force internally in the case of Yugoslavia. *See* O'Connell, *supra* note 30, at 909-12. The United Nations recently adopted trade sanctions against Yugoslavia in an effort to promote peace in Bosnia and Herzegovina. Paul Lewis, *U.N. Votes 13-0 for Embargo on Trade with Yugoslavia; Air Travel and Oil Curbed*, N.Y. TIMES, May 31, 1992, § 1, at 1; *Excerpts From U.N. Resolution: "Deny Permission,"* N.Y. TIMES, May 31, 1992 § 1, at 8.

33. [Some argue that] one State should be free to invade another country to prevent a holocaust or to depose a genocidal regime. That argument is seductive but specious. . . . In fact, no State has pressed for exception to the law of the Charter that would permit invading another country to remedy even the grossest of human rights violations. In fact, no State has gone to war against another State for the purpose of ending human rights violations.

Henkin, *supra* note 8, at 156.

C. Compliance

The international peacekeeping regime focuses on the acts of states, that is, acts of aggression by one state against another.[34] While acts of individuals may well have an impact on peace, they neither trigger sanctions nor justify the use of force by the target state, unless they can be positively attributed to a state.[35] Terrorism, for example, has been discouraged in a series of multilateral treaties,[36] but it generally does not give the target state the right to use force in self-defense.[37]

How does the international system deal with violating states?[38] Article 51 self-defense, described above,[39] is basically an interim measure under the United Nations Charter scheme. A state may utilize self-defense "*until* the Security Council has taken the measures necessary to maintain international peace and security."[40] Under Article 41, the Security Council has a broad range of options, including resolutions of condemnation, economic sanctions, "complete or partial interruption of economic relations and . . . communication, and the severance of diplomatic relations."[41] Moreover, the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including the use of force, should it decide that Article 41 measures "would be inadequate or have proved to be inadequate."[42] It remains an open question whether Security Council action preempts further independent action by the target state or its allies.[43]

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34. *Definition of Aggression Resolution* art. 1, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, 143, U.N. Doc. A/9631 (1975).

35. Military and Paramilitary Activities, *supra* note 17, at 354-63.

36. *See, e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (Hague Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 10 I.L.M. 1151 (Montreal Convention).

37. A state may be held accountable for terrorist acts under norms governing state responsibility if the state subsidized, supported, or otherwise affirmatively encouraged terrorists. Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 307-09 (1977); *cf.* Geoffrey M. Levitt, *Intervention to Combat Terrorism and Drug Trafficking*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 8, at 224, 227 (the United States bombing of Libya was carefully justified by focusing on "a pattern of incidents which, taken as a whole, amounts to an ongoing armed aggression" likely to continue absent "preemptive" action by the United States).

38. *See* U.N. CHARTER art. 51.

39. *See supra* notes 27-28 and accompanying text.

40. U.N. CHARTER art. 51 (emphasis added).

41. U.N. CHARTER art. 41.

42. U.N. CHARTER art. 42.

43. Henkin would leave this to the Security Council. Henkin, *supra* note 8, at 161. There is also the question of the extent of Security Council authority over

The Article 43 regime, calling for "special agreements" under which member states would provide armed forces for international security, has never been implemented because of the stalemate in the Security Council during the Cold War.[44] While the scope and usefulness of the Article 43 regime remains to be proved, two points are critical for present purposes. First, the Charter's peacekeeping regime contemplates an international, collective response to the use of force. Second, until and unless the member states commit substantial resources to Article 43 forces[45]—or an alternative is devised and adopted—international peacekeeping is structured more to respond to actual acts of aggression than to defuse simmering hostilities and prevent their outbreak.

While some commentators have argued that the prohibition against the use of force has been selectively enforced, on one has claimed that it is a variable norm. This is not to say that the use of force is unambiguous under the Charter. Louis Henkin takes the position that there may be absolutely no transboundary use of force except in the case of self-defense against armed attack.[46] Oscar Schachter has explained that the use of force under Article 2(4) must be "proportional."[47] And Anthony D'Amato has argued that under the doctrine of humanitarian intervention, the limits on the legitimate use of force are even more liberal than those accepted in the Persian Gulf War.[48] All of these authors, however, like most international

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member states. During the Persian Gulf War, commentators noted that Security Council Resolution 678 imposed no legal obligation on the United States to use armed force. *See, e.g.*, Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991). *See generally* S.C. Res. 678, U.N. SCOR, 45th Sess., Resolutions and Decisions of 1990 at 27, U.N. Doc. S/INF/46 (1991).

44. *But see Uniting for Peace Resolution*, G.A. Res. 377A, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1951)(urging the Security Council to promote the formation of special agreements under Article 43). This resolution was passed during the Korean War and is usually considered an exceptional case. For a concise summary, see DAVID J. SCHEFFER, UNITED NATIONS ASS'N OF THE UNITED STATES OF AMERICA, THE UNITED NATIONS IN THE GULF CRISIS AND OPTIONS FOR U.S. POLICY 8 (Occasional Papers 1991).

Franck and Patel say that the lack of Article 43 military forces does not matter. Franck & Patel, *supra* note 2, at 66. Many other scholars disagree. *See, e.g.*, Glennon, *supra* note 40.

45. For a recent assessment, see Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 482-84 (1991).

46. Henkin, *supra* note 26, at 37, 44-45.

47. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 120 (1986). For an updated analysis, see O'Connell, *supra* note 45, at 481-86.

48. Anthony D'Amato, Book Review, 85 AM. J. INT'L L. 201, 202 (1991)(reviewing HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE (1989)); *see also* Tesón, *supra* note 11; D'Amato, *Invasion of Panama*, *supra* note 11.

scholars who analyze the use of force, seek to articulate a standard to be applied universally, in all situations.[49] All states, obviously, have an interest in a clear standard, fairly applied.

II. HUMAN RIGHTS

A. Impetus for Acceptance

Just as the United Nations Charter's restrictions on the use of force limit a state's options in its dealings with other states, the growing body of international human rights law restricts a state's options in its dealings with its own people.[50] A series of international instruments requires states to respect and protect what the Charter refers to as "the dignity and worth of the human person."[51] The Universal Declaration of Human Rights[52] fleshes out this concept, establishing the framework for the "International Bill of Rights."[53] This consists of the International Covenant on Civil and Political Rights[54] (Political Covenant or ICCPR) and the International Covenant on Economic, Social and Cultural Rights[55] (Economic Covenant or ICESCR).

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49. For a summary of the impact of United Nations peacekeeping from 1945-1984, see Eric Stein, *The United Nations and the Enforcement of Peace*, 10 MICH. J. INT'L L. 304, 314 (1989) (quoting Ernst B. Haas, *The Collective Management of International Conflict, 1945-1984*, *in* U.N. INST. FOR TRAINING AND RESEARCH, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY at 3, 19, U.N. Sales No. E.87.III.K.ST/20 (1987)).

50. *See generally* Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991); Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978). The restrictions may also limit a state's options in its dealings with foreign nationals and refugees, i.e., stateless people. *See* Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335 (1991).

51. U.N. CHARTER pmbl.; *see also* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 51-52 (1987)(arguing that "minimally good lives" should be the focus of human rights).

52. G.A. Res. 217(A) (1948). The Universal Declaration "is not in terms a treaty instrument." Secretary-General, *1971 Survey of International Law*, U.N. Doc. A/CN. 4/425, at 196.

53. *See* LOUIS HENKIN, THE AGE OF RIGHTS 16-18 (1990).

54. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)[hereinafter Political Covenant]; *see also* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed., 1981).

55. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976)[hereinafter Economic Covenant]. A group of distinguished experts in international law met in Maastricht, the Netherlands in 1986. *See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex, *reprinted in* 9 HUM. RTS. Q. 121, 122 (1987). The group agreed unanimously that these principles "reflect[ed] the present state of international law" unless specifically qualified as a "recommendation." *Id.* at 121.

ICCPR addresses "first generation" civil and political rights, what Philip Alston aptly called "rights to freedom."[56] These rights are most like the negative rights familiar to those of us in the United States from our own Constitution.[57] Negative rights forbid a state from interfering with its peoples' freedoms of "thought, conscience and religion,"[58] "expression,"[59] and "liberty and security,"[60] and from denying equal protection of the law.[61] Although the United States did not ratify the Political Covenant until 1992,[62] the nation's pervasive influence and the persistent appeal of its Constitution played an important part in familiarizing the rest of the world with these rights.[63]

"Second generation" economic and social rights are set out in the Economic Covenant. Like ICCPR, the Economic Covenant is predicated on the "dignity and worth of the human person."[64] ICESCR recognizes that civil and political rights cannot be realized unless basic human needs are met.[65] Economic rights were a major concern for the former colonial Third World states who joined the United Nations in the 1960s. Article 11.1 of ICESCR, for example, provides in pertinent part: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living condi-

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56. Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 310 (1982).

57. *See, e.g.*, HURST HANNUM & RICHARD B. LILLICH, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW (1985); Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851 (1989); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158 (1985).

58. Political Covenant, *supra* note 54, art. 18, para. 1.

59. *Id.* art. 19, para. 2.

60. *Id.* art. 9, para. 1.

61. *Id.* art. 16.

62. *See supra* note 5.

63. *See* William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1 (1991). *See generally* authorities cited *supra* note 57.

64. Economic Covenant, *supra* note 55, pmbl.

65. *See* U.N. GAOR 3d Comm., 6th Sess., 358th-372d, 411th-417th mtgs., at 67-150, 399-499, U.N. Docs. A/C.3/SR.358-.372, .411-.417 (1951-1952)(general debates on draft international covenant on human rights). The decisions resulting from these debates are contained in the *Report of the Third Committee*, U.N. GAOR, 6th Sess., Annexes, Agenda Item 29, at 37, U.N. Doc. A/2112 (1952), and are discussed by David M. Trubeck, *Economic, Social and Cultural Rights in the Third World*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 211 n.17 (Theodor Meron ed., 1984). *See generally* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).

tions."[66] Under Article 12.1, the parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[67]

Both covenants have been ratified by a substantial majority of the United Nations member states, including virtually all of the Western states and Japan.[68] The "conventional wisdom" is that two separate covenants were drafted "because of the East-West split and a disagreement over the value of socio-economic rights."[69] Some commentators attribute the division more to the differences in "the nature of the legal obligations and the systems of supervision that could be imposed."[70] Economic rights, which might require significant state expenditures, were to be achieved "progressively," while civil and political rights, which depended more on state restraint, were to be implemented immediately.[71] The interdependence of the two covenants, and the fallacy of asserting the superiority of either, are now well-established.[72]

B. Concessions to State Sovereignty

States give up some of their sovereignty by adhering to the covenants, although the extent of that relinquishment varies.[73] Two

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66. Economic Covenant, *supra* note 55, art. 11, para. 1.

67. *Id.* art. 12, para. 1.

68. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 357 n.*, 376 n.* (1989)(listing states which have ratified the ICCPR and the ICESCR).

69. David P. Forsythe, Book Review, 8 HUM. RTS. Q. 540, 541 (1986)(reviewing A. GLENN MOWER, JR., INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS (1985)).

70. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 666 n.1 (4th ed. 1991).

71. Trubeck, *supra* note 65, at 205-33.

72. *See Resolution on the Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G.A. Res. 130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/44/49 (1989)(accepted Dec. 15, 1989); Melanie Beth Oliviero, *Human Needs and Human Rights: Which Are More Fundamental?*, 40 EMORY L.J. 911 (1991); Michael W. Giles, *Comments on Oliviero Article*, 40 EMORY L.J. 939. *See generally*, Russell L. Barsh, Current Development, *A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192, 199 (1991)(noting recent "linkage of human rights with the conditions for capitalism").

For a discussion of the limits of the positive-negative dichotomy in the context of ICESCR, see Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159-60 (1987).

73. Sweden, for example, incurred no further obligations by ratifying ICESCR:

> Prior to ratification . . . pertinent Swedish legislation had been submitted to a careful review in order to ascertain to what extent it was in conformity with the [Economic] Covenant. No major adjustments had then been

important caveats preserve enough state autonomy to make this palatable. First, except for a handful of peremptory norms, there is little risk of interstate enforcement or even censure of human rights violations.[74]

Peremptory norms, or *jus cogens*, are norms "accepted and recognized by the international community of states as a whole as [norms] from which no derogation is permitted."[75] These norms include prohibitions against genocide, torture, racial discrimination, and apartheid.[76] Violations occur, of course, but as Professor Henkin pointed out, no state claims that torture is legal.[77] If *jus cogens* is in fact violated, the international community may impose sanctions on the offending state, as it did most notably in the case of South Africa.[78]

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deemed necessary. Subsequent to ratification, any proposals for new legislation falling within the area covered by the Covenant must likewise be submitted to a corresponding review before their adoption as law in order to guarantee compatibility.

Report on the Second Session, U.N. Committee on Economic, Social and Cultural Rights, 2d Sess., at 26, U.N. Doc. E/1988/14, E/C.12/1988/4.

74. In response to the Chinese government's attack on demonstrating students in Tiananmen Square, for example, President Bush expressed "deep regret," and Japanese Prime Minister Sousuke Uno said he was "praying for a return to calm." *World Leaders React to Bloodshed in China*, JAPAN ECONOMIC NEWSWIRE, June 4, 1989, *available in* LEXIS, Nexis Library, JEN File; *see also* Ted Morello, *Chinese Still Welcome to Join UN Peacekeepers*, THE CHRISTIAN SCI. MONITOR, June 21, 1989, at 4; *cf. Canada Announces Measures to Protest at Chinese Crackdown*, REUTER LIB. REP., June 30, 1989, *available in* LEXIS, Nexis Library, LBYRPT File (Canada to withdraw support for three projects worth 9.1 million dollars, and also to withdraw its ambassador in Peking, but not to cut off all diplomatic and business ties "for fear of isolating China in the international community").

75. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334 (entered into force Jan. 27, 1980). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k, Reporter's note 6 (1987); Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

76. *See* Richard B. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 15-17 (Hurst Hannum ed., 1984).

77. HENKIN, *supra* note 53, at 21.

78. S.C. Res. 418, U.N. SCOR, 32d Sess., Resolutions and Decisions of 1977, at 5, U.N. Doc. S/INF/33 (1978). *See also* Douglas G. Anglin, *United Nations Economic Sanctions Against South Africa and Rhodesia*, *in* THE UTILITY OF INTERNATIONAL ECONOMIC SANCTIONS 23, 34-38 (David Leyton-Brown ed., 1987).

Victims may also seek relief in the domestic courts of other states willing to assert jurisdiction. *E.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)(United States court has jurisdiction over wrongful death action brought under Alien Tort Statute, 28 U.S.C. § 1350 (1988), for torture in Paraguay of plaintiffs' son); *see also* Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991)(United States court could properly assert jurisdiction under Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1988 & Supp. II 1990), where engineer, recruited and hired in United States for hospital job in Saudi Arabia, was tortured by government

Consensus with respect to other human rights is problematic.[79] The process of acceding to the international covenants represents some agreement, but there is an ongoing debate as to whether it is enough.[80] The Optional Protocol,[81] which establishes an international enforcement regime, and various regional regimes,[82] which promote enforcement on the regional level, define smaller transnational communities which accept and enforce shared norms. Still, these have generated relatively scant precedent.[83] States remain reluctant to participate in regimes that allow other states to judge them. The

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agents for reporting safety violations), *cert. granted*, 112 S. Ct. 2937 (1992). *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

79. *See generally* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861 (1987) (arguing that law is "a communal language" and urging that it be interpreted in "social contexts in which norms can be generated and given meaning"); Howard Tolley, Jr., *Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting*, 11 HUM. RTS. Q. 561 (1989).

80. As Professor Sohn noted,

> [O]n one hand, acceptance of the lowest possible common denominator would assure rapid ratification, but the documents would have no real effect; on the other hand, strict adherence to high ideals might lead states to refuse to ratify the documents, and the instruments would thus be of little value.

Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 39 (1982). *See generally* Ranee K.L. Panjabi, *Describing and Implementing Universal Human Rights*, 26 TEX. INT'L. L.J. 189 (1991)(reviewing JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989)).

81. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

82. *E.g.*, Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, *amended by* Feb. 27, 1967, 2 U.S.T. 607 *and* Dec. 5, 1985, 25 I.L.M. 529. *See generally* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991)(discussing the evolution of the United States tradition of predicating constitutional rights on "membership" in the domestic polity and alternatives to that tradition in an international context).

83. *See, e.g.*, 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 247-53 (Theodor Meron ed., 1984); Francesco Capotorti, *Human Rights: The Hard Road Towards Universality*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY 986 (Ronald St. John MacDonald & Douglas M. Johnston eds., 1983). *See generally* Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, *in* MANUAL ON HUMAN RIGHTS REPORTING 39, U.N. Doc. HR/PUB/91/1, U.N. Sales No. E.91.XIV.1 (1991); Philip Alston, *The Purposes of Reporting*, *in* MANUAL ON HUMAN RIGHTS REPORTING, *supra*, at 13; John P. Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31 (1978); Fausto Pocar & Cecil Bernard, *National Reports: Their Submission to Expert Bodies and Follow-Up*, *in* MANUAL ON HUMAN RIGHTS REPORTING, *supra*, at 25.

United States, for example, has been wary of being held to a more rigorous standard than less affluent countries.[84]

Because a state has no obligation to provide aid to another, bilateral aid can and has been conditioned on respect for certain human rights by the recipient state.[85] Similarly, because a state has no obligation to trade with another state, it can certainly refrain from doing so on human rights grounds. Once trade has been entered into, however, a state is not free to terminate the relationship because of subsequent human rights violations, however repugnant, of its trading partner. Violating the human rights of its own people does not justify countermeasures. Even humanitarian intervention—even after the Kurds[86]—remains highly sensitive.[87] Those denied their human rights depend primarily on the domestic legal system of the denying state for their vindication.[88] In some countries there is a "culture of compliance" and respect for the rule of law.[89] In states where human rights protections are most needed, however, there usually is not.[90]

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84. *See* Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 819-25 (1984).

85. *E.g.*, 22 U.S.C. § 262d(d) (Supp. I 1989)(United States to seek to channel economic assistance to governments respecting human rights); *see also Canada Announces Measures to Protest at Chinese Crackdown*, *supra* note 74 (Canada cancels 9.1 million dollars in aid to China following Tiananmen Square debacle).

86. *See* Tom J. Farer, *Human Rights and Foreign Policy: What the Kurds Learned (A Drama in One Act)*, 14 HUM. RTS. Q. 62 (1992).

87. As Professor O'Connell pointed out, however, "Distribution of humanitarian aid, even against the wishes of a government in effective control, is not unlawful intervention according to the International Court of Justice." O'Connell, *supra* note 30, at 906.

International law still rejects the use of force for humanitarian intervention by a state (except perhaps to save the lives of hostages, as the Israelis did at Entebbe). Henkin, *supra* note 8, at 151-52. "A different question is the permissibility of collective humanitarian intervention on the authority of the U.N. or of a regional body such as the [Organization of American States]." *Id.*

88. *See* Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979); *accord* Bilder, *supra* note 76, at 13 ("Once again, the easiest and most effective way to implement human rights is through action within each nation's own legal system.").

89. Great Britain, for example, has a well-established tradition of deference to the rule of law. LOUIS HENKIN, THE RIGHTS OF MAN TODAY 51 (1978). *See generally* R.R. FENNESSEY, BURKE, PAINE, AND THE RIGHTS OF MAN 213-50 (1963)(describing schism in eighteenth century British liberal thought over the amount of deference due human rights considerations). However, even such states may have blind spots or lapses, as shown, for instance, by Britain's record with respect to Northern Ireland. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A)(1978)(Judgment of Jan. 18), *reprinted in* MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 117-32 (1990). *See generally Symposium on Human Rights in the U.S.*, 135 PROC. AM. PHILOSOPHICAL SOC'Y 1 (1991).

90. Jimmy Carter, *The Rule of Law and the State of Human Rights*, 4 HARV. HUM. RTS. J. 1, 3 (1991) (describing "too many countries [where] the final

Even if the domestic state endeavors to provide a remedy for a human rights violation, the victim is confronted with the second caveat: the human rights norm at issue is interpreted and enforced under domestic law.[91] Adherence to the Political Covenant represents a continuum of commitment to its principles. States differ, not only in the degree of deference they give international law,[92] but in how they interpret the covenant's provisions as applied in their respective domestic contexts.[93] While giving lip service to civil and political rights, for example, the Soviet form of these rights was virtually unrecognizable to a Western viewer.[94] Under the former Soviet constitution, civil and political rights were conceived of less as "negative rights," constraining the state, than as positive rights, granted (and determined) by the state itself. The people's "right to free association," for instance, consisted of an affirmative right to assemble in specific public buildings designated by the state.[95] While domestic construction of norms may accommodate legitimate concerns of cultural relativism,[96] human "dignity and worth" may become a

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decisions are made by the government itself, depending on transient circumstances. . . . No higher law constrains the state."). *See generally* Robert F. Drinan & Teresa T. Kuo, *The 1991 Battle for Human Rights in China*, 14 HUM. RTS. Q. 21 (1992).

91. *See* STANDING COMM. ON WORLD ORDER UNDER LAW, AM. BAR ASS'N, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 16-18 (1985) (considering how international human rights law could "infuse" domestic standards); Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1 (1981).

92. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987) (treaties should not be subordinated to subsequent statutes). *But see* Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511, 512 (1987)(lawful treaties are "lexically superior to statutes and . . . binding on the political branches of government").

93. As Henkin suggested, at the very least adherence represents an acknowledgement that we live in an "age of rights," an age in which rights have acquired universal cachet. HENKIN, *supra* note 53, at ix-x. *But see* Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917 (1990)(reviewing HENKIN, *supra* note 53). *See generally* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 313 (1992)(discussing "status of treaties in national legal systems, that is, the question of 'direct application'; and the hierarchical status in national legal systems when directly applied treaty norms clash with other norms of the same system").

94. The Soviet Union was a party to the Civil Covenant. HENKIN ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS 388 (2d ed. 1987). For a scholarly comparison of the Soviet and American approaches to domestic implementation of human rights norms, see Damrosch, *supra* note 6.

95. Konstitusiia SSSR [Constitution] art. 50 (U.S.S.R.)(1977). *See* Damrosch, *supra* note 6, at 2330 & n.77 ("International human rights law resists the tendency of Soviet constitutional law to place the interests of the state above the rights of individuals.")

96. *See generally* RELATIVISM: INTERPRETATION AND CONFRONTATION, *supra* note 14; Donnelly, *supra* note 14; Renteln, *supra* note 14.

variable and even indeterminable standard, depending on one's location and the current political situation in that state.

Implementation of economic rights is even more problematic. The major mechanism for assuring compliance, aside from domestic law, is the preparation and submission of self-monitoring reports to the United Nations Committee on Economic, Social and Cultural Rights (Committee).[97] The Committee meets with state representatives after its review of the reports. During this meeting, which is open to the public, the Committee typically asks for further information or clarification[98] and concludes with comments[99] intended to enable the state to better achieve its own objectives.[100] A similar self-

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97. As Professor Alston noted, "The principal obligation of States parties to the [Economic] Covenant is to implement its provisions at the national level. The obligation to report to an international body . . . is essentially a means of promoting the implementation of that obligation." Alston, *supra* note 83, at 39. The Committee also uses the reporting process "to demonstrate a consistency of approach from one report to another." *Id.* at 40. This procedure has not always been effective. *See* Forsythe, *supra* note 69, at 541 (East Europeans resisted Committee review prior to collapse of Soviet bloc); *accord* REBECCA M.M. WALLACE, INTERNATIONAL LAW 189-90 (1986). *See generally* Alston, *supra* note 83, at 13-16, 39-77; Humphrey, *supra* note 83, at 37-38.

Article 16 of the Economic Covenant requires the parties to submit "reports on the measures which they have adopted and the progress made" to the Secretary-General of the United Nations. Economic Covenant, *supra* note 55, art. 16, paras. 1-2. The Secretary-General originally transmitted copies of the reports to the United Nations Economic and Social Council, but they are now submitted directly to the Committee. For a full account of the reasons for the change, and its consequences, see Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603 (1988); *see also* MOWER, *supra* note 69, at 31-46. For present purposes, it is sufficient to note that the formation of an independent monitoring organ represented both an acknowledgement of the inadequacy of the original system and a renewed commitment to economic rights on the part of the United Nations.

98. Countries are accordingly encouraged to send knowledgeable experts to these meetings. Interview with Alexandre Tikhonov, Secretary to the Committee, United Nations Centre for Human Rights, Palais des Nations, in Geneva, Switz. (June 11, 1991).

99. Pocar & Bernard, *supra* note 83, at 25, 26.

100. The Committee indicates when a report, or the activity reported, fails to satisfy ICESCR. Interview with Alexandre Tikhonov, *supra* note 98; *see also* Alfred de Zayas, *The Potential for the United States Joining the Covenant Family*, 20 GA. J. INT'L & COMP. L. 299, 304 (1990)("[D]iscussions have been serious, well-focused, and non-political. . . . [T]he Committee has encouraged but not pressured states parties."). For an example of relatively vigorous questioning, see *Report on the Third Session*, U.N. Committee on Economic, Social and Cultural Rights, 3d Sess., at 34, U.N. Doc. E/1989/22, E/C.12/1989/5 (France questioned about right to housing).

The Committee also prepares "general comments," which are not limited to specific countries. "The Committee endeavors, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further

monitoring regime has been proposed in connection with international environmental rights.[101]

III. ENVIRONMENTAL RIGHTS

A. Impetus for Acceptance

Environmental rights are rooted in both our real fears of collective annihilation and the growing international recognition of the dignity and worth of the individual human being.[102] Like peace, environmental rights have emerged from the common realization that our survival as a species, as well as the survival of the other species with whom we share this planet, requires their recognition and rigorous enforcement.[103] Indeed, it may be argued that the threat of annihi-

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implementation of the [Economic] Covenant." *Id.* Annex III, at 87.

While this illustrates the deference accorded a sovereign state under international enforcement procedures, it should be kept in mind: "As is not the case with civil-political rights, . . . another state can help give effect to some economic-social rights . . . without forcible intervention, merely by financial aid to the local government." HENKIN, *supra* note 53, at 45. *But see* Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 *U. Ill. L. Rev.* 575, 588 ("economic rights are especially unsuitable for international protection by one state against another or by the international community as a whole").

101. *See* Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457 (1991). "[I]n what many said would be the true significance of [the Earth Charter], machinery would be set up to constantly assess the danger of climate change and to take further action, if necessary." William K. Stevens, *43 Lands Adopt Treaty to Cut Emissions of Gases*, N.Y. TIMES, May 10, 1992, § 1, at 14.

102. For a cogent introduction, see Richard B. Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 144 RECUEIL DES COURS 139, 145-50 (1975). For astute assessments of the existing regimes, see Palmer, *supra* note 16; Catherine Tinker, *Environmental Planet Management by the United Nations: An Idea Whose Time Has Not Yet Come?*, 22 N.Y.U. J. INT'L L. & POL. 793 (1990). For a comprehensive overview, see Developments in the Law, *International Environmental Law*, 104 HARV. L. REV. 1484 (1991). For an authoritative analysis, see Schachter, *supra* note 101. *See generally* FACTSHEET: THE UNITED NATIONS AND THE GLOBAL ENVIRONMENT (United Nations Ass'n of the United States of America, New York, N.Y.).

About 140 multilateral treaties on environmental issues had been concluded as of 1990. Schachter, *supra* note 101, at 470. For a succinct description of some of the major international treaties, resolutions, and declarations, see A.O. Adede, *A Profile of Legal Instruments for International Responses to Problems of Environment and Development*, 21 ENVTL. POL'Y & L. 224 (1991).

103. AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT (1991)(civilization cannot survive unless saving the environment becomes its organizing principle); Catherine Tinker, *Environmental Damage and the United Nations Security Council: Towards a Broad Definition of Threats to International Peace and Security and the Need for Collective Security*, 59 TENN. L. REV. 787 (1992); *cf.* William K. Stevens, *Lessons of Rio: A New Prominence and an Effective Blandness*, N.Y. TIMES, June 14, 1992, § 1, at 10. (noting "new-found prominence of the environment as an international issue, bidding to rank with economics and national security").

lation from continuing violations of environmental rights is less of a risk and more of a certainty than nuclear war ever was.

It may also be more urgent.[104] A major part of the nuclear horror was the potential for catastrophe without time to prepare, to warn, or to avoid. Advocates of disarmament emphasized the risk of instant holocaust, even instant holocaust by mistake.[105] The Cuban missile crisis was probably the closest we came—surely close enough, but in fact it was avoided.[106]

Environmental apocalypse is qualitatively distinguishable. Even if absolute catastrophe may be averted,[107] even if policies and practices which lead to it are abandoned, we have a long way to go to recovery.[108] We must cope with massive clean-ups and remote, often unforeseen, consequences. Reclamation may not only be dauntingly complex and expensive, but impossible.[109] While environmental destruction may be even more pressing than the threat of war, it may well be less susceptible to diplomatic resolution or deterrence. Private actors, for example, are likely to be less easily controlled by the state than its own personnel.

Equally important, the international commitment to environmental rights is compelled by the same considerations of "human worth

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104. The threat posed by humans to the global environment may well be the major danger in the post-Cold War world. *See* GORE, *supra* note 103, at 34-35. The Bush Administration's lack of a coherent environmental policy "raise[s] questions about the United States role in a world in which national security may be as affected by global environmental threats as by military ones." Keith Schneider, *Environmental Policy: It's a Jungle in There*, N.Y. TIMES, June 7, 1992, § 4, at 1.

105. *See, e.g.*, EUGENE BURDICK, FAIL-SAFE (1962). As Anthony D'Amato remarked, "Acts of cosmic stupidity are always possible . . . ." Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT'L L. 190, 190 n.6 (1990).

106. *See generally* ABRAM CHAYES, THE CUBAN MISSILE CRISIS (1974); Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592 (1963); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

107. It has been suggested, for example, that space may serve as a "safety-valve"—that within "perhaps two human lifetimes, it will be possible to move most polluting industries off the Earth and into space. And the industries that remain can be made far less polluting through the use of clean, inexpensive energy derived from space." OUTER SPACE AND THE GLOBAL ENVIRONMENT: A NSS POSITION PAPER 4-5 (Nat'l Space Soc'y, Washington, D.C.). For a concise overview of environmental concerns in outer space, see GLENN H. REYNOLDS & ROBERT P. MERGES, OUTER SPACE: PROBLEMS OF LAW AND POLICY 195-98 (1989).

As Professor Schachter pointed out, extension of the concept of environmental harm to outer space presents as yet unresolved issues of policy. Schachter, *supra* note 101, at 465-66.

108. Douglas R. Weiner, *Chernobyl Isn't the Whole Story*, N.Y. TIMES, June 7, 1992, § 7, at 14 (describing "full recovery" for the Soviet Union as an "unimaginably expensive prospect").

109. Schachter, *supra* note 101, at 472-73 (discussing the irreversibility of global warming).

and dignity" that mandate compliance with other human rights norms. As the environment deteriorates, there is a growing acknowledgement that health as well as the use and enjoyment of natural resources are as crucial to the realization of human dignity as first and second generation human rights.[110] Environmental rights, moreover, meet the United Nations General Assembly guidelines for states and United Nations bodies articulating new rights. These rights are "consistent with . . . existing . . . international human rights . . . of fundamental character and derive from the inherent dignity and worth of the human person . . . sufficiently precise . . . provide . . . realistic and effective implementation . . . [and] . . . [a]ttract broad international support."[111] Indeed, Stephen Marks has described environmental rights as

> the most "classical" case of a set of claims which have been given holistic formulation in terms of human rights. All the features of a right of the new generation are there: elaboration of a specialized body of law, an easily identifiable international legislative process, incorporation of the right as human right within municipal systems, and need for concerted efforts of all social actors.[112]

B. Concessions to State Sovereignty[113]

Unlike the leeway given states in connection with intrastate use of force and the dearth of interstate enforcement of human rights,

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110. For an early appreciation, see Charles Maechling, *The Emergent Right to a Decent Environment*, 1 HUM. RTS. 59 (1970). The first important intergovernmental meeting to address the need for an international response to environmental degradation was held in Stockholm in 1972. Declaration of the U.N. Conference on the Human Environment in Stockholm, June 16, 1972, 11 I.L.M. 1416 (1972), U.N. Doc. A/CONF. 48/14/Rev. 1. (1974) [hereinafter Stockholm Declaration]; *see also* Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. J. INT'L L. 423 (1973). *See generally* W. PAUL GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION 121-45 (1976) (describing United Nations "experiments" to formulate a functional program).

This refers to future as well as present health, use, and enjoyment. *See* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 1-3 (1989); RESPONSIBILITIES TO FUTURE GENERATIONS (E. Partridge ed., 1981); Agora, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, 84 AM. J. INT'L L. 190 (1990). *See generally* THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT (René-Jean Dupuy ed., 1984).

111. *Setting International Standards in the Field of Human Rights*, G.A. Res. 120, U.N. GAOR, 41st Sess., Supp. No. 53, at 178, U.N. Doc. A/41/53 (1987).

112. Marks, *supra* note 12, at 442-43.

113. For a cogent description of approaches to the "sovereignty problem" in this context, i.e., obtaining the assent and assuring the compliance of sovereign states, see Developments in the Law, *supra* note 102, at 1552-66.

there are no accepted structural exceptions to international environmental rights.[114] The states of the Southern Hemisphere argue that allowances must be made in order to permit them to develop and provide their people with a standard of living more like that of the already industrialized North.[115] The well-established law against transboundary pollution,[116] in conjunction with the already alarming contamination of the global environment, has made the Northern states unreceptive to these arguments, especially in view of their own decreasing reliance on heavy industry and their comfortable economic hegemony.[117]

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114. Sovereignty concerns are typically framed in terms of "States' sovereign rights over their own natural resources." Stockholm Declaration, *supra* note 110, principle 21; *accord Developing Countries and International Environmental Law*, 21 ENVTL. POL'Y & L. 213 (1991)(formulation adopted at symposium sponsored by Chinese Government). The implications of sovereignty in this context may have grave consequences. *See, e.g.*, Daniel B. Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 AM. J. INT'L L. 305, 325 (1986)(importation of hazardous waste as a sovereign prerogative of a developing state); Jeffery D. Williams, Comment, *Trashing Developing Nations: The Global Hazardous Waste Trade*, 39 BUFF. L. REV. 275 (1991); Symposium, *The Bhopal Tragedy: Social and Legal Issues*, 20 TEX. INT'L L.J. 269 (1985); *cf.* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 383 (1991)("[L]inkage between international and domestic law is crucial for environmental protection.").

115. *See, e.g.*, Ved P. Nanda, *International Environmental Protection and Developing Countries' Interests: The Role of International Law*, 26 TEX. INT'L L.J. 497 (1991)(reviewing developing countries' perspectives on the export of hazardous wastes and pesticides and protection of the ozone layer); Symposium, *International Development Agencies (IDAs), Human Rights and Environmental Considerations*, 17 DENV. J. INT'L L. & POL'Y 29 (1988).

Even on the national level, consensus is often difficult to achieve. *See, e.g.*, David M. Driesen, *The Congressional Role in International Environmental Law and Its Implications for Statutory Interpretation*, 19 B.C. ENVTL. AFF. L. REV. 287 (1991).

116. Trail Smeltor Case (U.S. v. Can.), III R.I.A.A. 1905 (U.N. Arbitral Trib. 1949); Stockholm Declaration, *supra* note 110, principle 21; *see also* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (April 9) (holding that every state has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States"—Albania's failure to warn a British ship of mines in the Corfu Channel was accordingly a violation of international law). *See generally* Magraw, *supra* note 114.

117. I am not suggesting that the "Northern states" have agreed upon a consistent approach. *See* Steven Keeva, *Environmental Law Takes Root*, 78 A.B.A. J., May 1992, at 52, 54. For a description of the process through which consensus is sought among the members of the European Community, see Michael S. Feeley & Peter M. Gilhuly, *Green Law-Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. TRANSNAT'L L. 653 (1991). *See generally*, David A. Westbrook, *Environmental Policy in the European Community: Observations on the European Environment Agency*, 15 HARV. ENVTL. L. REV. 257 (1991); G. Nelson Smith, III, *A Comparative Analysis of European and American Environmental Laws: Their Effects on International Blue Chip Corporate Mergers*

The draft Earth Charter,[118] prepared for the United Nations Conference on Environment and Development (UNCED),[119] held in June 1992, reflects some important rhetorical compromises.[120] Principle 3, for example, provides that "[T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[121] Principle 4, similarly, concedes both the need for "sustainable development" and the need for "environmental protection" within the framework of any such development: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[122]

As Professor Edith Brown Weiss recently observed,[123] the major issue for UNCED is how these interests may be addressed in the context of an effective international regime.[124] While there may be

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and Acquisitions, 14 HASTINGS INT'L & COMP. L. REV. 573 (1991).

Neither the "North" nor the "South" is monolithic. William K. Stevens, *Rio: A Start on Managing What's Left of This Place*, N.Y. TIMES, May 31, 1992, § 4, at 1. The United States, like some "Southern" states, rejected measures that it feared would adversely affect economic growth. For example, the Bush administration feared the biodiversity treaty would damage the biotechnology industry. Steven Greenhouse, *Ecology, the Economy and Bush*, N.Y. TIMES, June 14, 1992, § 4, at 1.

118. Declaration of the U.N. Conference on Environment and Development in Rio de Janeiro, April 4, 1992 (draft) [hereinafter Draft Rio Declaration] *reprinted in Draft of Environmental Rules: "Global Partnership,"* N.Y. TIMES, April 5, 1992, § 1, at 10.

119. *See* G.A. Res. 228, U.N. GAOR, 44th Sess., Supp. No. 49, at 151, U.N. Doc. A/44/49 (1990). Exhaustive planning for UNCED included three meetings of the Preparatory Committee (PrepCom I, II, and III). *See PrepCom: Third Meeting*, 21 ENVTL. L. & POL'Y 186 (1991). During these meetings the broad structure for UNCED was endorsed. This structure consists of three elements: a statement of principles (the Earth Charter), an agenda for action in the 21st century (Agenda 21), and global treaties, including treaties on climate change and biodiversity. *Id.*

For a useful overview of UNCED in nontechnical terms, see Bruce Babbitt, *The World After Rio*, WORLD MONITOR, June 1992, at 28.

120. *But see* Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 403 (1991).

> The official ideology of [UNCED] compels diplomats to speak of environmental and developmental goals as if there were no essential conflict between them, by defining one in terms of the other. Poverty is pollution; environmental quality is an aspect of the standard of living. Such harmony is soon dispelled when concrete action is debated.

Id.

121. Draft Rio Declaration, *supra* note 118, principle 3.

122. *Id.* principle 4.

123. Edith Brown Weiss, Remarks at the American Society of International Law Annual Meeting (January 3, 1992).

124. The normative authority of UNCED is an open question. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990) (describing how "a rule or rule-making institution . . . itself exerts a pull towards compliance on

some room for accommodating different local conditions, needs, and standards, it is doubtful that variation on the scale tolerated under other human rights treaties could be accepted in the context of environmental rights.[125] The argument can be made that such variation should not be tolerated in any context—that this amounts to the derogation of purportedly agreed-upon norms and the ultimate subversion of the protective regime. It has been suggested that the Women's Convention (CEDAW),[126] for example, is so riddled with reservations and understandings[127] that the international regime itself is debased.[128] The extent of such debasement is unclear, however, in

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those addressed normatively"); Richard L. Williamson, Jr., *Building the International Environmental Regime: A Status Report*, 21 U. MIAMI INTER-AM. L. REV. 679 (1990)(giving an overview of key international environmental problems and assessing the international response to those problems); *see also* Roberta Dohse, Comment, *Global Air Pollution and the Greenhouse Effect: Can International Legal Structures Meet the Challenge?*, 13 HOUS. J. INT'L L. 179 (1990)(global air pollution and the greenhouse effect); Ved P. Nanda, *Stratospheric Ozone Depletion: A Challenge for International Environmental Law and Policy*, 10 MICH. J. INT'L. L. 482 (1989)(analyzing the possibilities and limitations of the international regime for the protection of the ozone layer). For a detailed account of the first global-international (as opposed to regional-interstate) treaty for environmental protection, see VEIT KOESTER, THE RAMSAR CONVENTION ON THE CONSERVATION OF WETLANDS (1989). *See generally* Myron L. Scott, *Two Models for Environmental Cooperation*, 22 ENVTL. L. 349 (1992)(reviewing KOESTER, *supra*, and PETER M. HAAS, SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION (1990)).

125. *See, e.g.*, Michael B. Saunders, Comment, *Valuation and International Regulation of Forest Ecosystems: Prospects for a Global Forest Agreement*, 66 WASH. L. REV. 871, 891 (1991)("Previous agreements designed to protect global resources located within national borders have proven to be of limited effectiveness. States perceive conflicts between economic interests and conservation and fail to undertake measures that they believe are incompatible with national sovereignty.").

126. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

127. *See* Vienna Convention on the Law of Treaties, *supra* note 76, arts. 19, 31 (formulation of reservations and interpretation of treaties). *See generally* Belilos Case, 132 Eur. Ct. H.R. (ser. A) at 21-24 (1988); D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L. L. 67 (1976-1977).

128. *See* Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L. L. 643 (1990). States' often haphazard observance of CEDAW exacerbates this debasement. International consensus on gender discrimination is notably problematic. For a comprehensive and perceptive discussion, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). *But see* Arthur Rovine & Jack Goldklang, *Defense of Declarations, Reservations, and Understandings*, *in* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 54 (Richard B. Lillich ed., 1981); Reservations to the Convention on Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). *See generally* Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes*

part because its perception is so contingent upon cultural factors. As a corollary, there is no agreed-upon method of precisely measuring derogation.

Environmental degradation, in contrast, is often demonstrably uncontainable,[129] and the spread of pollution may be ascertained with relative precision.[130] For this same reason, interstate tolerance of violations, deplored but characteristic of first and second generation human rights, is not feasible in the environmental context, at least not to the extent hitherto condoned with respect to other human rights. As Sir Geoffrey Palmer warned, "The stakes are so high that slippage in meeting the standards will be intolerable. The actions of one nation could render nugatory the actions of all the others to preserve the global environment."[131] At the same time, however, states for the most part remain as reluctant to submit to the judgment of other states as they are when human rights violations are claimed.[132]

Environmental rights are predicated on both the concern for our collective survival underlying the commitment to international peace

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and Comments, 23 VAND. J. TRANSNAT'L. L. 779 (1990). For a cogent analysis of this problem in the political rights context, see Oscar Schachter, *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AM. J. INT'L L. 462 (1979).

129. It has become "axiomatic that these problems transcend the capacity of any nation to handle or avoid." Bilder, *supra* note 102, at 146 (quoting Maurice F. Strong, *One Year After Stockholm*, 51 FOREIGN AFF. 690, 697 (1973)); *accord*, FACTSHEET: THE UNITED NATIONS AND THE GLOBAL ENVIRONMENT, *supra* note 102, at 4 (quoting Carl Sagan, Remarks at the Global Forum on Environment and Development in Moscow (Jan. 15-19, 1990)) ("Intrinsically, [these assaults on the environment] are transnational, transgenerational, and trans-ideological. So are all conceivable solutions."). *See generally* Robert A. Kaplan, *Into the Abyss: International Regulation of Subseabed Nuclear Waste Disposal*, 139 U. PA. L. REV. 769 (1991).

This does not mean, of course, that there are always "significant or substantial" harmful effects, which will necessarily cross national boundaries. Schachter, *supra* note 101, at 463-65. Thus, not all "degradation" would be cognizable under existing international regimes. *Id.*

130. At the same time, the significant difficulties confronting environmentalists should not be underestimated. Monitoring is not simple, and in too many substantive (as well as geographic) areas it is not being done at all. Palmer, *supra* note 14, at 263. What are the standards and what is the process for determining them? What are acceptable deviations? Who has the responsibility and who has the authority to decide these questions? *See, e.g.*, Stevens, *supra* note 101 (describing unsuccessful efforts to "establish clear targets and timetables on emissions"). These are not abstract problems, but ever-present dilemmas in negotiation. For a discussion of possible legal approaches to the problem of setting specific standards, see Schachter, *supra* note 101, at 467.

131. Palmer, *supra* note 16, at 282.

132. *See, e.g.*, *supra* notes 14, 33, 75. The idea of international "green policing," for example, which is central to the plan of the European Environment Agency, has been criticized for interfering with member state sovereignty. Westbrook, *supra* note 117, at 263-64.

and the concern for individual dignity and worth underlying international human rights. Because environmental rights require compatible intrastate and interstate standards and compliance mechanisms, however, they place unprecedented demands on the state system.

CONCLUSION

In his brilliant novel, *The Remains of the Day*,[133] Kazuo Ishiguro describes an automobile trip taken by an aging butler through the English countryside.[134] Inspired by the natural beauty around him, the butler finds himself reviewing his life, particularly the years between the world wars. As he wanders through the tranquil landscape he thinks about the failure of the world leaders to avert the second world war and his own unquestioning support of what he now realizes were their misguided efforts. At the end of his journey, he sits at dusk by the ocean with tears streaming down his face.[135] A stranger tries to comfort him: "The evening's the best part of the day. You've done your day's work. Now you can put your feet up and enjoy it."[136]

But Ishiguro's hero has spent a lifetime serving in what he refers to without irony as one of the "big houses,"[137] passively accepting rules, hierarchies, and boundaries that not only kept him from exploring the natural world but from meaningful human contact as well. He has had a belated glimpse of a harmonious natural world and his place in it, a clear view of what he has already lost, but he seems more likely to suffer than to learn from his vision.

We, too, have glimpsed an integrated vision of a harmonious natural world and our place in it.[138] We have to ask whether a system of sovereign states can support such a vision.[139] The state system has

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133. KAZUO ISHIGURO, THE REMAINS OF THE DAY (1989).

134. *Id.*

135. *Id.* at 240-45.

136. *Id.* at 243-44.

137. *Id.* at 241.

138. I am not suggesting that we have all had such a vision personally. But even if we have not—and even if we have not read Lester R. Brown, Rachel Carson, Annie Dillard, Christopher Stone, Edith Brown Weiss, or the Club of Rome's publications—we have followed the Earth Summit in the news, seen the Sierra Club calendar, "saved the whales," bought "dolphin-safe" tuna, recycled newspapers and aluminum cans, participated in Earth Day, or sat through FERN GULLY (Twentieth Century Fox 1992) or *Captain Planet* (ABC television broadcast, Saturday mornings). Environmental consciousness has become part of our zeitgeist.

139. [W]e must reassess our unquestioned respect for national sovereignty and our faith in the capacity of the nation-state to respond fully to the challenges we face. There are two areas . . . where I think this reality strikes hardest. One is human rights and the second is the protection of the environment.

Mondale, *supra* note 17, at 450.

shown that it can recognize and endorse universal values, but not without major structural concessions to state sovereignty.

Even if such concessions are acceptable in the contexts of peace and human rights, they are unendurable in the context of environmental rights. We see, in our dead rivers[140] and dying forests,[141] in the encroaching deserts of sub-Saharan Africa,[142] in the putrid stench of East European cities,[143] what we have lost.[144] We see the limitations that inhere in a sovereign system. While these limitations permit a pinched success in the peace and human rights regimes, they tolerate and perpetuate normative conflicts between intrastate and interstate regimes fatal to any meaningful conception of environmental rights. Are we capable of the transformative act of imagination necessary to articulate that conception?[145] Do we have the political will to realize it?[146] Unless both questions can be answered affirmatively—

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140. *See, e.g.*, Ray Moseley, *E. Germans Fear Ecological Crisis*, CHI. TRIB., Feb. 4, 1990, § 1, at 23. (noting that the Elbe, "Europe's most polluted river," carries about 27 tons of mercury a year); Matt Neufeld, *Pols on the River Push for Cleaner Anacostia Tide*, WASH. TIMES, Aug. 28, 1990, at B4 (describing the "most polluted river on Chesapeake Bay").

141. *See, e.g.*, Timothy Egan, *Satellite View: Forest Damage, North and South*, N.Y. TIMES, June 14, 1992, § 4, at 6 (photos of forests from space show nearly 90 percent of the original Northwest forest is gone); Saunders, *supra* note 125.

142. Bruce Finley, *Desertification: Africans Losing Battle Against the Sahara*, SAN FRANCISCO CHRON., Apr. 20, 1992, at A10; Mark Huband, *Desert Creeps Up on Northern Nigeria*, THE GAZETTE (Montreal), June 2, 1992, at A14.

143. *See, e.g.*, MURRAY FESHBACH & ALFRED FRIENDLY, JR., ECOCIDE IN THE U.S.S.R.: HEALTH AND NATURE UNDER SIEGE (1992); Weiner, *supra* note 108.

144. *See generally* CLIVE PONTING, A GREEN HISTORY OF THE WORLD: THE ENVIRONMENT AND THE COLLAPSE OF GREAT CIVILIZATIONS (1992).

145. "[M]ethods and techniques now available to fashion new instruments of international law to cope with global environmental problems cannot meet [the] challenge." Palmer, *supra* note 16, at 264; *accord* Hermann Scheer, *Earth Summit in Rio: Will It Do More Harm than Good?*, THE NATION, Apr. 20, 1992, at 522, 523 ("At best [Rio will produce] nonmandatory, ineffective guidelines. The international political system is not capable of more—not now and not in the near future.").

146. Governor Babbitt correctly predicted a "three-part North-South bargain," consisting of a Northern commitment to stabilize, and then reduce, carbon dioxide emissions, and in exchange for some kind of Northern support for sustainable development in the South, Southern acceptance of a biodiversity treaty to stop the destruction of the rain forests and the extinction of plants and animals that live there. Babbitt, *supra* note 119, at 30.

Perhaps if we can rethink the limitations of the state system as opportunities for nonstate participation, including participation by international organizations and even individuals, we can begin to create a sustainable future. *See* Janis, *supra* note 10, at 363 (noting the "obvious importance of non-state actors in international politics"); *see also* Developments in the Law, *supra* note 102, at 1600-04 (urging broadened participation in the decision-making process). For a specific and creative example, see David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model*

and soon—we, too, are likely to spend "the remains of the day" in futile regret.[147]

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for Advocacy on Third World Environmental Issues, 100 YALE L.J. 2645 (1991). For a description of the ways in which scientists and conservationists may play a more significant role than states in shaping the law, see PETER M. HAAS, SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION (1990), and Thorme, *supra* note 15, at 305-08 (Sierra Club Legal Defense Fund, along with Friends of the Earth, brought two environmental cases before the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities). Finally, of course, there is the Voluntary Human Extinction Movement. Under the slogan, "The Answer to All Our Problems," the movement points out that "the extinction of *Homo Sapiens* would mean survival for millions, if not billions, of other Earth-dwelling species." Theodore Roszak, *Green Guilt and Ecological Overload*, N.Y. TIMES, June 9, 1992, at A27.

See, e.g., DONELLA H. MEADOWS ET AL., BEYOND THE LIMITS: CONFRONTING GLOBAL COLLAPSE, ENVISIONING A SUSTAINABLE FUTURE (1992)(computer model-based argument for sustainability); Lester R. Brown, *Environment: World Watcher's Warning*, 5 WORLD MONITOR 18, 20 (May 1992). *But see* Developments in the Law, *supra* note 102, at 1639 (concluding that "the ultimate goal . . . must remain the development and strengthening of each state's own regulatory regime"); *accord* Melissa Thorme, *Local to Global: Citizen's Legal Rights and Remedies Relating to Toxic Waste Dumps*, 5 TUL. ENVTL. L.J. 101, 148-51 (1991)(noting that domestic options—on the local, state, and federal levels—are more promising options for dealing with toxic waste dumps than the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* March 22, 1989, S. TREATY DOC. No. 5, 102d Cong., 2d Sess., 28 I.L.M. 649 (entered into force May 5, 1992)); *cf.* Williamson, *supra* note 124, at 744-50 (making a persuasive case for addressing environmental problems on the "proper level," i.e., global, regional, bilateral, or national). *See generally* Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51 (1981).

147. As Albert Schweitzer predicted, "Man has lost the capacity to foresee and forestall. He will end by destroying the earth." RACHEL CARSON, SILENT SPRING v (1962)(quoting Albert Schweitzer in dedication). Maybe not. For heartening descriptions of "paradigmatic success stories," see Scott, *supra* note 124.