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International Human Rights and the International Law Project: The Revolving Door of Academic Discourse and Practitioner Politics

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Anniversaries are moments of reflection. In the best of the tradition, one looks backwards not simply to recapture the moment of creation, but to see how much the visions of the creators have turned into reality. The retrospective gaze thus is valuable as a pedagogic tool. Anniversaries are also moments for seeking to chart course corrections; that is to say, for renewal and, possibly, reorientation. A panel devoted to critique and evaluation is required simultaneously to engage in both.

In addition to being the 60th anniversary of the Universal Declaration of Human Rights (UDHR), 2008 was a personal anniversary of sorts. I had my introduction into the legal academy in the Fall of 1988. We were at the tail end of the discursive project of the Critical Legal Studies Movement, and just beginning to take seriously the notion that personal histories and stories were valid tools in legal research and commentary.[1] One of the few perquisites

* Professor, University of Maryland School of Law. I would like to thank and extend my congratulations to the members of this founding Editorial Board of the Maryland Journal of International Law for making the restoration of the Journal a reality, and for their excellent editorial assistance with what follows. The remaining errors, of course, are mine.

1. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988).

of the profession is to attend conferences that are more or less paid for by one's employer. I readily recall my second conference. It was sponsored by the American Society of International Law, which was then looking for ways of making itself again relevant to the propagation of international law in the United States, an undertaking, it should be said, that it has succeeded handily in doing. Regardless of the topic under discussion at the conference (e.g., writing about and/or the teaching of Public International Law, the place of International Economic Law in the curriculum, getting published in "mainstream" journals, library acquisition policies for international law, and the like), the persistent and constant refrain was the "marginalization" of international law within the academy.[2] A new entrant, I could scarcely have imagined a less auspicious start. And yet, as we now can say with complete confidence, 1989 marked the start of a new order in international relations and international law. The structuring of the politics of the post-Cold War world order, international concern and cooperation over the environment, the emergence of a significantly enlarged and deepened European Community, the emergence of an economically dynamic China, and a more ambitious take on trade negotiations of the Uruguay Round on the General Agreement on Tariffs and Trade were all looming on the horizon, and were to usher in unprecedented material for international law scholarship over the next two decades. But no one topic in international law has held the imagination of international lawyers during these decades as have issues related to what has come to be termed "International Human Rights," and the UDHR is undoubtedly the birth mother of its current conception.

Although a student of international law, I am not a particularistic scholar of international human rights. I shall therefore take advantage of the tripartite confluence of the restart of the Maryland Journal of International Law, the University of Maryland School of Law's celebration of the 60th anniversary of the adoption of the UDHR, and the occasion of my now indisputable attainment of the age of majority as a law school teacher to ruminate on the ways the

2. Many suggestions at the conference related to collaborative cross-disciplinary research and writing by international law academics with other academics such as those involved in the study of international relations and international economics—suggestions that were taken up by many legal scholars whose works are now well mainstreamed in the legal academy. Indeed, there is now a journal dedicated to the intersections of International Law and International Relations, the *Journal of International Law and International Relations*.

objectives and methods of international human rights scholarship intersect with and influence the broader liberal internationalist project in the making of a postmodern international legal order. In the process, I shall try to say something about the possible lessons of the trajectory of human rights discourse from the UDHR to Guantánamo Bay, the significance for that discourse of the increased participation of human rights "activists" and "practitioners" as instructors in the legal academy, and provide some reflections on what these relationships say about the teaching to and consumption of human rights discourse by our students. The story that I shall tell will differ, I think, in some important ways from much of the received wisdom that is often passed on in International Human Rights courses from one class of students to the next, but I believe it is just as accurate, and if it helps spur reflection among our students, then I shall have achieved the objective of my participation on this panel.

FROM THE UDHR TO GUANTÁNAMO BAY

The idea of human rights, like those of "truth," "justice," and "peace" (and, as this is largely an American audience, one might add "motherhood and apple pie"), is, as clearly evidenced by the presentations in this conference, beloved by all. And yet, few are (or, at least, ought to be) content to rest on the obvious goodness of all who tout human rights, and the equally clear evil of those who flout it. The shrillness with which the assertion of, and opposition to, its undifferentiated "universality" are sometimes articulated, and the defensiveness with which its pedigree is proclaimed or denied suggests some level of anxiety about what it means to believe in or subscribe to an idea. Only those who believe that there are inherently good or bad persons, good or bad societies, good or bad cultures find it easy to dismiss disagreements about human rights in Manichaean terms. A more helpful explanation for those disagreements, notwithstanding a general trans-cultural commitment to the "inherent dignity of the person," is that there is in fact a broad gulf between liking an idea or concept and implementing it. An idea—at least one that is deemed to be "progressive"—must challenge the distribution of power and resources in a given place and time, while its implementation, if it is to succeed, must be reconciled with those very realities. The method for mounting the challenge and for effecting the reconciliation vary with intellectual disciplines, among lawyers and philosophers deconstructing and applying a particularized text is

central to the process.

And here lies the central relevance of the UDHR for international human rights. It may be that the pedigree of contemporary international human rights commences with the intellectual ferment of Enlightenment Europe, as expressed by such authors as Locke, Rousseau, and Kant and the declarations of the French Revolution;[3] or, it may be that the pedigree dates further back to the writings of the Canonists of Bologna in the late European "Middle Ages"[4] or even to the philosophical works of Plato, Aristotle, and the Greeks.[5] Nor does one necessarily have to subscribe to the view of the privileging of human rights over other values being either exclusively occidental or otherwise in order to accept the special place the UDHR has in the canon of human rights claims. Its primary value is that unlike any of these other iterations, the UDHR speaks directly and in contemporary prose to the concerns of our moment. It speaks to the claims for humane governance that members of post-World War II societies have vis-à-vis those who exercise political control over their lives. The Declaration does affirm "the inherent dignity and . . . the equal and inalienable rights of all members of the human family," but it does so not as an end in and of itself, but as the basis for "freedom, justice and peace."[6]

Nor does the UDHR simply dwell on announcing lofty ideals. To the contrary, it is highly particularistic in fitting those ideals within its own temporal and spatial environment. Obviously the product of the concerns generated by the waging of World War II and the politics of the Great Depression that had preceded it, the UDHR proclaims that "freedom from fear and want" is the "highest aspiration of the common people."[7] It tells us that mass disregard and contempt for human rights have resulted in barbarous acts that have outraged the *conscience* of humankind, and that we need the rule of law to protect human rights so that "man is not to be compelled to have recourse, as

3. In this symposium issue, for example, see Peter G. Danchin, *Who Is the "Human" in Human Rights? The Claims of Culture and Religion*, 24 MD. J. INT'L L. 99 (2009).

4. *See, e.g.*, James Griffin, *Are Human Rights Parochial?*, *in* PAROCHIALISM AND DIFFERENCE IN INTERNATIONAL LAW (Mortimer Sellers ed., forthcoming 2009).

5. *Cf.* Hirad Abtahi, *Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights*, 36 DENV. J. INT'L L. & POL'Y 55 (2007); Danchin, *supra* note 3.

6. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

7. *Id.* pmbl.

a last resort, to rebellion against tyranny and oppression."[8] Furthermore, considerations of realpolitik are squarely presented as justifications for the announcement of these rights. Thus, the Declaration asserts that because it is essential to promote the development of friendly relations among states, and because members of the United Nations not only have affirmed under the Charter the inherent dignity and equal rights of all persons (men and women alike), but also have committed themselves "to promote social progress and better standards of life in larger freedom," the UDHR thus stands as "a common standard of achievement for all peoples and all nations."[9]

This is the backdrop for its prescriptions. Strikingly, they are not articulated as commands or even instructions, but as urgings:

> [E]very individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[10]

Equally striking (and again as a reflection of the ethos of the moment), the provisions of the UDHR do not merely encourage the recognition of those libertarian principles or "freedoms" that simultaneously promote collective self-governance while constraining the powers of the resulting government, they also articulate an affirmatively socialized vision of the role of government in providing material resources for the welfare of the community. These approaches embody not so much a generalized vision of the relationship of the individual to the state that transcends time and space, but the particular experiences of mid-20th century socio-economic politics. Thus, the UDHR does not simply assert some generalized vision of liberty, equality, or fraternity, but takes the trouble to spell out in quite specific terms a particularized conception of human dignity that is firmly rooted in the historical events and mindsets of the epoch of its crafting. It grounds its faith in the efficacy of human rights as a means for doing away with the

8. *Id.*
9. *Id.*
10. *Id.*

injustices of non-participatory politics,[11] unequal distribution of wealth,[12] and impermissible discrimination on account of religion, race, language, sex, nationality, or, notably, "property, birth or status."[13]

To acknowledge the explicitness and specificity of the text is not to frame that text as a set of legal commands. To the contrary, in many ways, the genius of the UDHR lies in its ability to capture, present, and recommend these broad aspirations not as legal obligations, but as goals that are worth striving for within a collaborative framework. This model of persuasion may be contrasted with an alternative model—that of coercion—in which behavior is hierarchically decreed and, whenever possible, coercively enforced. The debate between these two competing models for understanding the UDHR, I want to suggest, is emblematic of a much broader debate within the discourse of the modern international law project. Furthermore, as I shall show, the move from the one to the other is dictated as much by a sense of material power as by any depth of moral commitment to the principles at issue.

That the lawyers, diplomats, and politicians who crafted the UDHR operated within the persuasive model of international relations is borne out not only by the text of the declaration, but also by the history of the international human rights project in the wake of the UDHR. Beyond the aspirational statements of the UDHR, the Project contemplated the negotiation, adoption, and enforcement of legally binding treaties and covenants. These actions were premised on the notion of law as the product of good-faith cooperation among and cooptation of states. The underlying assumption was that states were equally desirous of coexisting in a peaceful international society and that the function of international law was to provide the order within which that coexistence can occur. The nature of the state, and

11. *See, e.g.*, UDHR, *supra* note 6, arts. 3–5 (right to life, liberty, and security of the person), arts. 6–12 (right to equal protection under law), arts. 13–21 (right to privacy, movement, free association, self-expression, self-definition, and full participation in the political life of one's national community), arts. 27–28 (right to education and to the enjoyment of the cultural life and scientific advances of the community).

12. *Id.* arts. 22–26 (right to work, just remuneration, "equal pay for equal work," social security, rest and leisure, a standard of living adequate to the maintenance of health and well-being, and, for mothers and children, the right to "special care and assistance").

13. *Id.* art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

particularly the concept of sovereignty, rendered unlikely the operation within international society of an Austinian conception of law. Of necessity then, law, if it were to exist within international society, had to be arrived at through the willing and voluntary cooperation of states rather than coerced compliance.

The Human Rights Project thus proceeded by negotiating and urging the adoption of treaties and covenants. Some were a lot easier to obtain than others. Reflecting the immediate experiences of the international society that had just waged a scorched-earth war, the Conventions on Genocide,[14] on the methods for the waging of war ("Geneva Conventions"),[15] and on treatment of refugees[16] were readily negotiated and widely adopted. But despite the broad acclaim of the aspirational statements of the UDHR, negotiating and adopting the implementing Covenants proved to be a much more prolonged undertaking. It is worth pausing to ask why this was so, for in the answers may lie some lessons not only for human rights lawyers, but also for international law scholars and practitioners of our current moment.

Among human rights scholars, it is commonplace to attribute the long gestation of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the geopolitics of relations between the "East" (i.e., states dominated by the Soviet Union), and the "West" (i.e., members of the various alliances cobbled by the United States). These two groups, it is said, differed over the primacy of rights, with the West preferring to give preeminence to civil and political rights, while the East sought to privilege economic rights. The adoption of two covenants, rather than a single unified treaty, is thus presented as a compromise, with the UDHR standing in as the authentic and definitive statement of what an undivided and

14. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

15. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

16. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

non-politicized international community genuinely wanted. As with any conventional wisdom, one can doubtless muster support for this view, but only by ignoring or overlooking other trends that were at play.

At its core, the horrors experienced in the waging of World War II (including the holocaust and the mass displacements of whole population groups), and the socio-economic upheavals leading up to it, made addressing human rights concerns in the wake of the war virtually unavoidable. Yet, enshrining moral norms as legal rules demands the existence of a particular kind of society—a political community. The shared experiences of the war, buttressed by the Nuremberg and Tokyo trials, and of course the formation of the United Nations, initially may have provided the illusion that international society indeed had congealed into a political community, but the unreality of the illusion was manifested not only by the existence of aggressively competing political economic and military blocs, but also by the emergence and maturation of new members and interests within the international society.

The evidence of the effects of the multipolarization of issues and interests on the human rights agenda is perhaps best reflected by the paucity of academic writings on international human rights as a focus of intellectual concern during the two-and-a-half decades between the UDHR and the Helsinki Final Act of the Conference on Security and Co-operation in Europe.[17] Nor can the dearth of such writings be attributed to a general decline during that period in the study of international law. Numerous other issues, notably those relating to the use of force, collective security, decolonization, self-determination, the regulation of foreign investments, national control over natural resources, and international involvement in civil wars all commanded substantially more attention than did the study of human rights. Indeed, the modern era of human rights, after the initial outpouring typified by the UDHR and the Genocide Convention, genuinely can be dated to the Helsinki Declaration. A puzzle worth asking and seeking to resolve, then, is what explains the quiescence of international human rights discourse between 1950 and 1975, and its resurgence—and more importantly, sustenance—since then? For reasons that I shall put forward later in this piece, the answer to this

17. *See* Conference on Security and Co-operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Final Act].

puzzle is vital for any meaningful prognostication of the future of human rights in our current international environment of economic turmoil and transition in the distribution of moral and political power. The answer to the puzzle, however deftly human rights proponents have sought to avoid it, says a lot not only about human rights discourse, but the international law project generally. That answer essentially is that if there is any truth to the claim that law and legal institutions invariably reflect the distribution and structures of power within a society, this is especially the case for international law, and trebly so for international human rights discourse. This is, of course, a far cry from the dominant perspective among celebrants of the human rights movement. International human rights law is often presented as an innately moral and altruistic undertaking that challenges power. But, as they say, the proof of the pudding is in the eating; so, let's have a quick bite by reviewing the post-World War II trajectory of international human rights discourse.

The insubstantiality of international human rights literature between 1950 and 1975 reflected the relative absence of its discourse in the corridors of power. To be sure, lawyers and diplomats within the Secretariat and the Legal Committee of the General Assembly and those negotiating the texts of the ICCPR and ICESCR were representatives of the power structure, as were the politicians and diplomats who occasionally invoked human rights rhetoric and norms in the decolonization, anti-apartheid, and "national liberation" struggles. But their place and influence on the totem pole of power structures in international relations were essentially invisible when compared to the rhetoric and demands for "self determination," "political independence," "territorial integrity," economic nationalism, and the sovereign rights of the state. Nor were the states of the West in any position to be vigorous advocates of human rights. France and the United Kingdom, as exiting colonial powers, often adopted recognizably anti-human rights practices, whether in Malaya, Kenya, or Algeria; and the United States, as the successor imperial state, found its mouth firmly glued shut by its internal racial discrimination practices and the increasingly anti-human rights policies it employed in the conduct of its wars in South-East Asia. By 1974, however, these Western powers had more or less successfully extricated themselves from these shackles and could now front as protectors of universal human rights. The initial framework was straightforwardly political.

The Helsinki Final Act was part of the package of détente or "rapprochement" between the Soviet Bloc and the members of the North Atlantic Treaty Organization. One of its seminal achievements was to provide a legitimate human rights platform for the Western states' criticisms of the emigration policies of the Soviet Union regarding Jews wishing to leave that country for Israel or the West.[18] This seeming concession by a "superpower"—that its regulation of the "right" of its nationals to emigrate to other countries was a proper subject of international discourse—indubitably created a chink in the hitherto absolutist position that many non-Western states had taken regarding the meaning and scope of the non-interference language of Article 2(4) of the United Nations Charter. Events within the United States made it possible to convert this concession into the flood of human rights claims that significantly shaped international law discourse over the last generation.

In August 1974, a president of the United States resigned his office in order to avoid involuntary removal. The Congress became effectively the most influential branch of the United States Government and it launched numerous investigations, the results of which revealed extensive political corruptions dating over several decades in the conduct of United States foreign policies. Of particular significance were the activities of the Central Intelligence Agency and of several large multinational corporations, whose conduct often seemed to align United States institutions with governments and persons thought to be immoral, unjust, or undemocratic. The 1976 elections confirmed the extent to which the American population had become dissatisfied with its government. The Democratic Party, seen since the 1930s as the more liberal and reform-minded of the two dominant parties, scored substantial victories. Even more importantly, a little known governor from the South, who openly campaigned on his moral probity and his belief in the equal and civil rights of all, was elected president. The Congress and the President were now united in a desire to imbue the practice of American politics with moral considerations. The creation of an Office for Human Rights within the Department of State was one consequence, thereby institutionalizing an advocacy center for the promotion of

18. Although the Final Act for the most part reaffirmed the then-standard clichés of East–West relations on "sovereignty" and the terms for "friendly relations" among states, it was notable for its provisions on the movement of peoples across borders on the basis of, *inter alia*, "humanitarian" considerations. *Id.*

international human rights within the United States foreign policy establishment.

The politics of morality did not last. By 1980, "realism" had again returned to center stage in thinking about the conduct of American foreign relations.[19] The election of President Reagan, who viewed the Soviet Union as "the evil empire" (and one of whose notable pre-election on-camera gaffes was counting down to the unleashing of bombs on that country), symbolized the reversion. Nor was this a uniquely American phenomenon. The British had rejected a year earlier a weak Labour Party in favor of the Conservative Party led by "the Iron Lady," Margaret Thatcher. France and Germany were headed by nominally social democratic parties that were in fact highly pragmatic and often worked in coalition with their ostensibly more conservative oppositions. In short, this was the age of "realism," when there was in large measure—at least in the West—a yearning for a return to Henry Kissinger's brand of "realpolitik." It may then be validly asked why there was not, at least in matters of human rights, a reversion to the pre-1974 status quo. Why did not the Helsinki Final Act and the Carter Administration, like the UDHR and the Genocide Convention, constitute simply another "Prague Spring" for the cause of international human rights?

The answer lies in the differences between the zeitgeist that shaped the power politics of the 1980s and 1990s, on the one hand, and that which had been dominant during the 1950s and 1960s on the other. Each zeitgeist, in turn, was formed by facts on the ground. Two resulting structural elements of the interactions between facts and ideas are worth focusing on. The first was the deconstitution of the state as the locus of material power and resources, and the second was the emergence of private entrepreneurs as possible heirs to the exercise of such power.

In the 1980s, as contrasted with the 1950s and 1960s, the Soviet Union, and the ideologies that it represented were in decline. The political leadership manifestly was experiencing significant difficulties in its self-renewal and public legitimation. Central planning and economic growth through heavy industrialization had stalled. It had failed to create a consumer society that regularly met the basic needs of the population. Externally, its ability to effectively command the obedience, if not loyalty, of client states such as Poland

19. *Cf.* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

and Afghanistan were under severe challenge. Ultimately, the center could no longer hold and the 1990s witnessed the disintegration of a once "superpower," with cataclysmic consequences for both the USSR and much of Eastern Europe, particularly for minority populations in the former Republic of Yugoslavia. The consequence of these breakups—especially their handling—was to strengthen the rhetoric of the demand for (if not the regime of) international human rights.

What was true about the disintegration of the Soviet Union was equally so about the collection of states often referred to as "the third world," "nonaligned," or "developing countries." These "new states" of the 1950s and 1960s initially offered a lot of promise for the re-constitution of international society. Predominantly former colonies of Western European powers, these states naturally had been expected to ape (if not heartily embrace) the liberal democratic and capitalist ethos of their colonizers. Their automatic requests for membership in the United Nations system, and especially in the Bretton Woods institutions, initially seemed to bear out these expectations. By the 1970s, however, few doubted that these expectations were illusory. The internal politics of many of these states were anything but liberal democratic. Most were being run by military juntas, "presidents for life," or "one party governments" whose rhetoric, if not actual practice, tended towards "socialism" or "communism." These tendencies often were buttressed by the votes these states cast in international organizations. Although nominally nonaligned, these votes, whether at the United Nations General Assembly, the United Nations Educational, Scientific and Cultural Organization, the International Labour Organization, the International Monetary Fund, the World Bank, or for the General Agreement on Tariffs and Trade, seemed intended to favor the East and undercut the West. As the 1980s began and the world found itself in another economic crisis, there was little solicitude in the West to bail out these autocratic societies. To the contrary, the economic crisis of the 1980s offered an opportunity in the West to have these countries cut down to size. The articulation and enforcement of a particularized international human rights agenda was one instrument deployed for this purpose. But to understand how that was possible, one other feature in the mindset of the 1980s and 1990s, as opposed to that of the 1950s and 1960s, needs to be discussed. That mindset was about the appropriate distribution of responsibility in the management of

the affairs of a society between governmental institutions and private actors.

As a teacher of International Business Transactions, I find that one of those moments for dramatically demonstrating the dynamism of international law arrives in the discussion of foreign direct investments. It is difficult to convey today to a student whose primary concerns relate to the punishment of multinational corporations for their antisocial behaviors (such as damage to the environment, running sweatshops, or for engaging in bribery and corruption), distinguishing between "green field" investments and takeovers through "mergers and acquisitions," protecting intellectual property rights, and understanding the uses of the letter of credit, "project financing" (or the like), that these topics have not always been the primary concerns of international business lawyers. How does one convey what a different legal world she now inhabits from her predecessors of the 1960s and 1970s? It may be that World War II was fought to make the world safe for capitalism—at least American style—but the vast majority of states came out of the war committed to a central place for the government in the "commanding heights" of the economy. During those decades, the Government was not, and simply could not, be a "mere regulator." It had to be actively involved in planning and directing the economy, in the ownership of essential economic assets, and in reserving to the nationals of the country the ownership and control of assets deemed essential for national interest and security. This consensus began to break down in the late 1970s, in part as a reaction to the events described in the prior two paragraphs of this essay.

President Carter of the United States began the process of "deregulation," and Prime Minister Thatcher of the United Kingdom followed with "privatization."[20] By the early 1980s, President Ronald Reagan of the United States no longer represented an outlier position when he blithely asserted that "government is not the solution to our problem; government is the problem."[21] International institutions espoused this doctrine. So-called "structural adjustment programs" had as their primary objective cutting governments down to size in

20. I have discussed this subject elsewhere. *See* Maxwell O. Chibundu, *Law and the Political Economy of Privatization in Sub-Saharan Africa*, 21 MD. J. INT'L L. & TRADE 1 (1997).

21. Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *available at* http://www.reaganlibrary.com/reagan/speeches/speech.asp?spid=6.

the "third world."[22] It was a policy embraced and given intellectual heft by the "Washington Consensus,"[23] and thereafter, in the 1990s, became neoliberal orthodoxy. That orthodoxy wholeheartedly embraced "globalization," seeing in the free movement of capital, goods, and ideas the best promise for liberal democracy, which came to be seen as the end for which human civilizations had been aiming.[24] Two core theses of the orthodoxy are worth emphasizing: first, the best government is that which is least involved in the affairs of society; and second, the international order functions best when it minimizes the relevance of national boundaries and national political institutions to the activities of members of the "international community." Neoliberalism anchors these values in its privileging of "privatization," while proponents of human rights endorse the same values in its claim of a universal set of rights that are independent of actual commitments by states.

In conversations with human rights activists and scholars, I am struck by the vigor of their protestations at being lumped in the same category as proponents of neoliberalism. I am never entirely sure whether such protests are disingenuous or whether they reflect genuine unawareness of the shared principles on which both contemporary human rights and neoliberal philosophies rest. That they are cut out of the same cloth, it seems to me, is indisputable. A central plank of international human rights at the beginning of the 1990s was the delegitimization of the state. Sovereignty, that abstraction in which the mystique of state power is often shrouded, was seen as the enemy.[25] The future of human rights in international society was often presented as resting on the activism of "civil society," an amorphous term that embraces virtually any organization whose power or influence does not derive directly from the government. In practical terms, however, the opposition was often to a particular kind of government: those who were, for any number of reasons, out of favor in Washington or London. The difficulty lay in trying to provide sufficiently coherent philosophical generalizations

22. I have also discussed this issue elsewhere. *See* Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm Wine*, 29 CASE W. RES. J. INT'L L. 167 (1997).

23. *See, e.g.*, James Gathii, *Human Rights, the World Bank, and the Washington Consensus: 1949–1999*, 94 AM. SOC'Y INT'L L. PROC. 144 (2000).

24. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

25. *Cf.* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 7 (1999).

to explain those third world governments that were acceptable and those that were not. In time, the appropriate language, such as "antidemocratic," "pariah," and "rogue," was furnished less by human rights scholars than by neoliberals and neoconservatives.

But the ultimate linking up of human rights with particular political preferences endorsed by neoliberalism came in the context of so-called "humanitarian intervention." The trip down this road in which human rights proponents heartily espoused the use of force in the service of their causes, although predictable, was rather gradual, and itself reflects the symbiosis between the agendas of political and military might and of ideas in international relations. International human rights scholars and practitioners may initially have seen their primary function in terms of persuading governments to comply with their legal or moral obligations, through "shaming" by the publication of reports, press releases, and peer reviews. The successes in the United States, however, of using the courts to impose civil sanctions under the "Alien Tort Statute" for alleged violations of international human rights laws and norms,[26] and the cooptation of the Security Council into creating ad hoc international tribunals to prosecute and impose criminal penalties on individuals alleged to have been responsible for "crimes against humanity" in the civil strife that occurred in the former Republic of Yugoslavia and in Rwanda,[27] opened up new vistas for the enforcement of human rights. When European countries such as the United Kingdom, Spain, and Belgium followed suit with attempts to prosecute such renowned purported human rights violators as Augusto Pinochet of Chile, and when a significant majority of the members of the United Nations through the adoption of the Rome Treaty created a permanent court to criminally punish, inter alia, notorious violations of human rights such as those that had allegedly occurred in the former Republic of Yugoslavia, the idea of a punitive human rights enforcement regime had become a reality. Indeed, a common mantra became the need to do away with "impunity" for human rights violators. It seemed but a small step to move from coercive judicial enforcement of human

26. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). *See generally* M. O. Chibundu, *Making Customary International Law Through Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069 (1999).

27. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda).

rights claims through post hoc litigation to preventive military intervention to forestall such violations.

The ethnically and religiously driven massacres in Rwanda and Bosnia-Herzegovina, the degree of which were at least attributable to the passivity of the United Nations "peacekeeping" forces, provided easily graspable instances of the horrendous consequences that can ensue from seeming international indifference, and suggested the possible benefits of vigorous preventive measures. Human rights proponents were thus at the forefront of urging the Security Council and members of the North Atlantic Treaty Organization to engage in active military intervention to forestall any extensive human rights violations in Kosovo. They took similar positions with regard to the various civil wars in Africa, including those in Sierra Leone, Côte d'Ivoire, Liberia, and, of course, Darfur in the western part of Sudan. But there is good reason to believe that human rights activists have come to see intervention as an end, not as a means to some broader objective. Thus, once the occupation has occurred, there appears to be a loss of interest in the human rights violations that continue and occasionally bubble up to the surface when active fighting resumes. While we may hear of a lot of purported human rights violations in Darfur, there is a veil of silence with the no-less-egregious violations going on in Somalia, and those that go on in the Democratic Republic of the Congo are surfaced only when news reports about active fighting make taking note of them unavoidable.

Although not immediately self-evident, there is now good reason to believe that we may be in the midst of significant changes in our conceptualization of human rights—at least, we ought to be. If such a change does occur, it will be because the last half-dozen years have been forcing human rights activists to confront, however reluctantly, the extent to which over the last two decades their articulations of human rights norms and legalities have been grounded on a highly particularized and parochial view of violators and victims. The prototype of the human rights violator was a self-appointed "third world" dictator and his underlings. To this group were added party leaders, apparatchiks, or religious oligarchies who governed with iron fists what effectively were one-party states. The victims were the disfavored opponents—usually presented as "democrats" or "moderates"—or socio-cultural minorities or women. International human rights thus stood as a bulwark against the arbitrary and otherwise unchecked exercise of totalitarian power by rulers against the ruled in

undemocratic societies. International human rights had to be articulated in universal terms because otherwise those who lived in democratic societies would lack the legitimacy and standing to speak for the silenced voices of the victims of repressive regimes.

If the so-called "global war on terrorism" has lasting lessons to impart, one of them surely has to be the artificiality—indeed parochialism—of the standard trope that the violation of human rights is a propensity peculiar to dictatorships. It is impossible to deny that much of the conduct of that "war" by unassailably "liberal democratic" states runs counter to what typically has been thought of as international human rights norms, values, or even rules.[28] One of the things that is especially worthy of note has to be the extent to which human rights scholarship, induced by domestic constitutional law scholarship in the West (especially the United States), has in fact been forced to engage not simply in debating the moral validity of the conduct, but in actually parsing the legal elements of the conduct. The consequence has been the nuanced application of texts and practices in order to determine the legitimacy of highly dissected and particularistic behavior. In the process, it becomes evident that there are differences between norms and rules, morals and law, preferences and commands. Ideas of derogation and of possible justifications for derogation, of exigencies and normality, of utilitarianism and deontology begin to creep into the discourse. Because human rights concerns are no longer monochromatically about "them" (the "other"), but also about "us," it becomes less suspect and more acceptable to acknowledge the possibilities of difference. Preachers, romantic poets and perhaps politicians may have the license to engage in rhetoric in matters relating to "us," but lawyers typically do not. International human rights lawyers, when they had the field entirely to themselves, could breezily avoid having to confront the realities of life as lived rather than as imagined; after all, prior to this decade, the subjects of the discourse had little voice in shaping the discourse.[29] That Olympian stance is no longer tenable both because the "other" has been given voice by the recent conduct of liberal

28. It serves little purpose here to recite or rehearse the debates about the morality or legality of such conducts as "extraordinary renditions"/disappearances, preventive detentions, "enhanced interrogation methods"/torture, "targeted assassinations"/extrajudicial killings, and the like. Whole library shelves can now be filled with books and articles that take varying positions on these subjects.

29. *See, e.g.*, MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002). *See also* Chibundu, *supra* note 26, at 1108–09.

democratic states in the "war" against terrorism,[30] and because the resulting defensiveness of these societies has transformed simplistic moralisms into parsed legalities. Confronted by scholars who operate well within the mainstream and the corridors of intellectual and political power, human rights scholars can no longer rest on the assertion of moral bromides, nor be dismissive of countervailing arguments about the need or desirability of exploring necessary trade-offs between the protections of rights and of other societal virtues.[31] In short, the future of human rights discourse will have to dispense with the Manichaean attitude that has long dominated much of its discourse.

A second likely spin-off for human rights discourse on the methods adopted in confronting "terrorism" and in waging the allied wars in Afghanistan and Iraq is that they have laid bare for non-Westerners, as much as for Westerners, in just how much raiment the emperor actually is clothed. The silent voices of the non-Western world may reasonably have been presumed to support (or at least acquiesce) in the framing of the human rights discourse as long as the idea of human rights could, without too much violence to the concept of truth, be claimed to be uniformly universal in application. That position can scarcely be maintained following the events in such places as Abu Ghraib and Guantánamo Bay, and the persistence in the so-called "antiterrorism" policies of several Western societies of differential treatment for alleged violations of such laws on the basis of classifications grounded in nationality or religion.[32] As has become evident in recent years, the internet has reduced the cost and opened up the means for mass communication to many well outside the main cosmopolitan communication centers. The extent to which these new participants view and treat human rights discourse, either as part of their own cultural life or with skeptical (or even outright cynical) distrust, will have a lot to say about the future of that discourse. Put another way, it is unlikely that human rights in the future will remain an essentially rhetorical discourse carried out

30. The dramatic testimonies of those imprisoned at Guantánamo Bay, Cuba, or otherwise "interrogated" as part of the war on terrorism give voice to this "other." *See, e.g.*, Mark Danner, *US Torture: Voices from the Black Sites*, 56 N.Y. REV. BOOKS (2009) (book review).

31. *See, e.g.*, Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007); TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

32. *See generally* Maxwell O. Chibundu, *For God, for Country, for Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883 (2004).

almost exclusively by and among the elites of the West about the goodness and altruism of the privileged for the welfare of the other. That discourse will have to engage with and reflect upon the multiplicities of realities that exist as a matter of course in the daily and routine lives of plural societies. The extent to which we can prepare our students to be informed participants in that discourse is, in my view, a relevant determinant of the course the discourse will take. In the remainder of this essay, then, I want to take on two issues that seem to me highly relevant in how well current human rights scholars, in particular, and international law academics in general, can help tutor our students for a legal and social environment that I believe is likely to be quite different from that which has existed in the last two decades.

THE PRACTITIONER AS ACADEMIC

The protection of human rights, as a political ideal, has been developed primarily within two discursive disciplines: those of moral philosophy and of law. The former is squarely located within the "ivory tower" of the academy, the latter less comfortably so. Law is a highly instrumentalist profession. Its practitioners exist to solve practical problems. Although the training of legal practitioners is now an academic undertaking, few lawyers have been entirely comfortable with viewing legal issues in abstract or essentially conceptual terms. This tension is evident in conceptions about the UDHR and human rights law in general. I want to suggest that the ways in which knowledge about human rights and its possibilities are acquired and communicated have been and will continue to be consequential for its development.

The UDHR, I have argued, is fundamentally an aspirational document. Not surprisingly, then, much of the writing about the UDHR in particular, and human rights generally, prior to 1966 was devoted primarily to the explication of the underlying moral and philosophical arguments. In its seminal 1980 opinion in *Filártiga v. Peña-Irala*, the United States Court of Appeals for the Second Circuit, however, presented international law as a bouillabaisse of more or less indistinguishable legal ingredients of which the UDHR is, for practical purposes an element.[33] The court cursorily shunted aside well understood distinctions in international law between policy

33. Filártiga v. Peña-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

declarations and legally binding pronouncements such as those embodied in treaties and customary international law. This error, although subsequently recognized by other courts, has been decisive in shaping the understanding of international human rights law in the country with the greatest power to coerce compliance. This doctrinal confusion was compounded by a second: under United States domestic law, if the grant of authority to a court to hear a category of cases necessarily entails the existence of substantive enforceable rights under that grant of jurisdiction, how are the substantive elements of those rights to be determined?[34] The *Filártiga* case had been brought by the Center for Constitutional Rights, a United States domestic civil rights litigation boutique that had not previously litigated any international law case. The jurisdictional statute on which the claim was grounded was a little-understood historical artifact about which there had been virtually no litigation.[35] But, in the wake of the post-Helsinki human rights fervor, neither substance nor jurisdiction could stand in the way of a court that had determined that "[i]n the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest," and which therefore concluded: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[36]

Law, of course, is about authority, and judicial opinions furnish authoritative text for the exercise of power. What distinguishes a lawyer from a philosopher is often less their commitments to any particular vision of society, but that the lawyer believes that she can in fact bring that vision into being not simply through the force of imagination or argument, but through the coercive use of power that her arguments can call into being. The capacity to do so is an art, one that is learned not through solitary engagement with text, but through active involvement with society. The life of the law, Holmes said to Harvard students over a century ago, is not logic, but experience.[37]

34. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). The resolution of these complex issues remains cloudy almost thirty years later. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

35. *See* IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

36. *Filártiga*, 630 F.2d at 890.

37. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

This mantra has gained particular salience during the last thirty years as clinical and so-called "experiential" learning have become core features of legal education in the United States. The *Filártiga* decision and the human rights litigation industry that it spawned effectively transformed the UDHR from an aspirational to a legal instrument, and the discourse of international human rights became as much a practitioner-oriented doctrinal undertaking as a philosophically engaged pedagogy. The involvement of practitioners, it can be said, enhances the credibility of relevant courses, and in part explains the flourishing of human rights courses in American law schools. But it may also have weakened the need for philosophical engagements with the assertion of rights. A "right" has become little more than what the speaker believes she is entitled to, and foundational tools for distinguishing between "is" and "ought" amount to little more than, in the best case, who can shout loudest or longest, and in most cases, who can command or wield the greater coercive power.

As already explained, the process of active enforcement of human rights claims was neither limited to the United States nor to the judiciary. The extension of enforcement in the 1990s to include resorting to coercive military and political power (with the use of economic sanctions being most favored) was a systemic change not only for international human rights, but for international law generally. This gave added credibility to the idea of international law as law and undoubtedly has been partly responsible for the place that it now has as a central component of legal education. But this sense of empowerment extends beyond the classroom. The idea of an "international community" is often invoked as a cellular organism that provides a competing center of power for the oppressed within national states. Disciples of this international community supposedly form a no-longer "invisible college" of "transnational networks" of persons and organizations dedicated to distilling and propagating the shared norms and values of international liberalism. An argument can thus be made that since the organization of this conference fits within this dominant mold, this writer/participant perhaps ought to take seriously the caution of Shakespeare's Fool in *King Lear*: "Let go thy hold when a great wheel runs down a hill, lest it break thy neck with following it; but the great one that goes up the hill, let him

draw thee after."[38]

And yet, perhaps purely as an academic exercise, this teacher cannot help asking if the future of international human rights discourse is bound to follow the last twenty years. That evidence exists to suggest that we might be at a fork in the road of the development of the international legal order seems indisputable. If our confidence in the ability of liberal ideals to organize the international legal order was bolstered by the resilience of the military, political, and economic institutions that underpinned it, the extent to which liberal states, when under pressure, have kept faith with those ideals over the last decade should surely give us some pause about how they—let alone other societies—will react in the gathering storms of economic and political instabilities. In any event, I am an academic, and I cannot help asking: "what if . . . ?"

THE FUTURE OF HUMAN RIGHTS PEDAGOGY

In a recent review of books dealing with that most ultimate of human rights crimes, genocide, Malcolm Bull succinctly captures the dilemma of the effort to regulate not only that crime, but the entire human rights project. "Feeling that nothing like the Holocaust should ever be allowed to happen again, the UN Convention on Genocide tried to define exactly what it was that had happened."[39] But consider: "If someone is sitting in their bedroom planning the annihilation of half the population, it is probably better described as fantasy than intent. On the other hand, soldiers who take no prisoners when clearing the survivors out of a bombarded village may have no sense that they are engaged in anything other than a messy military operation, and be quite indifferent to the identity of those they kill."[40] So, a legal order that is determined to punish genocide will have to decide whether to punish fantasies (a crime of thought), soldiers behaving as soldiers in times of war, both, or neither. One can rely on the text, giving it whatever "reasonable" "good faith" interpretation it can bear; essentially ignore the text and purport to be "purposive," thereby raising while begging the question of what informs and constrains purposiveness; punish all who arguably are

38. WILLIAM SHAKESPEARE, KING LEAR act 2, sc. 4.

39. *See* Malcolm Bull, *Ultimate Choice*, LONDON REV. BOOKS (Feb. 9, 2006) (book review).

40. *Id.*

connected with the wrongdoing; or arbitrarily select, on a so-called "case by case" basis, what interpretive tool to employ in any given situation. In an environment in which instrumentalism is the object, and in which one is not concerned with over-deterrence, the last two approaches recommend themselves. As long as one is unable to envision oneself or those close to oneself as potential defendants, then the last two choices will serve the purpose. If one can conceivably see oneself as a possible defendant, then a vigorous argument as to which of the first two makes the better sense should ensue.[41] But should a lawmaker or interpreter ever situate herself as a potential law violator?

Much of the discourse in international law, and international human rights in particular, elide these troublesome questions. Retrospectively finding particular practices abhorrent, condemnatory, and even subject to the imposition of sanction, there is in international law argumentation today a tendency to assert that the conduct at issue has been inherently and always universally wrong. Universal morality is said to provide the lens for international legality, at least in the context of human rights. One encounters in these discourses of international law a rather paradoxical attitude. Having found a text that superficially seems relevant to an issue that they confront, students almost never seem to actually parse the text. They take the text as conclusively resolving that issue. The only remaining issue for them is not so much the meaning of the text, but where in a legal hierarchy to situate it.

A quite frequent experience in the classroom, or while sitting as a moot court judge, is of a student who argues vigorously and with complete self-confidence that the UDHR, in its entirety, is "jus cogens" because it contains "peremptory norms," or that the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women is "customary international law" because it has been signed and ratified by a majority of the member states of the United Nations. If you point to a specific provision within the UDHR, such as Article 23(1) ("[e]veryone has the right to work"), and the student concedes that such a "right" does not

41. The popularity of the crimes of "enticement" and "glorification" is a testimonial to who calls the tunes; surely it is not those who believe that their thoughts and arguments will ever be sufficiently controversial to arouse the ire of the powerful. And so there is freedom of speech and thought, but only so long as the position espoused does not stray too far from the accepted mean.

constitute "jus cogens," she then either completely abandons the argument, or dogmatically maintains that the right exists under law even though she is unable to explain the legal source of the right. One of the consequences of framing norms as law is thus an unfortunate incapacity to distinguish among sources of "rights," and to place those "rights" within their proper context. Deprived of an artificially assumed essentialist position, and operating outside the pragmatism that cultural embeddedness unconsciously confers, my student finds herself unable to resort to those lawyering skills that come to her as second nature in her domestic law classes. She fails to appreciate that in international human rights law, no less than in domestic law, she must begin but almost never end with the text; that there is nothing intrinsically self-evident about the meaning of text; that the text was crafted as a compromise among varied and often competing interests; that, as such, texts are expressive but never definitive of contested values; and that the appropriate construction of any text is as much dependent on time and place as it is on the particular terms employed in the text. This failing, of course, is not the student's alone. In fact, it is a reflection of the dominant attitude of human rights scholars and practitioners to the conduct of international human rights discourse.

One possible consequence of the waning of the post-Cold War world order may well be to return to the teacher and her students the capacity to interrogate text and to situate it rightfully within the socio-cultural milieu that it seeks to regulate. If so, it would be a welcome change.

The practitioner in the classroom is indisputably a valuable asset in the training of international lawyers. It may be that the current tendency of human rights lawyers to be monochromatic in their view of human rights is simply a stage in the development of the international human rights legal order. Perhaps as courts confront more prosecutions, judges will not compulsively believe that their sole duty is to vindicate some uniform and universalized conception of human rights, and academic institutions will not continue to believe that the only practitioners worth having in their classrooms are those who represent the plaintiff or the prosecutor. In any event, it is likely that as different socio-economic orders are able to mount meaningful challenges to the idea of what constitutes international power and success, the vision of international law, as it has in the past, will change accordingly.

CONCLUSIONS

Sixty years of the development of international human rights under the auspices of the UDHR, at a minimum, suggest the following. First, the UDHR is better seen as a set of principles, not a legal decree. We ought to take seriously its invitation for the participation of all, not simply the elite or the materially well off, in negotiating accommodations among a full range of claims that make possible the enjoyment of peace, security, and happiness within a just international order. Secondly, respect for the dignity of the person exists not in the coercive compulsion of compliance, but in the persuasive explication of why the particular respect being sought or accorded is in the interest of the particular person or group. If international human rights are to serve worthy purposes, the concept of "human dignity" must not become another one of those vacuous vessels into which, in the name of altruism, particularistic preferences are asserted as "law," but should reflect the actual conditions within which peoples struggle to make sense of their daily existence. This exhortation is no less true in dealing with societies than it is in dealing with individuals. The reality is that whether we choose to accept it or not, the "dignity" of the individual cannot be wrenched from the sense the individual feels about respect for the community of which she is a part, whether that membership is by choice, by prescription, or by affect. Thirdly, precisely because human rights are as much about interests as they are about ideas, institutions, and practices, it behooves human rights scholars and practitioners (including the students and acolytes whose views they seek to shape) to think and learn about social realities that transcend their own parochial perspectives of what constitutes the good or the bad. Human rights scholars are not avenging angels. They should be engaged participants in a much broader discourse that explores not only politics and moral philosophy, but history, economics, sociology, religion, culture, and the full range of the humanities. This requires an approach to the idea of human dignity not as a monochromatic exercise in the resolution of conflicts between the individual and the pariah state, but a deeper and often necessarily sympathetic and particularistic understanding of the conflicts and accommodations with which persons and societies are regularly engaged, and which is intrinsic in the process of living. That process cannot be abstracted in terms of the lives of decision-makers and opinion-shapers in the metropolises of the world. Finally, legal

academics involved in the study of international human rights (including the many practitioners who act as such) have a profound obligation to engage with and encourage students in the particularistic exploration of the rich texts of the discourse, rather than in presenting the discourse as a Manichaean discipline in which invariably the good "us" seek to eviscerate the barbarian "them."