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THE GLOBALIZATION OF HUMAN RIGHTS LAW: WHY DO HUMAN RIGHTS NEED INTERNATIONAL LAW?

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ABSTRACT:

This Essay examines the globalization of human rights law, a rather recent legal development which has occurred in two parallel ways: human rights have become part of most national constitutions and have been enshrined in widely accepted international treaties. The central question of this Essay is the utility of international law in the field of human rights protection. The conclusion is that ideally human rights protection should be a national matter, but in an imperfect world, with failing national protection, international human rights protection is a necessary alternative. This Essay examines how, in an imperfect world, international law can contribute to human rights protection, and also how it hinders this goal. It looks at the problems of immunity, self-determination, and non-intervention; monism versus dualism; ius cogens*; international monitoring; and other ways in which international law can have a positive or negative impact on the protection of human rights.*

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I. Two-Track Globalization of Human Rights Law

Since the end of World War II, we have witnessed the globalization of human rights law. Originally an invention of the French and American revolutions in the eighteenth century, human rights have now become part of a global legal consensus. Although there are many violations of human rights and some philosophical, ideological, cultural, or religious objections to human rights, the fact is that these rights are part of internationally recognized legal documents (treaties) accepted by the overwhelming majorities of countries.[1] At the same time, they are included in nearly all municipal legal systems.[2] Human rights are de facto the law of mankind. They have been enshrined in the law because they need the law to be adequately protected.

This globalization of human rights law has occurred in two parallel ways: human rights have become part of national constitutions and have been enshrined in international treaties. Of course, these two developments have not everywhere occurred at the same speed and intensity. The question this Essay will try to answer is why human rights need international law. This question may seem strange and perhaps even somewhat useless. Is not the immense effort that has been invested in international human rights law during the last fifty or sixty years proof enough of its utility? I'm not convinced because there is a strong argument in favor of the assertion that the protection of human rights should be first and foremost a matter of national law and national judiciaries.

International law is far removed from ordinary citizens, and if they want to complain about human rights violations they will most likely want to use their national law and their national judiciary. Their own judiciary is closer and hence more accessible and more able to understand and punish. The first responsibility of the international community, therefore, is not regulation or the administration of justice, but assisting countries to reform their national laws and judiciaries in order to make them more compatible with human rights.

II. Some Reasons for Having International Human Rights Law

However, what if this fails? National law and national judiciaries do not always effectively protect human rights, either because of the absence of adequate national laws or because of the ineffective protection and enforcement of national laws by judiciaries and/or executive powers.[3] And outside assistance and pressure does not always

1. *See* United Nations Human Rights homepage, http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (last visited Mar. 6, 2008).

2. *See id.*

3. *See* Michelle Maiese, *Human Rights Protection*, BeyondIntractibility.org, June 2004, http://www.beyondintractability.org/essay/human_rights_protect/.

succeed in solving this kind of problem.[4] So, if there is international law protecting human rights, this law can step in when national law fails. Local judges can invoke international law at the expense of inadequate national law. And if not the national law but the national judges are inadequate, international human rights law also provides global mechanisms and institutions allowing citizens to complain about their state's conduct. Imagine that such institutions would not exist. That would mean that citizens could only complain to a national organ, an organ of their own state, an organ which may be ineffective, corrupt, incompetent, or perhaps even implicated in the rights violation. And even if these national organs are effective, they are quite useless if there are no international rules for them to apply in place of inadequate national ones. So there is a strong case in favor of international human rights law combined with international monitoring and complaints institutions.

Ideally, international human rights law and monitoring are unnecessary, and even undesirable, because human rights protection is best carried out on a national level by a state that can correct itself. But this implies the existence of an ideal state with a well-functioning national division of power, a national *trias politica* in which one power can control and correct the mistakes (e.g., rights violations) of another. As long as not all states are ideal states some national judiciaries need the assistance of international law when their national human rights laws are insufficient or nonexistent, and some citizens need the assistance of international monitoring and enforcement institutions when their national division of powers is insufficient or nonexistent.

International law and enforcement institutions are necessary for the universal protection of human rights and should complement national rules and institutions. Countries should be encouraged or, if necessary, pressured to accept international human rights treaties so that citizens can invoke international laws in the absence of national ones. International human rights law traditionally includes the right to monitor and to complain about human rights violations internationally, and this means, in theory at least, that individuals or groups do not have to trust their own state to correct itself and to punish its own crimes.[5] They can involve international monitoring and complaints institutions to further their cause when their national judges are incompetent, unwilling, or unable to implement national rules.[6] Countries should therefore also be encouraged to accept the authority of such treaty institutions wherever this acceptance is voluntary.

Furthermore, the existence of international law makes it easier to reform national law. An international system of law makes it impossible for states to take the law into their own hands and to decide au-

4. *See id.*
5. *See id.*
6. *See id.*

tonomously what is and what is not part of their law. International law is traditionally superior to national law and it can force national law to be compatible with it. It is therefore an additional means to ensure that human rights are part of the law everywhere. By improving national law, international law makes national protection mechanisms more effective.[7] And when it is not the national law but the national protection mechanism and institutions which are defective, international law replaces these mechanisms with global ones, or at least tries to do so (the best global complaints procedures are still less effective than the best national judiciaries).

III. THE STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW

A. *The Individual as Plaintiff*

International law and international monitoring can only be useful from the point of view of human rights if the individual occupies a central place in international law. Human rights are individual rights even if they can be violated for an entire group at once and even if groups may sometimes be more successful in claiming their rights than individuals. If human rights as individual rights are included in international laws and if individuals can address themselves to an international body with complaints about their state's criminal behavior, then it is obvious that individuals play an important role in international law.

This, however, is the problem. Traditionally, individuals play no part in international law. From its humble beginnings, international law has been the regulation of relationships between states. Individuals were present in international law merely as diplomats, ambassadors, heads of state, and such. Instead of international rights or duties, they had (and still have) privileges and immunities granted by national law at the instigation of international treaties. Until well into the twentieth century, individuals were treated in international law in a manner not much different from the way animals are treated in national law: they had no international rights or duties and they could not start judicial proceedings.[8] Individuals were objects rather than subjects of international law. For example, "if individuals who possess nationality are wronged broad, it is their Home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right."[9]

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7. *See* INTERNATIONAL PROTECTION OF HUMAN RIGHTS 6 (Louis B. Sohn & Thomas Buergenthal eds., 1973) [hereinafter INTERNATIONAL PROTECTION].

8. *See* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 70 (1991).

9. INTERNATIONAL PROTECTION, *supra* note 7, at 3–4.

From the end of the nineteenth century onwards, the individual started to become more prominent in international law, albeit slowly and cautiously.

- The first steps were perhaps the efforts to prohibit slavery (several states accepted treaties abolishing slavery in the first half of the 19th century).
- There were also "various treaties—such as those concluded at the Berlin Conference in 1878 or on the termination of the First World War—for the protection of religious and linguistic minorities."[10] These treaties granted rights to oppressed minorities. After World War I, the League of Nations tried to protect minorities: "representatives of such minorities gained the right to lodge 'petitions' with the League of Nations, if in their view the States concerned failed to honour their international undertakings."[11] The decisions of the League of Nations were expressed in binding verdicts of the "Permanent Court of International Justice." This was the first historical example of human rights limiting the sovereignty of states and being enforced by an international court (although the practical enforcement in the field was less successful).[12]
- The conventions of the International Labour Organisation (ILO) of 1919, dealing with labour relations conferred "on industrial associations of workers and employers the right to demand compliance with ILO Conventions by member States."[13]
- German war criminals were convicted in Nuremberg on the basis of international laws dealing with crimes against peace, war crimes, and crimes against humanity. "The Nuremberg tribunal transformed individuals from mere objects of the state to subjects having rights they could assert against their own states."[14]

After World War II, the development of international legal protection for individual human rights has initiated a shift of paradigm. Thanks to the Universal Declaration of Human Rights and the resulting treaties, individual rights are now part of international law and hence this law no longer deals exclusively with inter-state relationships but also with the relationships between states and their citizens (since it is often the state which violates the rights of its citizens).[15]

However, this shift is far from complete, which is shown by the still relatively limited role which individuals can play in international monitoring mechanisms. Often individuals do not have direct access to

10. *Id.* at 7.

11. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 99 (1992).

12. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 16 (1999).

13. *See* CASSESE, *supra* note 11.

14. BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 7 (Tom Farer ed., 1996).

15. *See* United Nations, Universal Declaration of Human Rights, *available at* http://www.un.org/Overview/rights.html (last visited Mar. 6, 2008).

these mechanisms like they have in normal national judiciaries and have to use other states or organizations as intermediates. We have to make sure that individuals become more prominent in international legal systems. Treaty bodies should become more like municipal judiciaries. Individuals should be able to put their case to international organizations and to claim that states respect international rules. They should be free to summon their states before international courts or committees in order to enforce their rights. These courts or committees in turn should have the right to monitor respect for individual rights and observance of the international duties of states and individuals, even when there is no individual complaint, because sometimes it is difficult or impossible for victims of rights violations to complain. They should also, if necessary, condemn and punish states and individuals. And states should not be allowed to opt out of international monitoring and enforcement mechanisms.

B. *The Individual as Defendant*

The fact that international institutions should be able to punish both states and individuals is important because rights violations are often committed by the state, but not by some abstract entity. They are committed by real people, individuals who represent the state. And because these perpetrators represent the state, it often happens that the national rights protection mechanisms, such as the courts and the police, do not assume their responsibilities or protect and that victims have to invoke international law and international mechanisms. It often happens that individuals who have committed rights violations are not prosecuted by their own states. Take for example the case of Pinochet or the case of the Serbian war criminals. Especially (former) state functionaries often enjoy immunity in national or even international law, which may be justified in some cases but not in cases involving rights violations. And even if they do not enjoy immunity—international law does not allow immunity to stand in the way of punishment for very serious crimes—they can use their position of power or their friends in power in order to pervert the justice system and the division of powers and to escape national punishment. Of course, they may also be able to escape international punishment. For example, they can use their power or their friends in order to avoid extradition to an international court or to avoid a case being initiated in such a court.

C. *Immunity*

The problem of immunity has always been a very difficult one and to some extent still is today. It allows individual perpetrators to hide behind their states. Heads of state or leading functionaries are not responsible for their actions. They represent their states and all their actions are "acts of state," and therefore the state is responsible for

these acts. Lower ranking officials are not responsible either because they can always hide behind the "Befehl ist Befehl" principle. They can not be punished because they follow orders from people who themselves are not responsible.

Only by transcending the principles of immunity and command can individuals be punished for violations of human rights and can human rights be protected (punishing states is very difficult and is not fair because it is a kind of collective punishment). This has been the main achievement of the Nuremberg Tribunal. The Charter of the Tribunal clearly states that individuals have international obligations that go beyond their national obligations or commands.[16] Since Nuremberg, it is no longer possible to claim that international law only deals with "acts of state" and that individuals cannot be punished for the acts they commit as representatives of their state or as executives carrying out orders.

Nuremberg has given individuals a place in international law on the level of criminal responsibility. The Universal Declaration of Human Rights and the UN Covenants that resulted from it have given them a place on the level of protection against crimes. Not only did they create individual rights; they also granted individuals the right to protest in case of alleged violations. Individuals consequently came to possess a certain measure of international status.

Individual rights, individual responsibility, and the individual right to denounce violations before an international judicial or quasi-judicial institution gradually took root after World War II. Today, the treatment of citizens by their state is no longer the exclusive competence of the state in question. The days are gone when states could treat their citizens as they liked. Individuals now have a right to speak in the international community and they are no longer confined to national law. They have international law to help them and international stages to voice their protest. International organizations in turn have a right to poke their nose into national affairs.

This means that citizens are no longer at the mercy of their states and that they can look for outside help if their state does not respect their rights, does not control and correct itself, does not provide mechanisms to enforce their rights (such as laws and the division of powers), or does not make sure that these mechanisms function adequately in all cases. But it also means that citizens are no longer at the mercy of powerful individuals within their states. It has become more difficult for individuals to shed their responsibility and to hide behind their functions, immunities, privileges, or hierarchy. Individuals can be made internationally accountable for their actions if these actions are crimes under international law. The fact that national law

16. ROBERTSON, *supra* note 12, at 205.

is not applied, is silent in the matter, or even explicitly approves or imposes the actions does not guarantee an escape from justice.

One of the characteristics of international law is its priority over national law. Human rights especially, as far as they have become part of international law, have priority over national law. Violations of rights that are not punished by national law or that are explicitly ordered by national law can be crimes under international law, in which case international law has priority. Individuals or states can be sentenced and condemned by organs representative of the international community.

If we do not accept individual responsibility for violations of international rules, then we can only punish entire states for such violations, even if these violations have been committed by only a few leading individuals. This is collective responsibility. One of the reasons we fought World War II was precisely the eradication of this concept. This is a kind of vendetta system, in which reprisals are directed not only at the criminal, but also at his entire family. Such a system is usually not a sign of civilization. Individual accountability can be handled by international institutions, but national states as well can decide to enforce international rules by way of their national judiciary and executive power.

IV. The Sources of International Law

A. *Treaties*

Apart from the status of individuals, there is another problem with international law. International treaties between states are the main sources of international law (other sources are common law and decisions of some international organs, such as the UN and the International Court of Justice). This is also the case for international human rights law. Hence, the will of states, rather than the will of the people, determines international law, except in those countries in which treaties have to be ratified by the people or their representatives. This means that the people, the primary beneficiaries of human rights law, can only influence their country's participation in human rights law when they live in a democracy, i.e., when their rights are already relatively safe. A state which is not a democracy and which perhaps is heavily implicated in the rights violations of its citizens, can decide to stay outside of human rights treaties. And its citizens are unable to influence this decision since it is not a democracy.

States should not have the sole authority to grant international rights and duties to individuals, for example by way of a treaty, because a state that plans to violate the rights of its citizens will obviously not grant these citizens international rights against their state. Neither is a state that is unwilling to prosecute its citizens suspected of human rights violations.

Whereas we are fortunate that in our age individuals become more and more prominent in international law, it is still always states that decide that this should be the case. Individuals have international rights and duties because a treaty between their and other states provides these rights and duties; and sometimes they are fortunate enough to live in a state that also grants them the right to claim their rights before international institutions. States that are unwilling are still able to hinder this process. They can refuse to grant rights or they can take rights away. Individuals depend on the goodwill of their states and in some cases they may as well depend on fate. However, it is very difficult to make international individual rights and duties independent of the will of states. International law is still to a large extent what states want it to be, although there is the exception of *ius cogens*. Not all international law springs from voluntary treaties.

B. Ius Cogens[17]

Ius cogens is part of international customary law or common law. The relationship between international and national law is not only top-down. National law may be used as evidence of international customary law, which is, like treaties, a source of international law. The problem with treaties is that they only create duties for the states that choose to accept the treaty, and therefore they only create rights for the citizens of such states. States are free not to accept treaties, like human rights treaties for instance. However, thanks to international customary or common law, things are not as arbitrary as that. This common law is not necessarily written down although it is just as binding as treaty law. Even more so, some parts of it are more binding than treaty law because it is much harder to opt out of common law than it is to opt out of treaty law.

International common law, which creates universal duties (contrary to treaty law, which only imposes duties on the states that accept the treaty), consists of two parts. First, there are some rules that are always respected and that are based on silent agreements (uniform, general, and consistent practices). Secondly, there are rules based on *opinio iuris*, rules that are generally considered by states to be a duty, even though they do not always respect this duty. An example is the rule against torture. Nobody defends the legality of torture, although many engage in torture.

Some of the rules of international common law are called *ius cogens* ("compulsory law" or "basic principles of international law"). The principles of *ius cogens* are more powerful than ordinary rules of international law, so powerful that treaties, for example, cannot contradict them. These principles have the power to render incompatible

17. Portions of this section come from the Author's prior work, FILIP SPAGNOLI, DEMOCRATIC IMPERIALISM: A PRACTICAL GUIDE (2004).

rules null and void, even those treaty rules that existed before the principles came into force. The principles are fundamental rules that cannot be contradicted and that can only be modified by rules of the same rank. Of course, not only rules but also actions that contradict these principles are illegal. And the traditional rules on immunity do not hold for heads of states who violate the principles of *ius cogens*. Violations of rules of *ius cogens* are punishable even if perpetrated by heads of state and in accordance with domestic laws or international treaties.

Ius cogens principles, which are fundamental and predominant rules—or, in other words, peremptory rules, rules from which no derogation is permitted—still require the consent of states, just as treaty rules do.[18] They are, after all, principles of international common law and are therefore accepted by all states. A rule that is not accepted by all cannot be "common" and therefore cannot be part of common law. International law, whether treaty law or common law, is created by the will of states.

Examples of *ius cogens* are the rules against genocide; the ban on aggression and the use of force in international relations (a violent attack on another state, conquering its territory, etc.); the rules against colonialism, slavery, and racism; the principles of national sovereignty, self-determination, and non-intervention; the rule against torture; and the rule against systematic violations of certain human rights (like the right to life).[19]

The almost universal ratification of most human rights treaties is also evidence of a worldwide *opinio iuris* on the *ius cogens* character of human rights. States are therefore forced by international common law to respect certain human rights (if not all), irrespective of treaty duties. National or international legislation must be compatible with human rights. The same goes for actions by states or individuals.

By definition, there is universal agreement on *ius cogens*. This means that Iraq and Israel, for instance, should respect the right to self-determination for Palestinians and Kuwaitis respectively. A state can legitimately violate *ius cogens* only if it explicitly and continuously rejects principles of *ius cogens* from the moment that these principles come into force. Opposition to a principle long after its acceptance into international common law is not enough. None of the existing rules of *ius cogens* has been explicitly and continuously rejected in this way by any state. As a consequence, states are no longer absolutely free to accept or reject certain international rules (although they still have this absolute freedom with regard to treaty law). They cannot simply opt out of *ius cogens* obligations (which contain human rights

18. *See* CASSESE, *supra* note 11, at 158–59; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 321 (2d ed. 2007).

19. *See* AUST, *supra* note 18.

obligations) as they can do with their treaty obligations. It is a bit strong to say that *ius cogens* is international law that is automatically applicable to states, even without their consent, or that can be forced onto states. But neither is it completely voluntary like treaties. It is not just a law that only exists if states accept it and that ceases to exist when states reject it.

How does one react to a violation of rules of *ius cogens*? States have a duty towards everyone to respect the rules of *ius cogens*. Therefore, everyone can and even should act when these rules are violated, not only those whose interests are harmed by the violation or the state where the violation has taken place. Everyone has an interest in the protection of *ius cogens* and can take measures against offenders. Every state—not only the state or the individual harmed by the violation—can press charges against the offenders. Perhaps the offence took place elsewhere and perhaps no citizens of the prosecuting state were involved either as victims or as perpetrators, but that is not a problem. Every state can and should prosecute those who have violated rules of *ius cogens*, wherever the violation took place, whatever the nationality or the whereabouts of the perpetrators or the victims. When a state systematically violates the rights of its citizens, then other states or the international community has the right by international law to intervene.[20]

This is important because the state where the violation took place or where the perpetrator happens to be a citizen often does not or cannot prosecute. Perhaps because the perpetrator is still in power, or perhaps because he has been given amnesty or immunity, or perhaps because the legal system is not up to the task. Take the example of Cambodia, which is still unable to prosecute the Khmer Rouge, notwithstanding the fact that they were removed from power a long time ago and do not enjoy immunity. So what is the hope for victims of rulers who stay in power, such as the Chinese rulers for example, or who give up power and arrange some kind of lasting immunity for themselves, such as Pinochet? It is clear that national protection of human rights crimes is often impossible, especially in undemocratic countries without a tradition of division of powers, rule of law, etc., and unfortunately it is in these countries that protection is most necessary because it is there that violations of rights are most common and most serious. In the absence of national protection, it is desirable to have international intervention.

It would undoubtedly be useful to have the same international or universal prosecution possibilities for human rights rules that are not yet part of *ius cogens*, if there are such rules. Most violations of human rights, including human rights that are perhaps not yet an undisputed part of *ius cogens*, are the consequence of state actions or of

20. *See* E.M. Borchard, in INTERNATIONAL PROTECTION, *supra* note 7, at 139.

actions by representatives of the state. Unless there is a highly effective division of powers, it is unlikely that a state will prosecute itself or its representatives, and it is necessary to have international protection.

National protection within a highly effective system of division of powers must be the first choice. National protection is close to the people, easily accessible, legitimate, acceptable, and knowledgeable of local circumstances. It is also close to the perpetrators, which is why effective punishment is more likely than in the case of protection by another country or by an international institution, which may even fail to see the perpetrators, let alone punish them.

National protection is the best option, but also the most difficult one. The perpetrator is often the state or its representatives, which is why national protection can only function within a highly effective system of division of powers. Unfortunately, but not accidentally, most of the more serious violations of rights take place in those states that do not have such a system. National protection can only protect us against relatively minor violations because it can only function in a country with a tradition of separated powers, rule of law, etc.; in a country, in other words, that is unlikely to suffer serious violations of human rights. But still, it is a model that should be used as a universal ideal, even or especially in those countries where it is as yet far from reality. In the meantime, international jurisdiction takes the place of the ineffective national jurisdiction.

V. INTERVENTION

A. *The UN Charter*

So, in an imperfect world, there should be, and there are, international institutions which legislate through treaties and *ius cogens* and which have a right to hear complaints and to monitor the human rights situation inside individual states. But this immediately raises the legal problem of international intervention, especially if we want these international institutions to be able to condemn states and take measures to enforce respect for human rights. Intervention is forbidden under international law. The Charter of the UN, although it mentions human rights as one of its aims, was never intended to be a document that would unambiguously and legally give the UN the means to force member states to respect human rights.[21] The only obligation of member states is the "promotion" of human rights, not the translation into laws and still less the enforcement of such laws. If you state that "we the peoples of the United Nations [are] determined

21. *See* Wladyslaw Czaplinksi, *Sources of International Law in the Nicaragua Case*, 38 INT'L & COMP. L.Q. 151, 156 (1989).

. . . to reaffirm faith in fundamental human rights,"[22] then you do not intend to force anybody.

Even more so, the Charter specifically prohibits intervention in so-called internal affairs of member states, in the intra-national relationships between states and their citizens. The famous, or rather infamous, article 2, paragraph 7, explicitly prohibits intervention or the violation of the sovereignty and territorial integrity of a member state unless there is an explicit Security Council mandate: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[23] This article is often used against attempts to intervene for the sake of human rights. Even merely verbal criticism of rights violations is often supposed to be the type of "intervention" prohibited by article 2, paragraph 7. The "matters" referred to in the article are never precisely defined, so that every state is free to define them. Hence, intervention becomes practically impossible. However, some acts clearly do not belong to these "matters": violations of international law; attacks on international peace; and, according to some, systematic and extreme violations of human rights if these violations threaten international peace. Chapter VII of the Charter allows intervention in these cases following a decision by the Security Council, and article 2 explicitly provides an exception for this kind of intervention.[24]

This is important for human rights, and today's consensus on the definition of "matters" may even include grave violations that do not result in threats to peace. Some "internal matters," which at first sight can benefit from article 2, paragraph 7, are clearly violations of other provisions of the Charter, e.g., structural violations of human rights such as apartheid (in particular article 55).[25] In that case, some believe that the UN may take measures under Chapter VII (sanctions or even military intervention).[26] Chapter VII can override article 2, paragraph 7, and is perhaps an instrument to enforce certain human rights in certain cases.[27]

But still, this discussion leads to the conclusion that inter-state relationships were clearly more important to the framers of the Charter than individual human rights. The emphasis on international relationships and the rule against intervention are comprehensible once we take into account the fact that the Charter was written in a very specific historical context, just after World War II. The main rationale of

22. United Nations, Charter of the United Nations, Introductory Note, *available at* http://www.un.org/aboutun/charter (last visited Mar. 6, 2008) [hereinafter UN Charter].

23. *Id.* art. 2, ¶ 7.

24. *See id.* art. 2; *id.* arts. 39–51.

25. *See id.* art. 2, ¶ 7; *id.* art. 55.

26. *See id.* arts. 39–51.

27. *See id.*

the Charter was precisely the struggle against intervention, invasion, and international aggression. This focus resulted directly from the experience of World War II, a war that started as a consequence of the intervention by Germany and Japan in other countries. The emphasis of the Charter is on the right to self-determination and national sovereignty ("the territorial integrity or political independence of any State" and the "sovereign equality" of all states). Self-determination and sovereignty are very important, but it is obvious that these concepts can easily be used to counter criticism of rights violations. The Charter is evidently still more concerned about the rights of states than about the rights of humans. States need to be protected against other states. The protection of citizens from their own states is not the first concern.[28]

The protection of states requires the doctrine of non-intervention and of the equality of sovereign states—sovereignty in the sense of the highest power. Unfortunately, what is necessary for the protection of states is often harmful to human rights, and this is especially true for the concepts of non-intervention and sovereignty.

Although the views today are perhaps a bit more shaded, it is tradition to assume that the only legitimate enforcement actions of the UN agencies (so-called "collective measures" and "preventive or enforcement action" under Chapter VII) are actions directed at the protection or enforcement of international peace. This is important enough also for human rights, but it only includes actions necessary to enforce respect for human rights when those human rights are directly violated as a consequence of the absence of peace or when their violation may lead to breaches of peace.

As I have mentioned before, article 2, paragraph 7 can be interpreted in such a way that even verbal criticism is not allowed. And it is often used when there is verbal criticism. However, the General Assembly of the UN and other UN human rights agencies have gained the right to discuss the human rights situation in member countries and to make recommendations which, however, are not binding.[29] It is now generally accepted that intervention in the sense of article 2, paragraph 7 only covers action that impairs the independence or the territorial integrity of states. Therefore, mere discussion is not covered. However, it is obvious that even this limited definition of intervention may make it impossible to enforce human rights in certain more serious cases. Enforcement may require actions that impair the independence of states.

The General Assembly can make recommendations but cannot act in order to enforce its recommendations. South Africa, for instance,

28. Portions of the foregoing paragraph come from the Author's prior work, SPAGNOLI, *supra* note 17.

29. *See* Hersch Lauterpacht, in INTERNATIONAL PROTECTION, *supra* note 7, at 643–44.

during the years of apartheid, was in breach of the Charter since its entry into the UN. The Charter prohibits racial discrimination. But forty years of condemnations was all the Assembly could produce in spite of the fact that a violation of the Charter is clearly a violation of international law (the Charter is a treaty). The UN Security Council has more powers under Chapter VII and has also taken measures against South Africa and other states as well, although mostly marginal states and never the great powers or their allies. The reason is, of course, that these powers are represented in the Security Council and can veto any decision.

B. *The UN Human Rights Covenants*

Of course, the Charter came too soon—just after World War II—and later the UN has elaborated treaties, such as the International Human Rights Covenants, that include human rights as binding obligations and even include monitoring and complaints mechanisms. These other UN documents are more concerned with so-called "vertical" relationships between states and their citizens than with "horizontal" relationships between states. They define the rights and duties of individuals rather than the rights and duties of states with regard to other states. And these individual rights and duties are international; they transcend the laws of the "sovereign" states. The fact that an act is permitted by national law is no longer a sufficient justification for this act. International law, instead of only the "law of nations," has become the law of the world and of the people; instead of merely the law between states, it has become the law within states. Citizens can now use international law to claim their rights against their state and against their fellow citizens.

The relationships between a state and its citizens, and hence the acts of a state in its own territory (including its legislation), are no longer the exclusive business of the state in question. International rules determine these acts, and international institutions can monitor them. International rules and institutions require a certain kind of governmental conduct and a certain kind of national legislation, and they limit the conduct of individuals as well. In an imperfect world, where states are not ideal democracies respecting the division of powers, this is the only way to control national legislation and national actions by governments or individuals and to make sure that both these laws and actions respect human rights.

The principle that international law can limit what is acceptable in national law and national behavior, and can even require a certain kind of national law and behavior, is very important for global respect of human rights. Many violations of human rights are not only permitted by national law or ineffectively redressed by national judiciaries; sometimes they are even enshrined in national law and hence become an obligation. Once the principle that international law de-

termines national law and national behavior is accepted, it becomes much harder to violate human rights. National law or the absence of national law can then no longer be used as a justification for rights violations, and the national courts are more or less obliged to take action against rights violations, even if their national law does not require them to do so.

VI. The National Implementation of International Law

A. *Monism*

However, even if the principle is clear, the way in which it should be implemented is a matter of dispute. These "requirements" of international law, how do they get implemented? Should national law that does not respect these requirements change immediately? If it does not change, does it become invalid, "null and void"? Can an individual ask a national court to apply international law immediately, even if it has not been translated into national law? These problems did not exist in the days when international and national law had entirely different fields of application, and they only arise once the individual enters the international stage and international law starts to interfere in domains that were traditionally reserved for national law. When international law was still exclusively the law of nations, national and international law never came into conflict.

This is where the discussion between so-called monists and dualists has to be mentioned. Monists assume that the internal and international legal systems form a unity. Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal.[30] International law does not need to be translated into national law. The act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because the latter have priority.

From a human rights point of view, this monist view has some advantages. Suppose a country has accepted a human rights treaty but some of its national laws hinder the freedom of the press. A citizen of that country, who is being prosecuted by his state for starting an opposition newspaper, can invoke this treaty in the national courtroom and can ask the judge to apply this treaty and to decide that certain national laws are invalid. He or she does not have to wait for national law that translates international law. His or her government can, after all, be negligent or even unwilling to translate. For example, the

30. *See* Pieter Hendrik Kooijmans, Internationaal Publiekrecht in Vogelvlucht 82 (1994).

treaty was perhaps only accepted for political reasons, in order to please donor countries.

B. *Dualism*[31]

Dualists, as their name indicates, emphasize the difference between national and international law and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges can never apply international law, but can only apply international law that has been translated into national law.

This view is problematic once we take into account the fact that human rights treaties are often accepted for purely political reasons, and many states never intend to translate them into national law or to take a monist view on international law. In a dualist system, international law is too dependent on national law for its implementation. It cannot work without the support of national law.

International law does not determine which point of view is to be preferred, monism or dualism. Every state decides for itself according to its legal traditions. International law only requires that its rules are respected, and states are free to decide on the manner in which they want to respect these rules and make them binding on their citizens and agencies. Both a monist state and a dualist state can comply with international law. All we can say is that a monist state is less at risk of violating international rules because its judges can apply international law directly. Negligence or unwillingness to translate international law, or delays of translation, or misinterpretation of international law in national law, can only pose a problem in dualist states. States are free to choose the way in which they want to respect international law, but they are always accountable if they fail to adapt their national legal system in a way that they can respect international law. Either they adopt a constitution that implements a monist system so that international law can be applied directly and without transformation, or they do not. But then they have to translate all international law in national law.

In a monist state we rely only on the judges and not on the legislators, but judges can also be negligent and they can also make mistakes. If a judge in a monist states makes mistakes when applying

31. Portions of this section come from the Author's prior work, SPAGNOLI, *supra* note 17.

international law, then the country violates international law just as much as a dualist country that does not allow its judges to apply international law directly, that fails to translate, or that fails to translate correctly and effectively. One of the few reasons for preferring dualism is precisely the fear that national judges are not familiar with international law—a highly complex field of law—and hence are liable to make mistakes.

Another reason is that judges are often appointed rather than elected. In a dualist state, the elected legislator decides what the law is, not an unelected judge or some undemocratic international organization. The national legislator fixes the only democratic and correct interpretation of international law. However, in many monist systems it is the legislator who decides to accept a treaty, not the judge. So the preference for monism is not really a problem in countries in which the legislator can decide on treaties. Democracies more often than not require ratification of international law by the democratically elected legislature. So the problem of a democratic deficit of judges does not really arise. The advantages of a monist system are far greater than the advantages of a dualist system. Monism is the only cure for negligence, unwillingness to translate, or ineffectiveness.

International law has priority over national law, but only in a monist system in which national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution. Judges must apply the international law.

Theoretically, the supremacy of international law is also a rule in dualist systems. If international law is not directly applicable—because some national rules say so—then it must be translated into national law, and existing national law that contradicts international law must be "translated away." It must be modified or eliminated in order to conform to international law. However, one problem remains. In a monist system, a national law that is voted after an international law has been accepted and that contradicts the international law becomes automatically null and void at the moment it is voted. The international rule continues to prevail. In a dualist system, however, the original international law has been translated into national law—if all went well—but this national law can then be overridden by another national law on the principle of *lex posterior derogat legi priori*, the later law replaces the earlier one. This means that the country—willingly or unwillingly—violates international law.

All in all, from a human rights point of view it seems better to promote the monist theory of international law because then we never have problems with national laws that do not respect human rights, that have not or not yet been modified in order to respect international law, or that override earlier laws specifically designed to translate international law. Nor will we have problems with citizens being

forced to go abroad in search of justice because their own judges do not yet have the necessary national laws available.

However, if we do have a dualist system and if it is impossible to get rid of it, then it is absolutely necessary that international law is translated into national law, and is translated rapidly, effectively, and correctly. Moreover, it is necessary that all subsequent national law is screened for possible incompatibility with earlier international law and does not override earlier national laws meant to translate international law. And to be perfectly fair to both systems, if we have a monist system, it is necessary that national judges understand and know international law, that they can effectively apply it, and that they are able to detect incompatibility between national and international law and consequently able to invalidate the former. In both systems, it is absolutely necessary that the division of powers functions adequately. Judges must always be able to apply human rights law, either international human rights law directly or national human rights law as a translation of international law. Of course, the recommendation to choose a monist system implies a prior recommendation, namely that the most important human rights treaties are universally accepted (a majority of states has already done so).

VII. Self-Executing International Law

A monist tradition in municipal law is not sufficient if we want citizens to be able to invoke international law in their domestic courtrooms. We also have to look at the nature of the international rules in question. These rules must be self-executing. This means that they have to be formulated in such a way that one can deduce that it was the purpose to create laws that citizens (and not only states, for example) can invoke directly. Self-executing rules, or directly applicable rules are rules which, from the viewpoint of international law at least (not necessarily from the viewpoint of national law), do not require transformation into national law. They are binding as such and national judges can apply them as such, as if they were national rules, on the condition that the judges live and work in a monist system. In a dualist country, all international rules, whether self-executing or not, need to be translated into national law. In a monist country, only non-self-executing laws require translation.

In order to decide whether a rule is self-executing or not, one must only look at the rule in question. National traditions do not count, contrary to the problem of dualism vs. monism. A rule that says that states should guarantee freedom of expression to its citizens is self-executing. A rule that says that states should take all the necessary measures to create enough employment is not. Non-self-executing rules of international law only impose the obligation on states to take measures and to create or alter legislation. Citizens or national judges cannot invoke these rules (and demand employment in this example)

in a national court. This means that even in a monist system, international law that is not self-executing must be transformed into national law or national policy.

The priority of international law remains a fact, whether this law is or is not self-executing. A state cannot invoke its national law as a reason not to respect its international obligations. In case of non-self-executing rules, it is obliged to change its national law or to take certain measures. It violates international law if it does not do so. In this case, a national judge can only decide that his state should modify national law or take certain measures. He cannot invalidate national law that contradicts non-self-executing international law, not even in a monist system. He can only declare national law null and void if it contradicts self-executing international rights, and only in a monist system.

In the framework of rights promotion, it is desirable that international rules on human rights are self-executing. Fortunately, most human rights contained in the main human rights treaties are self-executing and can be invoked by individuals in a national courtroom, at least in a monist country. The judge will have to decide if he works in a monist tradition and if the rules are really self-executing. If he answers "yes" to both questions, he will have to invalidate national laws that violate human rights, and he will have to punish acts that violate these rights. If the judge answers "no" to the first question and "yes" or "no" to the second, then he may have to condemn the legislator for not having adapted its national law. In this case, rights will be protected if the division of powers functions adequately, although perhaps not immediately. As long as the law is not adapted, the injustice remains because the judge cannot invalidate the law.