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International Human Rights Regime: A Theoretical Approach To Regime Formation And Persistence

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It is of man that I have to speak: and the question that I am investigating shows me that it is to men that I must address myself: for questions of this sort are not asked by those who are afraid to honour the truth ... I conceive that there are two kinds of inequity among the human species: one, which I call natural or physical because it is established by nature and consists in a difference of age, health, bodily strength and the qualities of the mind or of the soul: and another which may be called moral or political inequality, because it depends on a kind of convention and is established or at least authorised by the consent of men. This latter consists of the different privileges, which some men enjoy to the prejudices of others. Such as that of being more rich, more honoured, more powerful, or even in a position to exact obedience.^{[1](#)}

Jean-Jacque Rousseau

Introduction

Inequality among the human species arises from unequal distribution of power. Power is primarily in service of particular interests. Secondly, it is in service of the common good. Two categories of variables can account for the development of any regime. A first category involves general laws of cause and effect that can be categorised as principle factors. A second group of variables concerns subsidiary elements, which can be classified as peripheral or supplementary factors. The former consists of the actors' economic interests/incentives, sources of power, norms/principles and diffuse values, the latter comprising practice or usage, custom, and knowledge. The theoretical approach adopted here is a

confluence of three clusters of theories: modified structuralism, neo-liberal institutionalism and the theory of cosmopolitanism.

At the outset, I shall give a brief study of the main streams of thought on regime theories. Then, I shall survey the theory of hegemonic stability. The reason for this is this that first there is almost a consensus among the scholars that international relations in the post Second World War period were dominated by American hegemony and that this hegemony established several international regimes that were either *benevolent* or *coercive*² basically supporting the hegemony's interests. If coercive, the public utilitarian consideration was of secondary concern. Game theory and cosmopolitanism will be subsequently followed by my discussion on the principles, norms and rules of the human rights regime. In the end, I shall discuss the process of the international human rights regime formation. My conclusion will dwell upon both the contribution and limits of human rights in international politics.

Regime Theories

Elsewhere I have argued that the literature on international relations does not revolve round a single theory.³ The literature centred on regime analysis regimes are defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actor's expectations converge in a given issue area⁴ – does not present a coherent whole either. Yet, it is quite safe to argue that the regime literature focuses on economic behaviour, departing from traditional concerns with military security.

Through the works of such scholars as Ernst Haas, regime analysis emerged out of an earlier concern with functionalism and integration.⁵ However, the chief point of departure has been recognised as Keohane and Nye's *Power and Interdependence*.⁶ Under conditions of interdependence, they argued that sovereignty had not yet withered away.

However, states could no longer exercise absolute control over international economic movements. Non-state actors, entities and institutions whether transnational, transgovernmental or intergovernmental were incorporated in regime literature. In 1983, Krasner and his co-authors tried to synthesise a theoretical framework on regime analysis. Krasner himself identified three perspectives: structuralism, Grotian and modified structuralism.⁷

According to Waltz, of the three dimensions in structuralism that is, the distribution of capabilities, the ordering principles and the function of the units, only the distribution of capabilities actually matters. In analysing international-political structure, Waltz argues that:

We do not ask whether states are revolutionary or legitimate, authoritarian or democratic, ideological or pragmatic. We abstract from every attribute of states except their capabilities ... We ask what range of expectations arises merely from looking at the type of order that prevails among them and at the distribution of capabilities within that order... what emerges is a positional picture, a general description

of the ordered overall arrangement of a society written in terms of the placement of units rather than in terms of their qualities.⁸

Therefore, according to structuralism, regimes depend on the distribution of power within the system. It is the states that *set the scene and stage their dramas or carry on their humdrum affairs*.⁹ This approach leaves no room for regimes because only state power sets *the term of the intercourse, whether by passively permitting informal rules to develop or actively intervening to change rules that no longer suit them*.¹⁰ International institutions are ineffective in a self-help system and co-operation is fragile. It is fragile both because of cheating and because of states' preference for relative over absolute gain.

In a state of anarchy, Waltz posits *that relative gain is more important than absolute gain*.¹¹ In the words of Grieco, reflecting Waltz, states are positional, not autistic in character and in uncooperative interactions they are not only concerned about cheating but also worry that their partners might gain more from co-operation than they do.¹² Therefore, in a condition of anarchy, cheating and the search for absolute or relative gain impedes co-operation.

The Grotian approach, unlike structuralism, regards regimes as independent variables. Regimes are social institutions governing the actions of those interested in specifiable activities.¹³ Under this approach, regimes are omnipresent. For instance, Puchala opines that for every political system, be it the United Nations, the United States, New York city or the American Political Science Association, there is a corresponding regime.¹⁴ This generalisation ignores international anarchy and egoism. Unlike structuralism that sees regimes as outcomes, the Grotian perspective regards regimes as causal factors.

Modified structuralism views regimes as intervening variables between power and outcomes. This school encompasses two major intellectual streams: theory of hegemonic stability and bargaining theory. The prominent feature of modified structuralism is its adherence to the basic tenets of structuralism, which depicts an international system of functionally symmetrical, power-maximising states interacting in an anarchic environment. Yet, it postulates that under certain conditions when individual actors fail to secure Pareto-optimal outcomes, regimes play an important role even in an anarchic situation.

The Theory of Hegemonic Stability

The proponents of hegemonic stability theory argue that an open liberal world economy requires a hegemonic or dominant power.¹⁵ Hegemony is essential because hegemonic structure of power, dominated by a single country is most conducive to the development of strong international regimes whose rules are relatively precise and well obeyed. Domination of the world by a single country as Keohane suggests is an integral part of the theory.¹⁶ Kindleberger puts it more clearly: "For the world to be stabilized, there has to be a stabiliser, one stabiliser."¹⁷

By virtue of power, the hegemony should sustain the stability of the system such that a liberal world economy provides collective goods. Therefore, the World Bank, the International Monetary Fund, and

the Most Favoured Nation clause of the GATT, form some examples of such collective goods.¹⁸ The hegemony uses its influence to create international regimes, whose establishment in turn primarily purports to serve the hegemony's national interest.¹⁹

The hegemony's protection of its international interest is the main logic behind the notion of systematic stability. The implication is that regimes could be either benevolent or coercive. Duncan Snidal has argued that the question of when hegemony – whether by a single state or by a condominium of states – will be benevolent, coercive but still beneficial or simply exploitative cuts across subfield boundaries.²⁰

Keohane and Gilpin argue that regimes prescribe legitimate and proscribe illegitimate behaviour to limit conflict, ensure justice or facilitate agreement,²¹ (emphasis mine). If a liberal world economy is to survive the hegemony, it must be able and willing to respond quickly to threats to the system.²² Under this argument, systematic stability is a variable depending on power and most importantly on its maximisation. "A concentration of power would tend to lead to systematic stability whereas fragmentation of power and influence would lead to systematic instability."²³

From this line of reasoning one can infer that co-operation is also a variable depending on power because it is the hegemony that creates international regimes that ease co-operation; however, co-operation can be extended by itself even after hegemony."²⁴

My critique of hegemonic stability theory does not accord that of Susan Strange. Strange calls regimes *fads* and puts emphasis on traditional issue areas while I believe that regimes are still worth studying. It is, however, worth commenting on what Strange and Grunberg call the myth of hegemony.²⁵ It is also the theory of mythic content that downplays the coercive side of regimes while exaggerating the benevolent aspects.

Even the most positive writers on regimes such as Oran Young have acknowledged that some regimes are imposed.²⁶ Puchala and Hopkins admit: "All regimes are biased. They establish hierarchies of values, emphasising some and discounting others. They also distribute rewards to the advantage of some and the disadvantage of others and in so doing they buttress, legitimate and sometimes institutionalise international patterns of dominance, subordination, accumulation, and exploitation."²⁷ Ironically, such *imposed* and *biased* regimes *ensure equity*.²⁸ Regime writers analyses resemble a medium of whether in which coercion withers away in a twinkle. The core of the orthodox hegemonic stability theory is to justify force by all means including illegal economic sanctions: "A pattern of behaviour initially established by economic coercion or force may come to be regarded as legitimate by those on whom it has been imposed."²⁹

As Keohane posits, international relations should start from realism.³⁰ Accordingly, what I am concerned with here is the role of power at the early stage of co-operation and the conditions under which such co-operation has evolved in the past years.

A second critique is that the orthodox theory of hegemonic stability does not take into account the role of

other state actors. The hegemonies – the United Kingdom before World War II and the United States after World War II – tended to be viewed as the sole supplier of regimes and public goods. All other members of the international society are considered free riders or at least irrelevant to the production of public goods. As Haggard and Simmons put it, “The benign view of hegemony turns realism on its head... rather than the strong exploiting the weak, it is the weak who exploit the strong.”³¹ This had led American writers on IPE (International Political Economy) to ignore smaller states’ contribution to the process of regime formation and their function.

I would not attempt to move to the other extreme as Tooze, Murphy and co-authors do when they call for a non-counter-hegemonic international political economy and set an agenda for a research on hegemony from below simply because structural force lays the foundation of any given regime. However, they are right in suggesting that the *practice of international relations, driven by notions of consensus-induced co-operation rather than the bias of American universalism*³² can better serve the interests of smaller states. The problem with the traditional hegemonic stability theory is that it does not provide clear theorems and implications because its variables are not readily practical in world politics. As Martin Rochester has asked, “What advice, for example, does the theory of hegemonic stability offer policy makers concerned about the requirements of world order should they allow a single state to become and remain a hegemony?”³³ Therefore, it seems necessary to allow the roles of other actors.

Cosmopolitanism

The sons of Adam are limbs of each other

Having been created of one essence

When the calamity of time afflicts one limb

The other limbs cannot remain at rest

If thou hast no sympathy for the troubles of others

Thou are unworthy to be called by the name of a man.

Sa’di, the Persian Poet, 1193–1291

The problem of justice and inequality is not a new thing in human life. In Greek mythology, we hear Heraclitus saying, “The Sun will not overstep his measures. If he does, the Erinyes, the handmaids of justice will find out.”³⁴ Talking about the harmony of a life shared in common by all its members, the Greek philosophers began to expound on the institutions of city-state. The growth of Athenian government brought changes in its institutions and the concept of justice became dependent on the changes in these institutions. Greek philosophers laid the foundation of a belief in common life that continued with some modification from the fifth century to the eighteenth century and came to be identified as idealism or cosmopolitanism.³⁵

From the nineteenth century onward, its proponents have cast their eyes to a time when in the name of

humanity nation states and national interests would be transformed.³⁶ The ideas of such writers range widely from environmental issues to the issues of ethics and hunger. However, one common theme among the proponents of this school of thought is their concern for inequality and injustice one aspect of which is human rights.

The Holy Qur'an states:

“We sent Our messengers with clear signs and We sent down with them the Book and the Balance so that men might uphold Justice.” (Surah al-Hadid, 57:25)

Justice holds a special place in the constitution of the Islamic Republic of Iran, Article 154 stipulates that *the Islamic Republic of Iran strives for the happiness of human beings within the community of mankind and recognises independence, freedom and the rule of the justice as universal rights to be enjoyed by all peoples of the world. Hence, while withholding from all interference in domestic affairs of nations, the Islamic Republic shall bolster any legitimate struggle of oppressed peoples against the oppressive classes anywhere on the face of the earth.*³⁷

One can argue that the behaviour of the Islamic Republic of Iran does not at all accord with the theories of imperialism. Neither can it be explained by dependency perspectives. Different versions of the theories of imperialism ranging from classical theorists (Hobson 1902; Hilferding 1910; Luxemburg 1913 and 1915; Bulcharin 1915 and 1924; and Lenin 1916)³⁸ to more recent writers such as Baran³⁹ and Warren⁴⁰ and the dependency school whether the underdevelopment,⁴¹ the world system,⁴² articulation of the mode of production⁴³ or to some extent associated development⁴⁴ theories are all variants of economic determinism while the core of Iran's cosmopolitanism lies in its ideology and culture.

In the works of the seventeenth century philosopher John Locke and in the Declaration of Independence written by his American disciples, all men are endowed by nature or God with certain basic rights. These appeared as the Rights of Man and of the Citizen in the French Revolution, proclaiming the liberty and equality of all persons regardless of economic classes or social status. Later such rights were realised on a universal scale under the Universal Declaration of Human Rights.

Thomas Jefferson's emphasis on endowed and unalienable rights was reflecting a long tradition in natural rights philosophy with roots dating back to the natural law and cosmopolitanism of the Greek Stoics, its reevaluation by St. Thomas Aquinas who developed the Church's doctrine that the rulers of states were subject to a higher law.

Game Theory

Two men suspected of committing a crime together are arrested and placed in separate cells by the police. Each suspect may either confess or remain silent and each one knows the possible consequences of this action. These are: (1) If one suspect confesses and his partner does not, the one

who confessed turns state's evidence and goes free and the other one goes to jail for twenty years. (2) If both suspects confess, they both go to jail for five years. (3) If both suspects remain silent, they go to jail for a year for carrying concealed weapons—a lesser charge. We will suppose that there is no honour among thieves and each suspect's sole concern is his own self interest. Under these conditions what should the criminals do?[45](#)

The foregoing, a clear description of the Prisoners' Dilemma explains what it is for an actor to make a rational decision and why co-operative action for mutual benefit is impossible.

The central point of the game theory of the Prisoners' dilemma is that rational actors cannot ultimately reach a Pareto-optimal solution even if a certain degree of mutual interest exists between them. The underlying cause of discord is that each actor might benefit from double crossing the other one, that is to say. From defection as it is illustrated by the stag-hunt context.

In the prisoners' dilemma, each prisoner is expected to confess and thereby defect solely on self-interest grounds. They both could avoid prison sentences if they chose not to confess. If one prisoner confesses (defects) and the other one chooses not to confess (co-operate) the defector gets the benefit. Since none of them is sure the other would co-operate both would ultimately defect.

As we can see, the notion of uncertainty plays a critical role. The outcome could be different should a line of communication be established between them. Applied to states, therefore, one pitfall of the theory is that it ignores the possibility of communication among states. Just like individuals, states cannot fail to communicate in a world woven into complex interrelated issues. Actors have many occasions to meet one another in international affairs. They have a stake in the future interaction and always worry about any damage to their reputation.

Axelrod has shown that co-operation can take place even under *unconditional defection*. It cannot happen if the interaction involves scattered individuals who have little chance to meet each other. The evolution of co-operation stems from a smaller number of partners who interact on a *reciprocity* basis. However, any strategy based on reciprocity is tried in a world where many other strategies are involved. Once co-operation based on reciprocity is established, it cannot *protect itself from invasion by less co-operative strategies*.[46](#)

A second pitfall of the theory is that actors' decisions in international politics, just like those of prisoners are assumed to be voluntary. They have the choice either to choose or to pass the alternatives whereas in world politics alternatives are fixed in terms of (a) the distribution of capabilities ranging from military to economic power (b) forces involving *issue structure*.[47](#)

Hobbes holds that the agreements of men in the state of nature are covenant only. And covenants without the sword are but words.[48](#) *Duress* to which lawyers refer as a condition where one is induced by wrongful act or threat of another to make contract under circumstances which deprive him of exercise of his free will[49](#) is binding and lawful in the state of nature because:

Covenants entered into by fear in the condition of mere Nature are obligatory: For example if I covenant to pay a ransom, or service for my life to an enemy I am bound by it... and if a weaker prince makes a disadvantageous peace with a stronger, for fear he is bound to keep it ... and even in common wealth if I be forced to redeem myself from a thief by promising him money I am bound to pay it.[50](#)

In other words, promises made under duress are obligatory because *with a gun at my head ... I have rationally chosen to make such pledges rather than to be shot.*[51](#)

Some scholars have put emphasis on the bargaining position of the weaker states. Haas has maintained that the *expectation that the stronger will not use violence in economic relations has given the weaker the courage to assert themselves in many international forums.*[52](#) Wagner has summarised the writings on asymmetrical interdependence and has found that there were two ways in which the weak could demonstrate their bargaining power: one is the *willingness to suffer* and the other is that the *cost to the target state of agreeing to the demands made of it may be greater than the cost of the sanctions.*[53](#) Keohane warns that:

In applying rational choice theory to the formation and maintenance of international regimes, we have to be continually sensitive to the structural context within which agreements are made. Voluntary choice does not imply equality of situation; in explaining outcomes, prior to constraints may be more important than the process of choice itself.[54](#)

In the context of human rights, I must mention that as Axelrod puts it, states will have to meet each other repeatedly. Therefore, defection will not be allowed for a number of reasons. Firstly, states tend to observe human rights regime because of reputation considerations. Secondly, with the broad interpretation on chapter VII of the UN Charter after the Cold War, the Security Council takes action in two areas: humanitarian assistance and protected zones.

The Security Council's intervention under the rubric of collective security regime will operate as a deterring force against state behaviour. As a result, continued violation of the norms will work against the violator's self-interest. Thirdly, both on international and domestic scale, public opinion and mass media will largely constrain the states.

General Aspects of Human Rights Regime

Dimensions

The dimensions of human rights regime are primarily its structural components. Just as arms control constitutes a more or less hierarchical area within which various individual regimes can exist human rights regime is not uni-dimensional. Human rights are clearly an established issue-area of world politics. What was once a matter of domestic jurisdiction has now been internationalised .

Principles

I define principles as the general objectives under each dimension of human rights regime, while norms are more specific provisions intended to establish codes of conduct. Under the United Nations Charter, the most important principle of human rights regime is Article 55, which stipulates:

With a view to the creation of condition of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Some newly constructed regimes are founded upon regimes that already exist. Some are constructed following a crisis. Functionalism and its regimerelated consequences will help revive, in the end, the spirit of former regimes. That is the line along which we may expect future developments to take place. In the case of the previously mentioned principles, I must note that the principle takes its roots from the League of Nations, which encompassed primarily minority rights, Labour rights and the rights of individuals in mandated territories.

As for minority rights, it was war that produced concern. After World War I, there was a belief that unhappy minorities in central Europe had contributed to the outbreak of war in 1914. Minority treaties were attached to the Versailles peace treaty of 1919 in which an important principle lay behind these treaties: peace, order, and justice – in addition to human dignity – mandate that a national majority shows tolerance towards minorities.

Attempts to protect labour rights fared much better and led to the creation of the International Labour Organisation (ILG) which subsequently developed a series of treaties to protect the rights of labour. The rights of individuals in mandated territories were theoretically protected under the League Mandates Commission. The Commission consisted partially of the colonial powers and the individuals from Mandated Territories could not appear directly before the Commission. Yet, it was accepted that the League of Nations should guarantee the rights of peoples in these territories to achieve national independence and well-being.

Norms

Norms are the general legal provisions that help define codes of conduct for the actors in the system for each dimension of the human right regimes. The provisions are contained in international treaties or agreements and can originate from various sources. However, most of the norms for the current human rights regime stem from basic rules encoded in the Universal Declaration of Human Rights. Some norms

may also be found in other international agreements or regional arrangements. However, such agreements are normally aimed essentially at strengthening the norms and principles set forth in the Universal Declaration. In consequence, the Declaration remains the primary source for norms of regime, forming a kind of tool chest of basic codes establishing not only the general norms and principles of the regime but also its operating provisions. Like most regimes, the norms of the current human rights regime tend to merge with the principles and objectives in the declaration.

Rules

Rules are the means incorporated into fundamental arrangements, which make the norms and principles of the regime operational. The rules must comply with established norms and principles and may either be legal and formal (such as resolutions of the Security Council or the United Nations General Assembly) or informal (established behaviours that have been elevated to the status of rules through repeated use). Rules may be established at either the global or the regional level.

Usage And Custom

According to Krasner, custom practice and usage are sets of causal variables that affect regime development. Usage refers to regular patterns of behaviour based on actual practice of actors: custom to longstanding practice. According to the position taken by Hopkins and Puchala, practices that begin as ad hoc private arrangements later become the basis for official regimes.

Knowledge

Ernst Haas defines knowledge as *the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve as a guide to public policy designed to achieve some social goal*. In pinpointing the potentialities inherent in a stance of cognitive *evolutionism*, he argues that knowledge creates a basis for co-operation by illuminating complex interconnections that were not previously understood. Knowledge cannot only enhance the prospect for convergent state behaviour: it can also transcend *prevailing lines of ideological cleavage*. It can provide a common ground for both mechanical approaches (most conventional social science theories) and organic approaches (egalitarianism and various environmentally oriented arguments).

Implementation Procedures

Procedures—or the actions that implement norms and rule—can be divided according to the bodies that carry out the prescriptive features of the regime—to three levels of national, regional and global.

At the national level, rules are implemented under national sovereignty. We do not propose to detail how rules and procedures are implemented at the national level. Suffice it to say that the implementation of rules will be increasingly constrained as states pass national legislation to support the efforts made under the regime. This can be seen, for instance, in the declarations of willingness by some countries to

keep military contingents available for the United Nations on permanent basis.

Implementation procedures are created within multilateral organisations themselves. These arrangements include formal legal arrangements, tacit conventions and informal arrangements often established on a case-by-case basis. To understand this complex aspect of the human rights regime, it is useful to draw a distinction between global and regional levels.

Monitoring Regime Consequences

Most international organisations have established surveillance and control mechanisms to monitor implementation of prevailing rules and procedures. The Congruence of the regime can be determined by using these mechanisms to determine compliance with established norms or rules and procedures.

International human rights regime constitutes an ideology: it seeks to directly control behaviour through commands and finally it seeks to indirectly control behaviour via political socialisation. The international monitoring agencies act for indirect protection over time, trying to urge states to directly protect human rights. Although both the public and the private sector are monitoring the human rights protection, such efforts do not exist in a political vacuum.

Historical Antecedents to Human Rights Regime

War and the conditions for peace and security is the core of both international relations and international law. Spencer believes that war is the cause of all such developments. The beginnings of international attention to human rights can be traced either to slavery or to war.

The Charter Of Cyrus

The ancestor of the documents recognising the rights of man was promulgated in Persia by Cyrus the Great about twenty five hundred years ago. Christian Daubie has recounted the magnanimity and clemency of Cyrus to subject peoples – in marked contrast to the practice of earlier conquerors–and particularly his respect for their religion; from the Charter of Cyrus one induces the recognition and protection of what we now call the rights to liberty and security, freedom of movement, the right of property and even certain economic and social rights.^{[55](#)}

The Four Tribunals

The Four Tribunals^{[56](#)}

International wars and conflicts have produced four tribunals dating from the start of the twentieth century to the eve of the development of the human rights regime at the end of World War II. The four tribunals have radically different characters.

In sequence, the opinions are those of the United States Supreme Court [sitting as a court of prize] of an international arbitrate tribunal formed under a U.S.–Mexican convention of the Permanent Court of International Justice formed under the League of Nations [the predecessor to the present International Court of Justice formed under the United Nations Charter] and of the International Military Tribunal formed by the allied powers after World war II for the Nuremberg trials of war criminals.

The selection of the four tribunals' opinions to present some background to the human rights regime might suggest to the reader that tribunals have played a major role in resolving disputes over international human rights and in simultaneously developing that body of law.

The *Paquete Habana* deals with an earlier period in the development of laws of war, here navel warfare, and with a theme that became central in the later treaty development of this field the protection of non-combatant civilians and their property [here, civilian fishing vessels] against the ravages of war.

Within the framework of the laws of war, this case—involves *jus in bello*, the ways in which war ought to be waged, rather than the related but distinct *jus ad bellum*, the determination of those conditions [if any] in which a just or justified war can be waged in which war is legal.

In its analysis of the question before it, the U. S. Supreme Court here illustrate a classical understanding of international customary law. The *Paquete Habana* has the aura of a humane world in which if war occurs the fighting should be as compassionate in spirit as possible. It rests the rule of exemption of coastal fishing vessels on considerations of humanity to a poor and industrious order of men and [on] the mutual convenience of fishing vessels.[57](#)

The intricate body of international law considered by the Supreme Court grew out of centuries of primarily customary law although custom was supplemented and informed centuries ago by selective bilateral treaties. Custom remains essential to argument about the laws of war to this day. However, this field is increasingly dominated by multilateral treaties that have both codified customary standards and rules and developed new ones in numerous international conferences.

Multilateral declarations and treaties started to achieve prominence in the second half on the nineteenth century. The treaties now include the Hague Conventions concluded around the turn of the century the four Geneva Conventions of 1949 (as well as two significant protocols of 1977 to those conventions) and several discrete treaties since World War II on matters like bans on particular weapons and cultural property.

The basic Geneva Conventions (185 states parties as of January 1995) and the two Protocols (Protocols No. 1, 136 parties; Protocol No. 2, 126 parties) cover a vast range of problems stemming from land, air or naval warfare, including the protection of wounded combatants and prisoners of war, of civilian populations and civilian objects affected by military operations or present in occupied territories and of medical and religious personnel and buildings. As suggested by this list, the provision of the four Conventions and two Protocols constitute the principal regulation of *jus in bello*.

This entire corpus of custom and treaties came to be known as the *international humanitarian law of war*, the broad purpose being—in the words of the landmark St. Petersburg Declaration of 1864—alleviating as much as possible the scourges of war. Here lies the tension, even contradiction within the body of law.

Putting aside the question of a war's legality (an issue central to the judgement of the International Military Tribunal at Nuremberg and today governed by the UN Charter) a war fought in compliance with the standards and rules of the law of war permits massive international killing or wounding and other massive destructions that except at war, would violate fundamental human rights norms.

Hence all these standards and rules at some perilous and problematic division between brutality and destruction are (i) permitted or privileged or (ii) illegal or subject to sanction. Principles like proportionality in choosing military means or the avoidance of inflicting *unnecessary suffering* to the civilian population are employed to help mitigate war, thus countered by the goals of the state parties to a war—indeed in the eyes of the states, the paramount goal is gaining military objectives and victory as much as possible and directing the losses to one's own armed forces.

The generous mood of the *Paquete Habana* toward the civilian population and its food-gathering needs was reflected in the various Hague Conventions regulating land and naval warfare that were adopted during the ensuing decade. Note Article 3 of the Hague Convention of 1907 on certain restrictions concerning the Exercise of the Right to Capture in Naval War, 36 Stat. 2396. and TS. 544. which proclaimed in 1910: "Vessels used exclusively for fishing along the coast ... are exempt from capture."

The *Chattin* case was decided under a 1923 General Claims Convention between the United States and Mexico, 43 Stat. 1730, T.S. No. 679. That treaty provided that designated claims of Mexico against U.S.A. citizens (and vice versa) for losses or damages suffered by persons or by their properties that (in the case of the U.S. government for interposition to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity. Each state was to appoint one member and the presiding third commissioner was to be selected by mutual agreement (and by stipulated procedures failing agreement.)

These arbitrations grew out of and further developed the law of state responsibility for injuries to aliens, a branch of international law that was among the important predecessors to contemporary human rights law. That body of law addressed only certain kinds of conflicts—not including, for example, conflicts originating in the first instance in a dispute between a claimant state (X) and a respondent state (Y). Thus it did not cover a dispute based on a claim by X that Y had violated international law by its invasion of x's territory or by its imprisonment of x's ambassador.

Rather, the claims between states that were addressed by the law of state responsibility for injuries to aliens grew out of disputes arising in the first instance between a citizen-national of X and the government of Y, for example, respondent state Y allegedly imprisoned a citizen of claimant state X—allegations which, if true, could show violations of international law.

The Minority Schools in Albania opinion illustrates treaties as a source and major expression of international law and –introduces another field of the human rights movement. This comment provides some background to the opinion.

Treaties and other special regimes to protect minorities have a long history in international law dating from the emergence in the seventeenth century of modern form of political state, sovereign within its own territorial boundaries. Within Europe, religious issues became a strong concern since states often included more than one religious denomination, and abuse by a state of a religious minority could lead to intervention by other states where that religion was dominant. Hence, peace treaties sometimes included provisions on religious minorities. In the later centuries, the precarious situation of Christian minorities within the Ottoman Empire and of religious minorities in newly independent East European or Balkan states led to the outbreaks of violence and to sporadic treaty regulation.

World War I ushered in an era of heightened attention to problems of racial, religious or linguistic minorities. The collapse of the great AustroHungarian and Ottoman multinational empires, and the chaos as the Russian Empire of the Romanoffs was succeeded by the Soviet Union, led to much redrawing of maps and the creation of new states.

President Wilson's Fourteen Points, however compromised they became in the Versailles Treaty and later arrangements, nonetheless exerted influence on the post-war settlements. In it and other messages, Wilson stressed the ideals of the freeing of minorities and the related self-determination of people's and nationalities. That concept of self-determination, so politically powerful and open to such diverse interpretations, continues to this day to be much disputed and to have profound consequences. It not only appears in the U.S. Charter but it is given a position of high prominence in the two principal human rights covenants.

The trial at Nuremberg in 1945–56 of major war criminals among the Axis powers, dominantly Nazi party leaders and military officials gave the nascent human rights regime a powerful impulse. The UN Charter that became effective in 1945 included a few broad human rights provisions. However, they were more programmatic than operational, more a program to be realised by states over time than legal rules to be applied immediately to states.

Nuremberg, on the other hand, was concrete and applied, prosecutions, convictions, and punishment. The prosecution and the judgement of the International Military Tribunals were based on concepts and norms, some of which were deeply rooted in international law and some of which represented a significant development of that law that underlay the later formulation of major human rights norms.

The striking aspect of Nuremberg was that the trial and judgement applied international law doctrines and concepts to impose criminal punishment on individuals for their commission of any of the three types of crimes under international law that are described below. The notion of crimes against the law of nations for which the violators bore an individual criminal responsibility was itself an old one, but it had

operated in a restricted field.

As customary international law developed from the time of Grotius, certain conducts came to be considered a violation of the law of nations—in effect, a universal crime. Piracy on the high seas was long the classic example of this limited category of crimes. Given the common interest of all nations in protecting navigation against interference on the high seas outside the territory of any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own courts. Since there was no international criminal tribunal, prosecution in a state court sought to apply the customary international law defining the crime of piracy, either directly or as it had become absorbed into national legislation, the choice of forum became less significant, for state courts everywhere, at least in theory, were applying the same law.

As World War II came to an end, the Allied Powers held several conferences to determine what policies they should follow towards the Germans responsible for the war and the massive, systematic barbarity and destruction of the period. These conferences culminated in the (U.S., USSR, Britain and France) London Agreement of August 8, 1945, 59 Stat. 1544, E.A.S. No. 472, in which the parties determined to constitute an International Military Tribunal for the trial of war criminals. The Charter annexed to the agreement provided for the composition and basic procedures of the Tribunal and stated in its three critical articles.

Article 6

The Tribunal established by the agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b) War Crimes: namely, the violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, illtreatment or deportation to slave labour or for any other purpose of civilian population of or in war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The core of the universal system consists of the United Nations Charter and related instruments. Three

such instruments, comprising the so-called International Bill of Rights, stand out in significance: the Universal Declaration of Human Rights of 1948 and the two principal covenants on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As of September 1995, the ICCPR had 111 state parties, the ICESCR 112 parties.

There are three regional human rights systems—regional in that they are based on treaties whose membership is restricted to states in a particular region: the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights) (46 states parties as of September 1950), the American Convention on Human Rights (25 parties) and the African Charter on Human Rights and People's Rights (49 parties).

The Charter builds on the precedents to which the Nuremberg Judgement refers and states the UN's basic purpose of securing and maintaining peace. It does so by providing in Article 2 (4) that the UN members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, a rule qualified by Article 51's provision that nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member.

The Charter has little to say directly about human rights. Its references to human rights are scattered, terse, and even cryptic. The term human rights appears infrequently, although in vital contexts. Note its occurrence in the following provisions: second paragraph of the Preamble Article 1 (3), Article 13(1)(b), Articles 55 and 56, Article 62(2) and Article 69.

The UN And The Universal Declaration

Despite the proposals to the contrary, the Charter stopped shy of incorporating a bill of rights. Instead, there were proposals for developing one through the work of a special commission that would give separate attention to the issue. That commission was contemplated by Charter Article 69, which provides that one of the UN organs, the Economic and Social Council (ECOSOC), shall set up commissions in economic and social fields and for promotion of human rights... in 1946. ECOSOC established the Commission on Human Rights, which has evolved over decades to become the world's single most important human rights organ.

Custom And The UN Resolutions

As components of argument about international human rights, custom and general principles retain great importance. Few issues of international law theory have aroused as much controversy as that engendered by resolutions and declarations of the General Assembly, which appear to express principle and rules of law. Their adoption by large majorities through voting or consensus procedures has been seen by many as attempts to impose obligatory norms on dissenting minorities and to change radically the way in which the international law is made.

The arguments advanced in support of a finding that rights are a part of the customary law rely on different kinds of evidence—the incorporation of human rights provisions in many national constitutions and laws; frequent references in the United Nations resolutions and declarations to the duty of all States to observe faithfully the Universal Declaration of Human Rights.

Regional Regimes In Europe, The Americas And Africa

The remarkable feature of the European system is its productive and effective court; the materials illustrate the work of the Court through several revealing decisions. In the Inter-America system, the commission has been a very significant organ. The African system is the least developed institutionally; the materials concentrate on a distinctive aspect of its norms, a stress on duties as well as rights.

In addition to the three major systems, there is a largely dormant Arab system and a proposal for the creation of an Asian regional system. It is necessary to consider the broader European institutional context within which the Convention is situated. The Covenant is the creation of the Council of Europe, which is only one of the three major regional mechanisms dealing with human rights within Europe. The other two are the European Union and the organisation (formerly termed Conference) for Security and Co-operation in Europe. None of the three is concerned exclusively with human rights. The Council of Europe has the longest and most significant record of accomplishment in this field. Here I shall confine myself to the European regional arrangements.

The Council of Europe

The Council was established in 1949 by a group of ten states, primarily to promote democracy the rule of law, and greater unity among the nations of Western Europe. It represented both a principled commitments of its members to these values and an ideological stance against Communism. Over the years, its activities have included the promotion of co-operation in relation to social, cultural, sporting and a range of other matters. Until 1990, the Council's membership was essentially confined to Western European countries. Since then, post-cold War developments have made a major impact upon the Council.

The European Union

Despite the absence of a bill of rights, the European Court of Justice (the judicial organ of the European Union) began in 1969 to evolve a specific doctrine of human rights, the original motivation for which probably owed more to a desire to protect the competencies of the European Community than to any concern to provide extended protection to individuals.

Over the years during which the human rights doctrine has evolved, the Court has identified several different normative underpinnings for it. They include certain provisions of the treaty of Rome. The constitutional traditions of the member states and the international treaties accepted by member states. For the most part, the European Court of Justice has applied this concept of human rights to the actions

of the Community itself, but not to the actions of the member states.

The Organisation for Security and Co-operation in Europe (OSCE)

The Conference on Security and Co-operation in Europe (CSCE) opened in 1973 and concluded in August 1975 with the signing of the Final act of Helsinki. In 1995, the CSCE was officially transformed into the Organisation for Security and Co-operation in Europe (OSCE). It has many official organs like the Council of Ministers for Foreign Affairs. One issue, which the OSCE's evolution has made more pressing, is its relationship with the Council of Europe's human rights regime.

Women's Rights

The subject of women's rights as international human rights regime offers distinctive perspectives on the human rights movement as a whole. The basic treaty in this field—the Convention on the Elimination of all Forms of Discrimination against women (CEDAW, effective 1991, 144 ramifications as of September 1995) has exceptional reach. At the same time, the problems that it addresses have exceptional depth and complexity.

The cases and materials in the literature, including but not restricted to those of Woman Refugee Regime, suggest the complexity interwoven socioeconomic, legal, political and cultural strands to the problem of women's subordination and women's rights. Indeed, it is difficult to know where to begin inquiry and analysis. Each starting point implicates others and by itself seems patently insufficient for yielding an adequate understanding of the problem, let alone solutions. When one focuses specifically on what appears to be women's issues, links between those issues and other aspects of social order (disorder) appear pervasive. All is interrelated. The problem is truly systematic.

Self-Determination And Autonomy Regimes

Theoretically rooted in disintegration and fragmentation, self-determination and autonomy stress the character and significance of autonomy regime—political systems or subsystems organised within a state for the purposes of fostering political participation and self-government by ethnic minorities and indigenous peoples. Together with several other human rights norms, the notion of self-determination continues to exert a strong influence on the debate over and possible forms of realisation of these autonomy regimes. Wilson addressed the question of self-determination directly:

National aspirations must be respected: people may now be dominated and governed only by their consent. Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril. [58](#)

International Criminal Regimes

Among other considerations before the Security Council, the massive brutality in the former Yugoslavia

and related public pressure contributed toward persuading it to establish an ad hoc international criminal tribunal, the first such tribunal since the post World War II tribunals constituted by the victorious powers in Nuremberg and Tokyo. The United States as a hegemon took the lead in drafting a plan for prosecuting these men. That plan, which led to the establishment of the International Military Tribunal at Nuremberg was presented to America's allies in San Francisco at the same time that the UN Charter was signed.

Within a year, a similar plan was adopted for the prosecution of top Japanese war criminals. The international community's knowledge about the atrocities in Bosnia, Croatia, and Rwanda – and its response to them—is reminiscent of the Allies response to the Nazi atrocities during World War II. Some countries have employed certain mechanisms to address widespread human rights abuses with strictly domestic remedies.

Argentina and Chile are examples of the societies where a mixture of truth-finding, public accountability and amnesty has paved the way for a return to a relatively civil and human life. In Honduras, a civilian court has charged military officers with committing human rights violations during the 1990s.

Such domestic remedies usually involve regional consequences. There is a growing trend to explore international remedies instead. American hegemony behind the United Nations is the primary source of such responses. A secondary source is the will of the international community that the United Nations embodies. Issues of sovereignty remain problematic. In fact, there is a contradiction in the Charter of the United Nations, Article 2 (7) of the Charter speaks more specifically about non-interference in matters, which are essentially within the domestic jurisdiction of any state. At the same time, it outlines more broadly the overriding exception to that rule for any enforcement measures under Charter VII.

According to Oran Young, certain international regimes harbour international contradictions that eventually lead to serious failures and mounting pressure for major alterations.⁵⁹ International contradictions may culminate in a developmental character, deepening due to normal operations.

The clearest manifestations of an emerging trend toward international judicial intervention are the two *ad hoc* criminal tribunals established by the Security Council—one in early 1993 for the former Yugoslavia and the other in late 1994 for Rwanda. The United States, as hegemony seeking to stabilise the system after the collapse of bipolarity was the forefront in creating both tribunals. The Clinton administration has launched an investigation into the genocide by Iraqi government during the Persian Gulf War. However, both the United States and the international community ignored Saddam Husayn's gross violations of human rights during Iran-Iraq war.

The Iraqi atrocity against the Iranians and subsequently the U.S. silence (or its de facto support of the Iraqi regime during the war) on such crimes buttresses the public tenet of Hegemonic Stability Theory that hegemonies create international regimes primarily for their own benefit and not for the benefit of international community. In any case, the ultimate weapon of those ad hoc tribunals would lead to an

international judicial intervention that will create a permanent International Criminal Court (ICC).

Development Regime

Ever since the first UN World Conference on Human Rights held in Tehran in 1960, the relationship between human rights and development has occupied a prominent place in the international discourse of rights. Since 1977, the debate has been pursued with the increasing vigour under the rubric of the right to development. That debate brings together several important themes. They include the legal foundations of the classical human rights and the basis for the recognition of new rights, the priority to be accorded to the different sets of rights, the links between human rights and democratic governance, the extent to which international community bears some responsibility for assisting states whose resources are inadequate to ensure the human rights of their own citizens, and the relationship between individual and collective rights (including peoples' rights). In addition, an examination of the concept of the right to development and its implications in the 1990s cannot avoid consideration of the effects of the globalisation of the economy and the consequences of the near-universal embrace of the market economy.

The list of internationally recognised human rights is by no mean immutable. Just as the British sociologist T.H. Marshall characterised the eighteenth century as the century of civil rights, the nineteenth century as that of political rights and the twentieth as that of social rights, so too have some commentators over the past two decades put forward claims for the recognition of the new rights, in particular a category known as the third generation of solidarity rights. By analogy with the slogan of the French Revolution these rights have been said to correspond to the theme of fraternite, while the first generation of civil and political rights correspond with liberte and the second generation of economic and social rights with egalite. Karel Vasak's list of solidarity rights includes the right to freedom, the right to peace, the right to environment, the right to the ownership of the common heritage of mankind, and the right to communication.

Far more significant has been the impact of the right to development. First recognised by the UN Commission on Human Rights in 1977, it was enshrined by the General Assembly in the 1986 Declaration on the right to Development. It has never ceased to be controversial among the governments as well as among academic and other commentators. Efforts to secure its recognition raised the question of the process by which new human rights should be recognised. Some commentators emphasised the need for the catalogue of the rights to keep pace with new developments and to be responsive to new challenges. Others argued that the third generation approach of rights of peoples was a flawed way of seeking to meet such needs.

Conclusion

Some regime analysts offer four models for regime change. Power structure, diffusion of technology, issue structure and the function of international organisations serves as a basis for regime change.[60](#)

Others suggest, *inter alia*, the notion of internal contradiction. All of them can affect the pattern of international human rights regime, leading ultimately to the proliferation of rights. Alston has listed a large number of rights ranging from the right to sleep and the right to social transparency to the right to coexistence and the right to tourism.[61](#)

Stephen Marks has warned against the abandoned proliferation of rights. He posits that not only is proliferation of rights regarded to be dangerous but also the employment of the term generation implies that the rights belonging to earlier generations are outdated and that the rights of the new generation are too vague to be justifiable and are no more than slogans.[62](#)

Issues covered by the recent writers on human rights—such as Gay and Lesbian Rights leads the literature to a scientifically unknown, culturally inadmissible, legally challengeable domain. The first openly homosexual person who spoke in a UN human rights forum on August 1992 noted that lesbian women and gay men should be represented in UN work.[63](#)

In recent US foreign policy from about 1973, Nixon, Carter, Reagan, Bush and Clinton all used the rhetoric of rights. Each of them meant something different. Mention can be made of several cases in which the United States was seeking its own egoistic interests. Suffice it to mention that in Greece, the United States supported the Greek Junta 1967–74. It sponsored and organised the Shah's SAVAK (secret police) in Iran. This brings to mind the idea of cultural relativism.

The most fundamental and pertinent reason for the anthropologists' restricted involvement with human rights issues can be traced directly back to the theory of cultural relativism. This is exemplified by the American Anthropological Association (AAA) statement's rejection of the idea of universal human rights, its emphasis on different peoples' different rights concepts and its criticism of a universal legal framework as ethnocentrically Western.

While this position is generally seen as a major burden contribution to the exclusion of anthropologists from human rights research, this is not the only impact of cultural relativism. For quite some time now, the theory has, in fact, been nurturing a seemingly never-ending debate among human rights researchers on the question of universalism or relativism of human rights. The classical conflict is well-known: cultural relativists see the Universal Declaration on Human Rights as enumerating rights and freedoms which are culturally, ideologically and politically non-universal. They argue that the current human rights norms possess a distinctively Western or Judeo-Christian bias, and hence, are an ethno-centric construct with limited applicability.[64](#)

There are also unresolved systematic factors. For instance, human rights regime must also be seen from the perspective of economic interactions between the developing and the developed countries. The evolving nature of the international system also would indicate a need for new research into human rights and multi-national corporations (MNCs). As the globe become more interdependent, multi-nationals move to centre stage in the international arena.

In Donaldson's philosophical treatment of the corporations and morality, post-modern trends toward MNC dominance are highlighted in his claim that from a moral point of view, the central issue is that of economic justice. In the confrontation between the developed and underdeveloped nations, do multi-nationals aggravate or help solve social and economic problems?⁶⁵

Two schools of thought are readily identifiable when it comes to theories of MNCs, development, and rights in the third world. One view is generally pro-MNC. The pro-MNC view holds that multi-nationals operating in the third world promote economic and social rights and indirectly support civil and political rights.⁶⁶ A second view holds that MNCs directly contribute to the violations of human rights in developing countries. The most carefully elaborated theoretical support for this position can be found in the work of economist Stephen Hymer.⁶⁷ Viewed from this perspective, the issue of human rights seems to be as controversial as the problem of expropriation under international law, which deals, among other things, with the role of such transnational corporations in the third world.

Against this myth, there is also a reality. There is an emerging tension between the principle of sovereignty, which is the constitutive principle of political system and other principles such as the principle of property rights, which is the constitutive principle of the economic system. Tensions are growing between the rights of the individuals, the rights of peoples and the rights of states. Such rights are derived from the conceptions of human nature: that is, covering the basic needs of the human body and mind (e.g. the right to life, liberty and security) and ought not to be denied by other humans.

However, owing to the unequal distribution of capabilities, international human rights regime has stemmed from the heart of modified structuralism. Within the framework of a modified structural analysis, there need not always be congruity between power distributions and related behaviour or outcomes. A change in power does not always suggest a change in outcomes because regimes may operate as intervening variables. Regimes will continue to exist after hegemony. International human rights regime will have its own life within a nation-state system, but this nation-state system will also have a society of states as illustrated by Charles Beitz. The society of states will be concerned with the moral relations of members of a universal community... There are no reasons of basic principle for exempting the internal affairs of states from external moral scrutiny and it is possible that members of some states might have obligations of justice with respect to persons elsewhere.⁶⁸ Elites will have to search for compromises, balances, and practical forward steps that will maximise the possibilities for international human rights regime.

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