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# International Human Rights and Cultural Relativism

FERNANDO R. TESÓN\*

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Notre conception des droits de l'homme ne varie pas selon les latitudes ni selon les circonstances.<sup>1</sup>

## I. INTRODUCTION

We are witnessing an unequivocal process of universalization of the concern for human dignity.<sup>2</sup> As international law becomes more responsive to the demands for individual freedom, however, it necessarily challenges the validity of certain state practices reflecting geographical and cultural particularities. The tension between national sovereignty and the enforcement of international

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1. President Francois Mitterand on the eve of his trip to the Soviet Union, *Le Monde*, May 17, 1984, at 1, col. 5. ("Our conception of human rights does not vary with latitudes or with circumstances.") [trans. by eds.].

2. For a survey of the literature dealing with what has been, in the words of Professor Sohn, a true "human rights revolution," Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U.L. Rev.* 1 (1982), see Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature-Part I: International Law and the United Nations*, 14 *N.Y.U. J. Int'l L. & Pol.* 209 (1981); Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature-Part II: International Protection of Refugees, and Humanitarian Law*, 14 *N.Y.U. J. Int'l L. & Pol.* 487 (1982); Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature-Part III: The International Labor Organization and Human Rights*, 15 *N.Y.U. J. Int'l L. & Pol.* 211 (1982) [hereinafter collectively cited as Vincent-Daviss, *Human Rights Law Research Guides*].

human rights standards is highlighted when governments point to national cultural traditions to justify failures to comply with international law.<sup>3</sup> States espousing such positions have found invaluable allies not only in Third World writers,<sup>4</sup> but also among certain Western legal scholars,<sup>5</sup> anthropologists, and philosophers.<sup>6</sup>

"Cultural relativism" is not a term of art, nor even a legal term. It has been borrowed from anthropology and moral philosophy, a fact that has several consequences. First, because an intimate link exists between the moral and legal dimensions of relativism,<sup>7</sup> both the philosophical aspects of relativism and the status of that doctrine in positive international law will be discussed. Second, the theory of cultural relativism has several different possible meanings.<sup>8</sup> While the core idea of cultural relativism will be discussed and critiqued,<sup>9</sup> arguments that relativists could or should advance will also occasionally be anticipated, even though such arguments may not yet have been articulated by relativist scholars or governments.

In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.<sup>10</sup> A central tenet of relativism is that no transboundary le-

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3. See, e.g., the statement made by the Saudi Arabian representative to the United Nations, 32 U.N. GAOR C.3 (43rd mtg.) at 11-13, U.N. Doc. A/C.3/32/SR.43 (1977) (different social, cultural, and political traditions justify different interpretations of human rights).

4. See, e.g., Wai, *Human Rights in Sub-Sahara Africa*, in *Human Rights: Cultural and Ideological Perspectives 1* (A. Pollis & P. Schwab eds. 1979) (claiming that Western-oriented human rights notions embodied in the U.N. Charter and the Universal Declaration on Human Rights may not be applicable in non-Western areas); Mani, *Regional Approaches to the Implementation of Human Rights*, 21 *Indian J. Int'l L.* 96, 97 (1981).

5. A recent work by E. McWhinney, *United Nations Law Making* (1984), bears the following subtitle: *Cultural and Ideological Relativism and International Law Making for an Era of Transition*.

6. See, e.g., M. Herskovits, *Man and His Works* 61-78 (1949); E. Westermarck, *Ethical Relativity* 183-219 (1932).

7. See *infra* notes 79-84 and accompanying text.

8. See *infra* notes 85-94 and accompanying text.

9. See *infra* text accompanying notes 10-13.

10. Many contemporary situations exemplify the tension between domestic cultural imperatives and international norms: mutilation and flogging as criminal punishment (see U.S. Dep't of State, *Country Reports on Human Rights Practices* 1084 (1981); Marett, *Some Medical Problems Met in Saudi Arabia*, 4 *U.S.A.F. Med. J.* 31, 36 (1953)); the circumcision of women (see Dullea, *Female Circumcision a Topic at U.N.* Parley, *N.Y. Times*, July 18, 1980, at B4, col. 3.); the subjugation of women (see White, *Legal Reform as an Indicator of*

gal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.<sup>11</sup> Thus, relativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncracies. What may be regarded as a human rights violation in one society may properly be considered lawful in another, and Western ideas of human rights should not be imposed upon Third World societies.<sup>12</sup> Tolerance and respect for self-determination preclude crosscultural normative judgments. Alternatively, the relativist thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.<sup>13</sup>

The critique advanced here of cultural relativism shall be limited in several important ways. First, the paper will only deal with violations of civil and political rights—the so-called “first generation” rights. Cultural relativism will not be analyzed in relation to other human rights that may be part of international law, such as the socioeconomic or “second generation” rights.<sup>14</sup> Second, cultural

Women's Status in Muslim Nations, in *Women in the Muslim World* 52 (L. Beck & N. Keddie eds. 1978); Marshall, *Tradition and the Veil: Female Status in Tunisia and Algeria*, 19 *J. Mod. African Stud.* 635, 632-37 (1981); and various authoritarian methods of government (see Note, *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*, 12 *Ga. J. Int'l & Comp. L.* 55, 92 (1981) (Shari'a values established a philosophical foundation for human rights abuses)). All of these examples of contemporary practices, while clearly unlawful by international standards, are defended by some as being required or permitted by cultural traditions. See also the discussion of the Iranian position on human rights in E. McWhinney, *supra* note 5, at 210.

11. Since the main concern of international human rights is the position of the individual vis-à-vis the government, the expression “human rights practices” encompasses, in addition to governmental acts, actions by groups or individuals that governments tolerate or condone (e.g., religious practices carried out by the clergy and tolerated by the state).

12. See *supra* note 4.

13. See Pollis, *Liberal, Socialist and Third World Perspectives on Human Rights*, in *Toward a Human Rights Framework* 1, 23 (A. Pollis & P. Schwab eds. 1982) (arguing that human rights judgments ought to be determined “by the criteria set by the philosophic/cultural/ideological roots of particular states”); Said & Nasser, *The Use and Abuse of Democracy in Islam*, in *International Human Rights: Contemporary Issues* 61 (J. Nelson & V. Green eds. 1980) (“freedom exists in Islam as long as it serves the interest of the community”).

14. For a complete though somewhat uncritical account of the evolution and meaning of the different “generations” of rights in the United Nations, see Sohn, *supra* note 2, and references cited therein. The so-called “third generation” of human rights are the “solidarity” rights. The advocacy of this new set of rights may represent an attempt to use the favorable emotive connections of human rights language to expand the “rights” of the state at the expense of individual rights. Cf. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 *Neth.*

relativism must be distinguished from the thesis that governments, especially those of the Third World, may suppress, delay or suspend civil and political rights in an effort to achieve a just economic order. While the issue of whether socioeconomic rights should in certain situations have priority over civil and political rights has received a great deal of attention in human rights literature,<sup>15</sup> it differs from the problems raised by cultural relativism *stricto sensu*.<sup>16</sup>

The discussion here will be further circumscribed by two assumptions which have solid foundations in international law. The first assumption is that human rights are a substantive part of international law, not only as a matter of treaty, but also as part of customary law.<sup>17</sup> It follows that arguments premised upon the ex-

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Int'l L. Rev. 307, 321 (1982) (proponents of such rights have a strong burden of proof to show that they are compatible with and do not devalue existing rights).

15. See Forsythe, *Socioeconomic Human Rights: The United Nations, the United States and Beyond*, 4 Hum. Rts. Q. 433, 434-45 (1982); Zalaquett, *An Interdisciplinary Approach to Development and Human Rights*, 4 B.C. Third World L.J. 1, 28-31 (1983). Unlike "solidarity" rights, socioeconomic rights represent a positive force in the fight to enhance human dignity. However, the emergence of socioeconomic rights need not entail the demise or contraction of civil and political rights. It should be noted that authoritarian regimes, whether Marxist or not, invariably defend the priority of socioeconomic rights. See Forsythe, *supra*, at 434. The U.N. majority appears to take the position that socioeconomic rights deserve as much attention as civil and political rights. See G.A. Res. 34/46, 34 U.N. GAOR Supp. (70th mtg.) at para 4, U.N. Doc. A/Res. 34/46 (1979). The philosophical literature has devoted considerable attention to the priority issue since the publication of John Rawls' *A Theory of Justice* (1971). Rawls suggests a "lexical" order between civil and political freedoms on the one hand and economic principles of justice on the other. *Id.* at 243-50. Some of the numerous responses to Rawls' solution of the priority problem include B. Barry, *The Liberal Theory of Justice* ch. 8 (1973), and Hart, *Liberty and Its Priority*, in *Reading Rawls* 230 (N. Daniels ed. 1975).

16. The position that socioeconomic rights should have priority over civil and political rights need not embrace cultural relativism. The relativist thesis states that *cultural* standards—and not economic development or the need to implement distributive justice—determine the extent and nature of human rights. A government that justifies human rights deprivations by appealing to economic priorities may well reject cultural relativism. Some of the arguments marshalled in this article, however, are also directed to the thesis of the priority of socioeconomic rights. See *infra* notes 121-26 and accompanying text.

17. See H. Lauterpacht, *International Law and Human Rights* 147-52 (1950) (human rights provisions of the U.N. Charter are binding). Accord Haile, *Human Rights, Stability and Development in Africa: Some Observations on Concept and Reality*, 24 Va. J. Int'l L. 575, 581 (1984). See also M. McDougal, H. Lasswell & C. Chen, *Human Rights and World Public Order* 7-27 (1980) (human rights are binding as a result of the *combined* effect of treaties, U.N. resolutions, diplomatic intercourse, and the impressive rise of awareness of the problem in world opinion); D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110, 1128-49 (1982) (human rights have become part of customary international law through the process of generalization of treaty provisions). On the other hand, some commentators deny that human rights are part of international law. See, e.g.,

clusively municipal nature of human rights law are inconsistent with present international law.<sup>18</sup> The cultural relativist may, but need not, disagree with this assumption. He need only hold that the various freedoms have different meanings when applied to different societies.<sup>19</sup> Some relativists would even agree that a few basic human rights, such as the right to life and the freedom from torture, are absolute in the sense that even cultural traditions may not override them. But relativists do not regard other rights, such as the right to physical integrity, the right to participate in the election of one's government, the right to a fair trial, freedom of expression, freedom of association, freedom of movement, or the prohibition of discrimination, as required by international law.<sup>20</sup> While I assume that the core meaning of international human rights law encompasses rights beyond the right to life and to freedom from torture, I do not attempt to prove this assumption. Rather, my main thesis can be condensed into the following two propositions:

a) If there is an international human rights standard—the exact scope of which is admittedly difficult to ascertain—then its meaning remains uniform across borders.

b) Analogously, if there is a possibility of meaningful moral discourse about rights, then it is universal in nature and applies to all human beings despite cultural differences.

The second assumption made in this paper is that an obligation in international law indeed exists to respect the cultural identities of peoples, their local traditions, and customs.<sup>21</sup> For example, the

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Lane, *Demanding Human Rights: A Change in the World Legal Order?*, 6 *Hofstra L. Rev.* 269 (1978); Watson, *Normativity and Reality in International Human Rights Law*, 123 *Stetson L. Rev.* 221 (1984); Watson, *The Limited Utility of International Law in the Protection of Human Rights*, 1980 *Am. Soc'y Int'l L. Proc.* 1.

18. See L. Goodrich, E. Hambro & A. Simmons, *Charter of the United Nations* 370-78 (1949); M. Rajan, *The Expanding Jurisdiction of the United Nations* 98-123 (1982).

19. See, e.g., Pollis, *supra* note 13, at 22-23.

20. See Murphy, *Objections to Western Conceptions of Human Rights*, 9 *Hofstra L. Rev.* 433 (1981).

21. See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. A/8028 (1970) ("Every State has an inalienable right to choose its political, economic, social, and cultural systems without interference in any form by another State.") [hereinafter cited as *Declaration on Principles*].

classical international law on the treatment of aliens has long recognized that Westerners cannot expect to enjoy Western judicial procedures in non-Western states. Arbitral tribunals have consistently refused to accept the claim that partially nonadversary criminal procedures violate the international minimum standard concerning the right to a fair trial.<sup>22</sup>

However, to say that cultural identities should be respected does not mean that international human rights law lacks a substantive core.<sup>23</sup> Such a core can be gleaned from international human rights treaties, both regional and universal,<sup>24</sup> and diplomatic practice, including the relevant practices of international organizations. Indeed, human rights treaties offer a surprisingly uniform articulation of human rights law. They may safely be used as a reference, regardless of how many or which states are parties.<sup>25</sup> The rights, *inter alia*, to life, to physical integrity, to a fair trial, freedom of expression, freedom of thought and religion, freedom of association, and the prohibition against discrimination are all rights upon which international instruments agree. Unless one wishes to give up the very notion of an international law of human rights altogether, these rights should have essentially the same meaning regardless of local traditions.<sup>26</sup>

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22. Salem Case (Egypt v. U.S.), 2 R. Int'l Arb. Awards 1161, 1197 (1932); McCurdy Case (U.S. v. Mexico), 4 R. Int'l Arb. Awards 418 (1929).

23. Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 Vand. L. Rev. 643, 652 (1951). Cf. M. McDougal, H. Lasswell & C. Chen, *supra* note 17, at 5-6 (while different peoples may assert human rights demands in different modalities, a universal insistence on certain basic values exists among all cultures); Kader, *Book Review*, 1980 *Ariz. St. L.J.* 815, 825 (1980) ("The challenge confronting the human rights movement . . . is to recognize and take into account the sociopolitical differences in the world and yet to resist the relativism which is incompatible with the promotion of universal standards of human rights.").

24. See, e.g., African Charter on Human Rights and Peoples' Rights, Organization of African Unity, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (Jan. 1981), reprinted in 21 *I.L.M.* 58 (1982) [hereinafter cited as African Charter]; American Convention on Human Rights, O.A.S. Off. Records OEA/Ser. K/XVI/1.1, Doc. 65 (1969), reprinted in 9 *I.L.M.* 101 (1970) [hereinafter cited as American Convention]; International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter cited as U.N. Covenant]; European Convention on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, 1950 Gr. Brit. T.S. No. 71 (Cmd. 8969) (1950) [hereinafter cited as European Convention].

25. As of December 31, 1983, 78 states are parties to the U.N. Covenant, 21 to the European Convention, and 14 to the American Convention. The African Charter is not yet in force. For the view that the treaties themselves have created human rights obligations to third parties, see D'Amato, *supra* note 17, at 1127-49 nn.70-74.

26. A growing number of Third World scholars reject the relativist approach. See, e.g.,

I will argue that cultural relativism cannot be reconciled with the recognition in international law of fundamental rights of the individual. Part II will demonstrate that positive international law does not recognize cultural diversity as a justification for the failure to observe human rights. In Part III, I will argue further that ethical relativism is a philosophically untenable position. Part IV includes a brief exposition on and critique of two by-products of relativism: the elitist and conspiracy theories of human rights. Finally, Part V sets forth some general conclusions.

## II. CULTURAL RELATIVISM AND INTERNATIONAL LAW

### A. *Cultural Relativism and the Structure of International Law*

Some commentators have argued that in the absence of centralized international organs, one cannot give a manageable core of meaning to international human rights norms.<sup>27</sup> It may be suggested along these lines that, because the uniform meaning of human rights advanced by the universalist thesis can be achieved only in conjunction with international bodies having jurisdiction to decide conflicting claims regarding the observance of human rights, relativism best accounts for the realities of contemporary international society.<sup>28</sup> This is not a negligible argument. While some encouraging steps are being taken, mainly in regional settings,<sup>29</sup> there

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Eisemokhai, *Towards Adequate Defense of Human Rights in Africa*, 21 *Indian J. Int'l L.* 141 (1981) (criticizing the failure of African governments to comply with human rights law); Haile, *supra* note 17, at 584 (African traditions are not inconsistent with international human rights law). Some African leaders have also taken a less relativistic position, at least with regard to basic human rights. See, e.g., the speech of President Julius Nyerere of Tanzania criticizing African nations that refrained from condemning President Idi Amin of Uganda on the grounds that Amin was black, 1979 *Keesing's Contemporary Archives* 29670A (1979) ("blackness has become a certificate to kill with impunity").

27. See Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 *U. Ill. L.F.* 609, 626 (1979).

28. Indeed, centralized systems for the protection of human rights aim to give uniform meaning to basic rights and freedoms in countries with disparate cultural and legal traditions. The system established by the European Convention provides a striking illustration. In the *Sunday Times Case*, the European Court of Human Rights held that the ancient British institution of contempt of court as applied by British courts was inconsistent with the freedom of speech guaranteed by the European Convention. *Sunday Times Case*, 23 *Y.B. Eur. Conv. Human Rights* 480 (1980) (*Eur. Comm'n on Human Rights*).

29. The creation of the Inter-American Court of Human Rights represents a major development in the human rights enforcement area, particularly because countries like Argentina have accepted the jurisdiction of the court. See generally Buerghenthal, *The Inter-American Court of Human Rights*, 76 *Am. J. Int'l L.* 231 (1982). The Inter-American Human Rights Commission, although not endowed with judicial power, has considerable political weight.



is no doubt that the lack of centralized, compulsive judicial machinery represents a major weakness of current international human rights law.

This argument, however, is open to two fatal objections. First, it proves too much. The lack of courts and enforcement agencies characterizes international law generally, not just the law of human rights. Therefore, the relativist who leaves human rights out of the scope of international law solely because of the absence of adjudicatory and enforcement mechanisms ultimately must deny the legal character of international law altogether.<sup>30</sup>

Second, this view overlooks the way that international law works. Unlike domestic societies where legislatures, courts, and government agencies create law, law in the international arena results from the subtle interplay of claims, counterclaims, actions and omissions of many international actors.<sup>31</sup> Thus, what nations do and say, even if they sometimes do not believe it, becomes part of the raw material from which international law ultimately springs. This observation rings particularly true in the field of human rights, precisely because of the absence of enforcement and judicial bodies. Soviet-bloc countries, for example, cannot join the critics of the Chilean regime without at the same time opening the door to criticisms of their own human rights abuses.<sup>32</sup> The process thus underscores the role of reason in international law. Contrary to what some realists contend,<sup>33</sup> national interest alone cannot support valid international claims. Instead, as is true in all legal discourse, such claims must be supported by principles that are neu-

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The same can be said of the U.N. Human Rights Commission, although the primary importance of both commissions stems from their position as forums for the open discussion of human rights situations. Governments attach great importance to the debates before the U.N. Human Rights Commission.

30. Although those who deny the "legal" character of international law can point to such venerable authority as John Austin's *The Province of Jurisprudence Determined* 201 (ed. 1954), this position has been fully discredited by modern scholars. See, e.g., H.L.A. Hart, *The Concept of Law* 222-25 (1961).

31. McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in *The Future of the International Legal Order* 73 (R. Falk and C. Black eds. 1969). The "New Haven" approach can be supplemented with the contributions of modern political philosophy. See generally *infra* notes 79-120 and accompanying text.

32. All of the Soviet-bloc countries voted in favor of the U.N. Resolution on the Protection of Human Rights in Chile, G.A. Res. 3219, 29 U.N. GAOR Supp. (No. 31) at 83, U.N. Doc. A/9631 (1974).

33. See, e.g., H. Morgenthau, *Politics Among Nations* 5-12 (5th rev. ed. 1978).

tral to individual interests.<sup>34</sup> No authoritative judicial bodies are needed for this process, though it would be preferable to have them. The decentralized nature of international law does not, therefore, preclude the existence of a universal human rights standard.

### B. *Cultural Relativism and the Human Rights Conventions*

Supporters of cultural relativism argue that the theory creates a legal defense to the general duty incumbent upon governments to observe international human rights. One should therefore expect to find a provision to that effect in the international legal materials. Yet, virtually nothing in the human rights conventions suggests that the respect for human rights depends upon, or can be modified by, local cultural conditions. The U.N. Covenant, the American Convention, and the recent African Charter<sup>35</sup> do not acknowledge any right of governments to avoid compliance by alleging the priority of local traditions.

The only apparent exception is article 63(3) of the European Convention, which states that “[t]he provisions of this Convention shall be applied in [colonial territories] with due regard, however, to local requirements.”<sup>36</sup> If one reads this provision as supporting cultural relativism, the parties would be exempted from enforcing the human rights guaranteed by the Convention in those colonial territories where “local requirements” conflict with the Convention.

The European Court of Human Rights rejected this interpretation in the *Tyrrer Case*, which involved corporal punishment, a local tradition, on the Isle of Man.<sup>37</sup> The court found that the word “requirement” embodied the idea of necessity, and that corporal punishment, no matter how accepted by public opinion and practice or enshrined in the traditions of the Isle, was not necessary to maintain law and order and consequently ran afoul of the Conven-

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34. The “neutral principles” advocated by Herbert Wechsler in a different context are narrower in scope, since they refer to constitutional review. Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). The concern here, more generally, is with *claims*. The “neutrality” requirement holds even where the principles argued from are incorrect or nonexistent. Cf. D’Amato, *supra* note 17, at 1125-27 (human rights are entitlements of nations which are universal in nature).

35. See *supra* note 24.

36. European Convention, *supra* note 24, art. 63(3).

37. Eur. Ct. Hum. Rts., *Tyrrer Case*, Judgment of 25 April 1978, Series A No. 26.

tion.<sup>38</sup> Further, the court wrote that no local requirement could enable a party to the Convention to make use of a criminal sanction in violation of article 3, which prohibits degrading punishment.<sup>39</sup>

The *Tyrer* opinion thus forcefully supports the idea that human rights are non-negotiable in the sense that not even the force of overwhelming public opinion or state practice may impair them. It also stands for the proposition that international human rights possess a transboundary meaning that cannot be modified or ignored on relativist grounds. The *Tyrer* court noted that article 63(3) of the European Convention,<sup>40</sup> drafted in 1950, had been conceived to meet the European perception about the insufficient degree of civilization of colonial peoples.<sup>41</sup> Although the court did not elaborate on this point, it is doubtful that the relativist interpretation of article 63(3) of the Convention, whereby entire populations are less eligible for protection in the enjoyment of human rights, conforms to the anti-colonialist values embodied in present international law.<sup>42</sup>

In assessing the validity of the relativist doctrine, it is noteworthy that each of the major human rights conventions contains a nondiscrimination clause.<sup>43</sup> The classical interpretation of such clauses holds that a government may not discriminate within its own borders on the basis of race, sex, religion or other impermissible criteria in the enforcement of human rights.<sup>44</sup> The clause is commonly regarded as operating purely within national borders, but a broader interpretation is also possible. The nondiscrimination clause arguably forbids governments to treat individuals in ways that substantially depart from the core of meaning of international human rights law, because such treatment would amount to discrimination vis-à-vis the treatment enjoyed by individuals in other states. In other words, one could argue that an individual's

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38. *Id.* at 18.

39. *Id.*

40. See *supra* note 24.

41. "The Court notes, in this connection, that the system established by article 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention." *Tyrer Case*, Judgment at 19.

42. Such a construction would amount to an elitist version of relativism. See *infra* notes 121-26 and accompanying text.

43. See, e.g., African Charter, *supra* note 24, art. 2; American Convention, *supra* note 24, art. 24; U.N. Covenant, *supra* note 24, art. 26; European Convention, *supra* note 24, art. 14.

44. See, e.g., *Belgian Linguistics Case*, 11 Y.B. Eur. Conv. Human Rights 832, 862-69 (1968) (Eur. Comm'n on Human Rights).

entitlement to human rights does not depend on the particular traditions of the state in which the individual is located, that national boundaries do not affect the imperative of nondiscrimination.

The thrust of article 1(3) of the U.N. Charter is no different. It states that a major purpose of the organization is to achieve international cooperation in encouraging and promoting "respect for human rights and for fundamental freedoms *for all without distinction as to race, sex, language and religion.*"<sup>45</sup> To interpret the clause "for all" to mean for all individuals on earth, and not just for all individuals within a given state, surely violates neither the letter nor the spirit of the Charter. Suppose, for example, states A and B conclude a human rights treaty that contains a nondiscrimination clause. It is insufficient to say that *within* state A there should be no discrimination based on sex, race, and the like. The nondiscrimination clause must also be read to have a transboundary dimension. Accordingly, the rights enjoyed by individuals in state A cannot differ substantially in content and scope from those enjoyed by individuals in state B. Otherwise the human rights treaty would be redundant, at least insofar as the principle of nondiscrimination already existed in those states as a matter of municipal or constitutional law.<sup>46</sup>

### C. *Cultural Relativism and Self-Determination*

One may object to the foregoing analysis on the grounds that human rights treaties only bind the parties,<sup>47</sup> and that the status of cultural relativism in international law cannot be ascertained from treaty analysis alone. It is therefore necessary to determine whether customary international law supports the claims of the cultural relativists. The principles of self-determination and nonintervention offer, at first glance, possible legal support for the rela-

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45. U.N. Charter art. 1, para. 3 (emphasis added).

46. Admittedly, the interpretation of the nondiscrimination clause suggested in the text is a novel one. But if we accept that the international legal system primarily entrusts the application of human rights law to states, and if we further accept that individuals are the beneficiaries of such law, then it becomes clear that violations premised upon cultural traditions represent transboundary discriminatory treatment. To put it differently, the relativist contention that freedom of religion, for example, means one thing in the West and a different thing in the Third World, requires a discriminatory application of human rights law.

47. See, e.g., the statement of the Chilean representative to the U.N. General Assembly Third Committee, 31 U.N. GAOR C.3 (46th mtg.) paras. 1-25, U.N. Doc. A/C.3/31/SR.46 (1976) (rejecting case law under the European Convention, *supra* note 24, regarding the Emergency Clause as irrelevant to the Chilean situation).

tivist doctrine.<sup>48</sup> A closer consideration of these principles reveals, however, that this support is only illusory.

Ascertainment of the precise contours of the self-determination principle is not easy.<sup>49</sup> In addition to the important anti-colonialist aspect of self-determination,<sup>50</sup> an internal dimension appears to exist as well.<sup>51</sup> Article 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>52</sup> ("Declaration of Colonial Independence"), widely regarded as embodying customary law concerning self-determination, provides that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>53</sup>

Commentators espouse two conflicting interpretations of this clause. The democratic, anti-authoritarian view holds that internal self-determination requires internal democracy and respect for the human rights of all peoples.<sup>54</sup> This thesis finds support in the intent of the framers of the U.N. Charter,<sup>55</sup> and arguably reflects a correct reading of the self-determination principle as agreed upon

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48. For a brief and lucid account of the role played by self-determination concerns in the development of the Third World's distrust toward the human rights movement, see Nickel, *Cultural Diversity and Human Rights*, in *International Human Rights: Contemporary Issues* 43, 43-46 (J. Nelson & V. Green eds. 1980).

49. See generally M. Pomerance, *Self-Determination in Law and Practice* 1-28 (1982).

50. External self-determination means the right of peoples to decide their international status. It represents an expression of modern anti-colonialist values in the international community. The literature on external self-determination is voluminous. See references in *id.* at 130-38.

51. See *id.* at 37 nn.209-11.

52. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960) [hereinafter cited as Declaration of Colonial Independence].

53. *Id.* This provision is echoed by the Declaration on Principles, *supra* note 21, art. 1 ("all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"), and by the U.N. Covenant, *supra* note 24, art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

54. See Moore, *Grenada and the International Double Standard*, 78 *Am. J. Int'l L.* 145, 154-56, 165 (1984) (Grenada mission was designed to restore self-determination, in the form of democratic rights, to the Grenadian people); Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 *Am. J. Int'l L.* 642, 643-44 (1984) ("Ongoing self-determination [works] to increase the probability of the free choice of peoples about their government and political structure."); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 *Am. J. Int'l L.* 713, 732 (1971).

55. See Cassese, *The Helsinki Declaration and Self-Determination*, in *Human Rights, International Law and the Helsinki Accord* 83, 84 (T. Buergenthal ed. 1977).

by the European states in the Helsinki Accord.<sup>56</sup> Under this interpretation, the word "freely" means "free from *internal*, as well as from external, interference." The right of self-determination in international law would thus represent an expression of the entitlement of all individuals to democratic representative government and to basic human rights.<sup>57</sup>

The relativist version of the rule embodied in article 2 of the Declaration of Colonial Independence differs radically from the one expressed above. According to this view, internal self-determination represents the flip side of the nonintervention principle: it forbids any state from interfering with the cultural and political choices of autonomous peoples.<sup>58</sup> Self-determination in this sense represents the rights-language version of the duty of nonintervention in internal affairs. People have the right to create whatever form of government they want, no matter how repressive, and human rights claims put forward by other states may not interfere with the fulfillment of this right. Under this view, a people exhausts its right to self-determination when it achieves the status of a sovereign state.<sup>59</sup> Once the people choose a political and cultural system, nothing in international law confers a right to change the system.<sup>60</sup> Under this construction, internal self-determination

56. Id. at 99-105.

57. Some Western states defended this position in the negotiations that led to the 1970 Declaration on Principles, *supra* note 21. The proposals presented by the United Kingdom and the United States suggested that representative government was essential for the realization of the right to self-determination. See U.N. Doc. A/AC.125/L.44, July 19, 1967 (United Kingdom draft); U.N. Doc. A/AC.125/L.32, Apr. 12, 1966 (U.S. draft). In fact, some support for this position may be found in the final wording of the Declaration on Principles, *supra* note 21, at 123: "[A]ll peoples have the right *freely* to determine, without external interference, their political status and to pursue their economic, social and cultural development." (emphasis added). Arguably, the word "freely" means "without *internal* interference," or else it would be superfluous. *Contra* Cassese, *supra* note 55, at 89-90 (Declaration only requires internal self-determination in cases involving racist regimes or foreign domination, in contrast with the Helsinki declaration).

58. See Mojekwu, *International Human Rights: The African Perspective*, in *International Human Rights*, *supra* note 48, at 89 ("Self-determination . . . would involve the right of a people to take into their hands the full responsibility of determining, without coercion, their own political, economic and cultural destiny."). Obviously, "coercion" here means external coercion. Mojekwu's definition clearly tolerates internal coercion, i.e., human rights violations without foreign interference.

59. This is the official position of Soviet-bloc countries. See Poeggel, 1 *Volkerrecht* (Manual of International Law of the German Democratic Republic) 270 (1973), cited in Cassese, *supra* note 55, at 85 n.7.

60. The Soviet Union and its allies defended this view during the 1975 Helsinki negotiations. See Cassese, *supra* note 55, at 99. This position does not simply reflect tactical "power

means that no state may impose a cultural or political system on people living beyond its borders.<sup>61</sup>

However, this version of internal self-determination is at best a misconception, and at worst it can be a rationalization for oppression. First, a contextual interpretation of the Declaration of Colonial Independence yields a very different result. The preamble of the Declaration recalls the commitment of the peoples of the world to "fundamental human rights" and to "the dignity and worth of the human person."<sup>62</sup> The same argument applies *a fortiori* to the self-determination principle embodied in article 1 of the U.N. Covenant,<sup>63</sup> which exactly reproduces article 2 of the Declaration.<sup>64</sup> The relativist interpretation of article 1 grants people "the right to freely . . . pursue their economic, social and cultural development"<sup>65</sup> even where that pursuit would reduce to meaninglessness the remaining fifty-one articles of the Covenant. A more reasonable approach, consistent with sound treaty interpretation, would dictate that the principle of independent cultural development as a part of self-determination be harmonized with human rights law.<sup>66</sup>

Further, the relativist version of internal self-determination often defines the interests of a people in mystical or aggregative terms that ignore or belittle individual preferences. Such mystical definitions may be articulated in the form of axiomatic "true" interests of peoples, as opposed to real or expressed interests.<sup>67</sup> They

politics" devices. It is strongly linked to the Leninist conception that the "true" interest of the people can only be expressed by, and result in, the dictatorship of the proletariat. See M. Pomerance, *supra* note 49, at 40.

61. The proviso "beyond its borders" is crucial, because according to a widespread view, self-determination does not grant rights (of secession or otherwise) to minorities within a sovereign state. See generally Nanda, *Self-Determination under International Law: Validity of Claims to Secede*, 13 *Case W. Res. J. Int'l L.* 257 (1981). Thus, many governments (not only those of the Soviet-bloc) hold the inconsistent view that cultural standards determine the scope of human rights, and that minorities within a sovereign state are not entitled to choose their own political institutions and pursue their independent cultural development.

62. Declaration of Colonial Independence, *supra* note 52, preamble.

63. U.N. Covenant, *supra* note 24.

64. See *supra* text accompanying note 53.

65. U.N. Covenant, *supra* note 24, art. 1.

66. See, e.g., the draft proposed by the Dutch delegation to the Helsinki conference:

The participating States recognize the inalienable right of the people of every State freely to choose, to develop, to adapt or to change its political, economic, social and cultural systems without interference in any form by any other State or group of States and *with due respect to human rights and fundamental freedoms*.

Doc. CSCE/II/A/8, cited by Cassese, *supra* note 55, at 96 (emphasis added).

67. See *supra* note 60.

may also be expressed as a plain rule of political power, whereby those in power automatically are deemed to represent the people, regardless of whether they have been democratically elected and regardless of their human rights record. Consequently, a relativist would maintain that in Pinochet's takeover in Chile or Ho Chi Minh's takeover in Vietnam, the peoples of Chile and Vietnam exercised their right of self-determination, and that the governments so formed are immune from foreign interference even when they deprive people of human rights. It may well be that self-determination, external or internal, exists only as a collective right that can be exercised jointly by individuals.<sup>68</sup> It is equally true, however, that self-determination is a *human* right, not a right of governments, whether they are headed by charismatic revolutionary leaders or military dictators.<sup>69</sup> Therefore, the right to self-determination must ultimately be ascertained by reference to the wishes and rights of individuals.<sup>70</sup> As Professor Schachter has convincingly argued, the concept of human dignity implies that high priority should be given to individual choices in ways of life, beliefs and the conduct of public affairs.<sup>71</sup> This concept, however, simple as it is, clearly contradicts many existing ideologies and political arrangements.<sup>72</sup>

Finally, a consideration of the concerns which prompted the development of the self-determination principle also leads to a rejection of the relativist thesis. The self-determination principle has traditionally been directed against colonialism and various tangible

68. See Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 *Int'l & Comp. L. Q.* 102, 103 (1976).

69. Professor Dinstein aptly cautions that "collective human rights retain their character as direct human rights. The group which enjoys them communally is not a corporate entity and does not possess a legal personality." *Id.*

70. "The state must protect the individual citizen, its units or atoms; *but the international organization also must ultimately protect human individuals, and not its units or atoms, i.e., states or nations.*" 1 K. Popper, *The Open Society and its Enemies* 288 n.7 (1966) (emphasis added). See also Luban, *The Romance of the Nation-State*, 9 *Phil. & Pub. Aff.* 392 (1980) (arguing against the "rights" emphasized by nationalism). Under the relativist version of internal self-determination, the term "state will" does not mean the sum of the individual wills, because then governments would never act against the popular will—which is obviously not the case. "State will," instead, means what the government decides. Relativism asks us to believe that the government necessarily represents the people, and that the government always acts as a surrogate for the "people." The authoritarianism embodied in this notion of "state will" is clearly incompatible with respect for human rights, and must therefore be rejected.

71. Schachter, *Human Dignity as a Normative Concept*, 77 *Am. J. Int'l L.* 848, 849 (1983).

72. *Id.* at 850.



forms of *foreign domination*.<sup>73</sup> It primarily guarantees to people the right to establish their own government and pursue their cultural development without external interference.<sup>74</sup> Yet external pressure for human rights compliance has nothing to do with colonial domination, imperialism and the other evils against which self-determination was conceived. An analysis of the purposive dimension of self-determination, therefore, provides no support for the relativist doctrine.

As to the nonintervention principle, there is broad support today for the proposition that discussing human rights does not amount to "intervention" within the meaning of article 2(7) of the U.N. Charter,<sup>75</sup> unless one takes the position—discarded at the beginning of this study—that human rights are not part of international law.<sup>76</sup> For the relativist, the nonintervention principle and internal self-determination have identical content. Saying that people may choose whatever government they want is the same as saying that other states may not intervene to criticize human rights violations.<sup>77</sup> Thus, *mutatis mutandi*, the same arguments marshalled in the previous paragraphs apply.<sup>78</sup>

In sum, under international law, all individuals, regardless of their state of origin, residence, and cultural environment, are entitled to fundamental human rights. International law does not relieve governments of the obligation to respect these rights simply because a particular right is inconsistent with local traditions.

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73. See *supra* note 50.

74. See generally M. Pomerance, *supra* note 49, at 9-28. The Declaration of Colonial Independence, *supra* note 52, emphasizes decolonization and independence, which suggests an "externalist" approach to self-determination.

75. See generally R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 118 (1963); Gilmour, *The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter—An Historical Perspective*, 16 *Int'l & Comp. L. Q.* 330 (1967).

76. *Contra* Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 *Am. J. Int'l L.* 60 (1977). Whether international law supports military intervention to protect human rights under certain circumstances is a far more difficult problem. It is the subject of extensive discussion in my forthcoming S.J.D. dissertation, "Humanitarian Intervention in International Law."

77. See Cassese, *supra* note 55, at 85-86.

78. See *supra* notes 47-74 and accompanying text. The Argentine military junta used the principle of nonintervention as its main defense against human rights criticisms. The U.S.S.R. also frequently invokes it. Schreman, *Gorbachev Meets the Press: A Bantering Style and an Echo of Krushchev*, *N.Y. Times*, Oct. 5, 1985, at 4, col. 2.

### III. CULTURAL RELATIVISM AND MORAL PHILOSOPHY

This part of the paper addresses the philosophical status of cultural relativism. After outlining the link between human rights law and moral philosophy, I draw a distinction between several types of relativism. Ultimately, I reject relativism on the grounds that it violates formal and substantive constraints of moral discourse.

#### A. *Moral Philosophy and Human Rights Law*

The law of human rights borrows its language from moral philosophy. From its inception at the end of World War II, the modern international law of human rights has been indissolubly linked with the moral concerns prompted by the Nazi horrors. The statesmen who drafted the U.N. Charter were motivated in part by the moral imperative to restore human dignity and give it legal status, and indeed that moral concern permeates the subsequent development of human rights law.<sup>79</sup>

At the same time, the framers of the Charter also worried about problems of conflict avoidance, peace, security, and maintaining the balance of power. Paradoxically, while national sovereignty continues to be strongly asserted both inside and outside the confines of the United Nations, human rights law has developed impressively.<sup>80</sup> Indeed, reconciling national sovereignty and the international law of human rights remains one of the central challenges of our times.<sup>81</sup> Despite serious problems of enforcement, the dynamism of human rights groups throughout the world and the pressure exerted on delinquent governments by democratic nations has achieved remarkable results, demonstrating that the belief in human rights is not a mere illusion created by scholars, but an effective and living tool for political reform.<sup>82</sup>

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79. See Sohn, *supra* note 2, at 9-14.

80. See Vincent-Daviss, *Human Rights Law Research Guides*, *supra* note 2.

81. Cf. Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 *Ind. L. J.* 567 (1982) ("[T]he sovereign states not only are creating the international norms for the protection of human rights, but also are determining the process of their implementation—or nonimplementation—according to their sovereign will. Seen from this perspective, state sovereignty and the international protection of human rights appear to be incompatible.").

82. Sometimes the importance of the pressure exerted by democratic governments is erroneously downplayed. I can personally attest that President Carter's human rights policy saved thousands of lives in Argentina. Human rights organizations also play a significant role, despite justified criticisms of occasional one-sidedness. See generally Weissbrodt, *Strategies for the Selection and Pursuit of International Human Rights Objectives*, 8 *Yale J.*

Another reason for focusing on moral philosophy is that the concern for human rights did not grow from a desire to force governments to comply with the law "as it is." The world regards human rights violations as a moral wrong of the most serious nature, and presumably continues to condemn such practices even though technically the accused government has not violated any unambiguous positive international obligation. Given the intimate historical and conceptual connection between international human rights law and morality and the current emphasis of some writers on relativism as a supposed basis of the contemporary world order,<sup>83</sup> it is important to examine the conclusions about cultural relativism that can be gleaned from moral philosophy.<sup>84</sup>

### B. *Descriptive, Metaethical, and Normative Relativism*

To analyze the moral status of relativism, several types of relativism must be carefully distinguished.<sup>85</sup> First, different societies have different perceptions of right and wrong. This assertion—which may be called "descriptive" relativism—finds support among anthropologists who consider themselves relativists.<sup>86</sup> Although descriptive relativism has been challenged,<sup>87</sup> its validity may be conceded for the purposes of the present analysis.

The second type of relativism, "metaethical" relativism, asserts that it is impossible to discover moral truth. Metaethical relativism may take the form of a thesis about the meaning of moral terms.<sup>88</sup> The relativist can adopt either some version of emotivism<sup>89</sup> or a

World Pub. Ord. 62 (1981).

83. See generally E. McWhinney, *supra* note 5. While McWhinney's conception of relativism is broader, it encompasses the one treated here.

84. The relevance of moral inquiry to international law depends, of course, upon one's particular theory of the relation between law and morality. However, if the relativist concedes that his theory is not supported by independent moral reasoning, he must conclude that cultural relativism, although technically legal, is immoral, and he is therefore logically committed to the reform of international law in the sense of eliminating the relativist defense.

85. See Brandt, *Ethical Relativism*, in 3 *Encyclopedia of Philosophy* 75 (P. Edwards ed. 1967).

86. See, e.g., M. Herskovits, *supra* note 6, at 61-78.

87. The debate centers on whether *fundamental* diversities of ethical views exist in different societies. See Brandt, *supra* note 85, at 75.

88. *Id.* at 75.

89. Emotivism holds that moral propositions are no more than interjections or emotive utterances. See generally, A. Ayer, *Language, Truth and Logic* (1946); C.L. Stevenson, *Ethics and Language* (1944).

straight nihilist position.<sup>90</sup> A milder version of metaethical relativism contends that there is no valid *method* for moral reasoning—that is, no method that would have, on moral matters, the same persuasive force as scientific method.<sup>91</sup>

Finally, “normative” relativism asserts that persons, depending on their cultural attachments, ought to do different things and have different rights.<sup>92</sup> This is the version of relativism equivalent to the one discussed in Part II of this study.<sup>93</sup> It should be clear that descriptive and metaethical relativism do not logically entail normative relativism. Descriptive relativism operates at a different logical level than its normative counterpart. The anthropologist or descriptive relativist says that different cultures in fact have different conceptions of morality. The normative relativist asserts that individuals of different cultures have different rights, and that they *ought* to do or to abstain from doing different things. It is therefore perfectly possible for the descriptive relativist to concede that different societies have different social practices and conflicting views about morality and yet consider some practices or views morally preferable to others.<sup>94</sup>

The relationship between metaethical and normative relativism is more complex, but the two theories are still logically distinguishable. The metaethical relativist doubts the possibility of demonstrating the correctness of any particular moral principle. As a matter of moral decision, he may reject normative relativism while denying that any moral principle or system is demonstrably correct. To create a framework within which to make moral judgments, the metaethical relativist nevertheless has an option: he may subscribe to the “reflective equilibrium” method suggested by John Rawls.<sup>95</sup> Rawls devised a framework within which to make

90. Nihilism, in this context, holds that moral terms lack any meaning whatsoever.

91. Brandt, *supra* note 85, at 76.

92. See E. Westermarck, *supra* note 6, ch. 5; Benedict, *Anthropology and the Abnormal*, 10 *J. Gen. Psych.* 59 (1934). Even “relativism” is too charitable a name for this theory, which may properly be called “moral positivism.” See the brilliant critique in 2 K. Popper, *supra* note 70, ch. 12, 392-96.

93. See *supra* text accompanying notes 10-13.

94. See Douglas, *Morality and Culture*, 93 *Ethics* 786 (1983) (“Two conversations are running parallel, one the philosophers’, about the rational formulation of ethics, one the anthropologists’, about the interaction between moral ideas and social institutions. The conversations, as they are set at the present time, will never converge.”).

95. J. Rawls, *supra* note 15, at 48-51. Of course, the acceptance of reflective equilibrium as a plausible description of moral methodology is completely independent from (a) the acceptance of Rawls’ contractarian justification for principles of social justice; (b) the ac-

meaningful moral judgments without encountering the problem of demonstration. He suggests that moral conclusions may be reached by checking one's moral intuitions against one's moral principles with the crucial proviso that both be subject to modification.<sup>96</sup> At the very least, Rawls demonstrates that it is unnecessary to have an infallible method of discovering moral truth in order to speak about the rights all people should enjoy.

### C. *Critique of Normative Relativism*

As a moral theory, normative relativism cannot withstand scrutiny.<sup>97</sup> First, its straightforward formulation reflects a fundamental incoherence. It affirms at the same time that (a) there are no universal moral principles; (b) one ought to act in accordance with the principles of one's own group; and (c), (b) is a universal moral principle.<sup>98</sup> David Lyons demonstrated that the typical anthropologists' version of relativism ("an act is right if, and only if, it accords with the norms of the agent's group") does not validate conflicting moral judgments, because each group is regarded as a separate moral realm.<sup>99</sup> Consequently, the incoherence attached to normative relativism springs from the fact that the very assertion of universal relativism is self-contradictory, not from the fact that it validates conflicting substantive moral judgments. If it is true that no universal moral principles exist, then the relativist engages in self-contradiction by stating the universality of the relativist principle.<sup>100</sup> As Bernard Williams observed, this is a "logically un-

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ceptance of the principles themselves; or (c) the acceptance of his solution to the priority problem. For Rawls' view that "undeveloped" societies may fail to observe human rights in certain situations, see *infra* note 109.

96. J. Rawls, *supra* note 15, at 48.

97. Bernard Williams calls relativism "the anthropologists' heresy, possibly the most absurd view to have been advanced even in moral philosophy." B. Williams, *Morality: An Introduction to Ethics* 20 (1972).

98. *Id.* at 20-21; Lyons, *Ethical Relativism and the Problem of Incoherence*, 86 *Ethics* 107, 109 (1975-76).

99. Lyons, *supra* note 98, at 109.

100. This problem resembles the one exhibited by idealism, the theory that everything is ideology, which for some mysterious reason does not apply to itself. This paper will not deal with Gilbert Harman's narrower version of moral relativism because Harman intended for his version to apply only to "inner" judgments, i.e., judgments that someone who had already settled upon a moral code ought or ought not to have acted in a certain way. His theory does not apply to the judgment that a given institution is unjust, which is most relevant for the purposes of this paper. Harman, *Moral Relativism Defended*, 84 *Phil. Rev.* 3, 4 (1975). See the critique of Harman's theory by Copp, *Harman on Internalism, Relativism and Logical Form*, 92 *Ethics* 227 (1981-82).

happy attachment of a nonrelative morality of toleration or noninterference to a view of morality as relative."<sup>101</sup>

However, this objection over the incoherence of normative relativism is not decisive. Normative relativism can be reformulated to avoid the threat of incoherence as follows: (a) there are no universal moral principles, save one; (b) one ought to act in accordance with the principles of one's own group; and (c) the only universal moral principle is (b).<sup>102</sup> Yet, if the normative relativist is also a metaethical relativist, he cannot justify why (b) is a universal moral principle. If the relativist has a method of discovering universal moral principles—for example, Rawls' "reflective equilibrium" or the utilitarian principle—then it is difficult to see why the only principle yielded by such method would be (b) above. Thus, this new version of relativism avoids inconsistency, but it is epistemologically weak.

A second problem with normative relativism is that it overlooks an important feature of moral discourse, its *universalizability*.<sup>103</sup> Independently of substantive morals, when we talk about right and wrong or rights and duties, and act accordingly, we are logically committed to "act in accordance with the generic rights of [our] recipients as well as of [our]selves," on pain of self-contradiction.<sup>104</sup> This not only means that we cannot make exceptions in our own favor, but also that individuals must be treated as equally entitled to basic rights regardless of contingent factors such as their cultural surroundings. The requirement of universalizability may be thought of as having a logical nature,<sup>105</sup> or alternatively, as be-

101. B. Williams, *supra* note 97, at 21. See also a profound criticism of relativism in B. Williams, *Ethics and the Limits of Philosophy*, ch. 9 (1985).

102. I am grateful to David Kaye for demonstrating this point to me.

103. The requirement of universalizability is usually traced to IV I. Kant, *Critique of Practical Reason* § 436 (L. Beck trans. 1949). It has been revived in recent philosophical literature, mainly by A. Gewirth, *Reason and Morality* (1978) and M. Singer, *Generalization in Ethics* (1961).

104. A. Gewirth, *Human Rights: Essays on Justification and Application* 52, 128-41 (1982).

105. See *id.* at 89; IV I. Kant, *supra* note 103, § 436 ("All maxims have . . . a form, which consists in universality; and in this respect the formula of the moral imperative requires that the maxims be chosen as though they should hold as universal laws of nature."); M. Singer, *supra* note 103, at 34 ("The generalization principle . . . is involved in or presupposed by every genuine moral judgment, for it is an essential part of . . . distinctively moral terms."); Frankena, *The Concept of Morality*, 63 *J. Phil.* 688, 695-96 (1966). Professor D'Amato makes a convincing linguistic case against relativism, showing that when we ordinarily refer to some conduct as "moral," we usually mean that it is universally valid. Conversely, when we are prepared to be tolerant about some conduct (for example, sexual hab-

ing a requirement of moral plausibility.<sup>106</sup> If the first approach is correct, the relativist simply refuses to engage in meaningful moral discourse. Under the second approach, the relativist endorses the highly implausible position that in moral matters we can pass judgments containing proper names, and that consequently we may make exceptions in our own favor.<sup>107</sup>

The relativist has two responses to the universalizability argument. First, the relativist may argue that belonging to different communities is a morally relevant circumstance.<sup>108</sup> Universalizability, he would argue, is not violated when individuals are situated in different factual conditions. To say that if A ought to do X in circumstances C, then B also ought to do X in circumstances C, presupposes a similarity of circumstances. If such circumstances vary substantially, that is, if cultural traditions, creeds, and practices differ, then we would not violate the universalizability requirement by holding that individuals who belong to different cultures ought to have different basic rights.<sup>109</sup> Sometimes relativists articulate this position in the form of an attack on the assertion of the existence of abstract rights, as opposed to the assertion of concrete rights and duties in materially defined social conditions.<sup>110</sup>

its), we regard such conduct as "mores" or "custom," and not as "morality in the stronger sense." D'Amato, *Lon Fuller and Substantive Natural Law*, 26 *Am. J. Juris.* 202, 204 (1981).

106. See, e.g., J. Rawls, *supra* note 15, at 132 (principles apply to everyone by virtue of their being moral persons).

107. See J. Hospers, *Human Conduct* 276-77, 285 (1972).

108. See the elementary but excellent discussion in *id.* at 283-90.

109. John Rawls asserts that in societies which have not attained certain minimal material conditions, individuals may be denied human rights. J. Rawls, *supra* note 15, at 151-52. This seems a surprising statement in the context of Rawls' impressive defense of the "rights" conception of justice. As Brian Barry put it:

Why this should be so is not at all clear to me. Is there anything in the material condition of, say, a group of nomadic Bedouin eking a bare subsistence from the desert or a population of poor peasant cultivators which prevents them from being able to use personal liberty?

B. Barry, *supra* note 15, at 77.

In his most recent article, Rawls expressly refused to deal with the issue of whether his theory "can be extended to a general political conception for different kinds of societies existing under different historical and social conditions." Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *Phil. & Pub. Aff.* 223, 225 (1985). It would be unfair, however, to charge Rawls with yielding to relativism, since he expressly avoids "prejudging one way or the other." *Id.*

110. See Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1364-65 (1984) ("It does not advance understanding to speak of rights in the abstract. It matters only that some specific right is or is not recognized in some specific social setting. . . . In this way rights become identified with particular cultures and are relativized."). Tushnet's article astonishes in several regards. For example, he states that "[t]he use of rights in contemporary discourse

Such arguments are flawed, however, because the fact that one belongs to a particular social group or community is not a *morally* relevant circumstance. The place of birth and cultural environment of an individual are not related to his moral worth or to his entitlement to human rights. An individual cannot be held responsible for being born in one society rather than in another, for one “deserves” neither one’s cultural environment nor one’s place of birth. There is nothing, for example, in the nature of a Third World woman that makes her less eligible for the enjoyment of human rights (though she may, of course, consensually waive her rights) than a woman in a Western democracy.<sup>111</sup> If the initial conditions are not morally distinguishable, the requirement of universalizability fully applies to statements about individual rights, even where the agents are immersed in different cultural environments.

The relativist’s first objection to universalizability also confuses the circumstances in which one learns moral concepts with the *meaning* of those concepts.<sup>112</sup> A person who learns a moral concept (such as that of “wrong”) by applying it in fact situations peculiar to his culture, is perfectly able to apply that concept to a set of facts he has never encountered before. As Bernard Williams said in his most recent work:

The fact that people can and must react when they are confronted with another culture, and do so by applying their existing notions—also by reflecting on them—seems to show that the ethical thought of a given culture can always stretch beyond its boundaries. Even if there is no way in which divergent ethical beliefs can be brought to converge by independent inquiry or rational argument,

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impedes advances by progressive social forces.” Id. at 1364. Such criticism, of course, assumes that it is morally desirable for the “progressive social forces” (whatever that means) to dictate conducts and impose ends and conceptions of moral excellence on other individuals (i.e., on those who presumably would be accused of militating in the ranks of the “regressive social forces”). John Rawls artfully responded to this assertion in an oft-quoted sentence: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.” J. Rawls, *supra* note 15, at 3. This is what I mean by “rights” in the “abstract.” See also *infra* text accompanying notes 116-17.

111. One must be careful not to overstate this exception. Dictators typically assert that they represent the people or that they have their support. Even if a particular dictator enjoys popular support, however, such support does not entitle him to oppress dissenters who have not consented to his rule. The majoritarian principle is thus useless when assessing human rights violations. See the discussion in J. Rawls, *supra* note 15, at 356-62.

112. See R. Trigg, *Reason and Commitment* 20 (1973).



this fact will not imply relativism. Each outlook may still be making claims it intends to apply to the whole world, not just to that part of it which is its 'own world.'<sup>113</sup>

By claiming that moral judgments only have meaning within particular cultures, the relativist underestimates the ability of the human intellect to confront, in a moral sense, new situations.

The relativist's second objection to universalizability has a logical nature. As noted above, the relativist may contend that (a) his only principle is that culture determines human rights; and (b), (a) is universal.<sup>114</sup> The relativist thus universalizes a principle. But the requirement of universalizability applies to *substantive* moral statements, which (a) is not. The principle that culture determines human rights is a principle of *renvoi*; that is, it refers us to different normative systems in order to determine the rights of individuals. The principle does not establish rules governing the rights of any particular individual. Universalizability requires that *if* we make a statement about the right of X to freedom of thought, we are committed to grant that right to Y under similar, morally relevant circumstances. Because the relativist principle does not address issues of substantive morality in this respect, it is not susceptible to being universalized in the same way. The violation of universalizability becomes apparent when one translates the relativist principle into substantive moral statements (i.e., X, who lives in culture C1, has the right R; while Y, who lives in culture C2, does not have the right R). In other words, the relativist principle may be regarded as *metamoral*, even where it is asserted as the basis of normative morality.<sup>115</sup>

Third, normative relativism runs counter to the principle that persons have moral worth *qua* persons and must be treated as ends in themselves, not as functions of the ends of others—a non-trivial version of the Kantian principle of autonomy.<sup>116</sup> This principle of moral worth forbids the imposition upon individuals of cultural

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113. B. Williams, *supra* note 101, at 159.

114. See *supra* text accompanying note 102.

115. The characterization of relativism as metamoral differs from the assertion of metaethical relativism. This part of the paper deals with normative relativism, which does not need support from metaethical skepticism. See *supra* notes 88-97 and accompanying text. But normative relativism is still not strictly a substantive moral theory. It only tells us where to look for the norms that determine individual rights.

116. See Ping-Cheung Lo, A Critical Reevaluation of the Alleged "Empty Formalism" of Kantian Ethics, 91 *Ethics* 181, 182 (1980-81). See also Schachter, *supra* note 71, at 849.

standards that impair human rights. Even if relativists could show that authoritarian practices are somehow required by a community—a claim which in many cases remains to be proven—they would still fail to explain why individuals should surrender their basic rights to the ends of the community. If women in Moslem countries are discriminated against, it is not enough to say that a tradition, no matter how old and venerable, requires such discrimination.<sup>117</sup> The only defense consistent with the principle of autonomy would be a showing that each subjugated woman consented to waive her rights. However, because of the mystical and holistic assumptions underlying relativism, presumably the relativist would not regard such a test as relevant or necessary.

Quite apart from the moral implausibility of normative relativism, it is worth noting the extreme conservatism of the doctrine.<sup>118</sup> Normative relativism tells us that if a particular society has always had authoritarian practices, it is morally defensible that it continue to have them. It works as a typical argument of authority: it has always been like this, this is our culture, so we need not undertake any changes.<sup>119</sup> In the final analysis, normative relativism thus conceived amounts to the worst form of moral and legal positivism:

117. For examples see *supra* note 10.

118. A similar point is made by Amy Gutman in her response to modern critics of liberalism. Gutman, *Communitarian Critics of Liberalism*, 14 *Phil. & Pub. Aff.* 308, 309 (1985). As the text demonstrates, anti-liberal theories that emphasize the priority of communal values are necessarily relativist.

119. Tushnet asserts that his radical critique of rights "is a Schumpeterian act of creative destruction that may help us to build societies that transcend the failures of capitalism." Tushnet, *supra* note 110, at 1363. Tushnet later expressed this idea in relativistic terms: "The critique of rights takes a strong relativist position: it insists that rights-talk is meaningful only when placed within a full social and legal context." *Id.* at 1394. Thus, relativism to Tushnet is a basic assumption of radical politics, an essential underpinning of left-wing scholarship and politics. Yet nothing is farther from the truth. Relativism is tantamount to moral positivism and to "legalism," two of the most reactionary doctrines in the history of ideas. Tushnet himself seems to realize this. He tells us that "to say that some specific right is (or ought to be) recognized in a specific culture is to say that the culture is what it is, ought to recognize what its deepest commitments are, or ought to be transformed into some other culture." *Id.* at 1365. Thus, for Tushnet the only way to talk about rights is to describe rights as they are recognized by this or that culture. Those are the only *existing* rights. True, he accepts that we can say that this culture "ought to be transformed into some other culture." He thus avoids the charge of moral positivism. But because he has been precluded from even talking about rights in the abstract, he loses the best and most effective philosophical tool for criticizing positive law: the idea that individuals have rights independent of contingent cultural standards. Thus, when criticizing a particular culture, a Tushnet-type relativist may not rely on the proposition that individuals are entitled to some other social arrangement or that their rights have been violated.

it asserts that the rules enacted by the group are necessarily correct as a matter of critical morality.<sup>120</sup> If there is a particularly unfit domain for arguments of authority, it is surely that of human rights.

Admittedly, the force of the moral critique of relativism articulated here depends on the intuitive acceptance of certain moral premises. The relativist can successfully resist the attack by rejecting metaethical relativism so as to avoid logical incoherence, denying that universalizability is an ingredient of moral judgments, and rejecting the principle of autonomy. But this is a high price to pay. Normative relativism would then be a poor and implausible moral doctrine, and it is doubtful that many relativists, upon careful reflection, would accept the harsh implications. Furthermore, cultural relativism as defined in the first part of this article expressly or impliedly assumes the validity of normative relativism. Not only does positive international law fail to provide any basis for the relativist doctrine, but the underlying philosophical structure of relativism also reveals profound flaws.

#### IV. TWO BY-PRODUCTS OF RELATIVISM: ELITISM AND CONSPIRACY

In this Part I will briefly consider two doctrines closely associated with relativism. The first theory asserts that one can appropriately honor human rights in certain societies, usually the most sophisticated ones, but not in others, on account, for example, of the latter's insufficient economic development. This doctrine, which can be called "elitism," necessarily follows from relativism. The second theory states that the law of human rights results from a conspiracy of the West to perpetuate imperialism. The "conspiracy theory," by contrast, does not follow inevitably from, and is not required by, cultural relativism.

##### A. *The Elitist Theory of Human Rights*

During the dark years of the military dictatorship in Argentina, one commonly heard many well-intentioned commentators exclaiming: "It is really a shame! Argentina, a country that springs

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120. See *supra* note 92. This indictment only attacks what Professor Carlos Nino has called "ideological positivism," the theory that the norms of a group are necessarily correct as a matter of critical morality. C. Nino, *Introducción al Análisis del Derecho* 32-35 (1980). This paper is not concerned with the more fertile concept of "methodological positivism," the theory of the separation between law and morality defended by H.L.A. Hart and others.

from Western tradition, cannot be excused for not respecting human rights." The statement implies that countries that do not spring from a Western tradition may somehow be excused from complying with the international law of human rights. This elitist theory of human rights holds that human rights are good for the West but not for much of the non-Western world.<sup>121</sup> Surprisingly, the elitist theory of human rights is very popular in the democratic West, not only in conservative circles but also, and even more often, among liberal and radical groups.<sup>122</sup> The right-wing version of elitism embodies the position, closely associated with colonialism, that backward peoples cannot govern themselves and that democracy only works for superior cultures.<sup>123</sup> The left-wing version, often articulated by liberals who stand for civil rights in Western countries but support leftist dictatorships abroad, reflects a belief that we should be tolerant of and respect the cultural identity and political self-determination of Third World countries (although, of course, it is seldom the people who choose to have dictators; more often the dictators decide for them).<sup>124</sup>

The position of relativist scholars who are human rights advocates illustrates an eloquent example of concealed elitism.<sup>125</sup> Such persons find themselves in an impossible dilemma. On the one hand they are anxious to articulate an international human rights standard, while on the other they wish to respect the autonomy of individual cultures. The result is a vague warning against "ethnocentrism,"<sup>126</sup> and well-intentioned proposals that are deferential to tyrannical governments and insufficiently concerned with human suffering. Because the consequence of either version of elitism is that certain national or ethnic groups are somehow less entitled than others to the enjoyment of human rights, the theory is fundamentally immoral and replete with racist overtones.

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121. I am indebted to Professor Guido Pincione from the University of Buenos Aires for our stimulating discussions on this point.

122. See, e.g., Pollis, *supra* note 13, at 22-23; Tushnet, *supra* note 110, at 1394.

123. Relativism influenced the British colonial administrators. See B. Williams, *supra* note 97, at 20.

124. See *supra* notes 67-72 and accompanying text.

125. See, e.g., Pollis, *supra* note 13, at 22-23.

126. *Id.* McWhinney's work is another example of this paradox. See E. McWhinney, *supra* note 5, at 209 ("eurocentrism").

## B. *The Conspiracy Theory of Human Rights*

The final aspect of relativism to be discussed is what Karl Popper might describe as "the conspiracy theory of human rights."<sup>127</sup> This theory asserts that human rights are a Macchiavelian creation of the West calculated to impair the economic development of the Third World. Starting from the Marxist assumption that civil and political rights are "formal" bourgeois freedoms that serve only the interests of the capitalists,<sup>128</sup> the conspiracy theory holds that human rights serve the same purpose in the international arena. It sees them as instruments of domination because they are indissolubly tied to the right to property, and because in the field of international economic relations, the human rights movement fosters free and unrestricted trade which seriously hurts the economies of Third World nations. Furthermore, proponents of the conspiracy theory charge that human rights advocacy amounts to moral imperialism.<sup>129</sup> In short, "the effect, if not the design, of such an exclusive political preoccupation [is] to leave the door open to the most ruthless and predatory economic forces in international society."<sup>130</sup>

The conspiracy theory, however, fails to justify the link between the support for human rights and support for particular property rights or trade policies—a fundamental flaw. The argument made in this paper does not presuppose or imply any position in this regard. Moreover, to claim that civil and political rights must be suppressed as a necessary condition for the improvement of Third World economies grossly distorts the facts. As Louis Henkin put it:

[H]ow many hungry are fed, how much industry is built, by massacre, torture, and detention, by unfair trials and other injustices, by abuse of minorities, by denials of freedoms of conscience, by suppression of political association and expression?<sup>131</sup>

The contention that the West imposed human rights on the world and that "poor peoples" do not care about freedom is clearly

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127. 2 K. Popper, *supra* note 70, at 94.

128. See, e.g., Marx, *On the Jewish Question*, in *The Marx-Engels Reader* 42 (2d ed. Tucker 1978).

129. For an account of the Marxist critique, see Murphy, *supra* note 20, at 438-42.

130. E. McWhinney, *supra* note 5, at 211. Cf. Tushnet, *supra* note 110, at 1398 (the fact of unnecessary human suffering alone is enough to support the critique of "rights" theory).

131. L. Henkin, *The Rights of Man Today* 130 (1978).

a myth.<sup>132</sup> First, it contradicts the plain fact that a growing awareness exists in the Third World about the need for reinforcing the respect for human rights.<sup>133</sup> Second, even if, *gratia argumentandi*, some Western plot created human rights philosophy, that fact alone would not necessarily undermine its moral value. Conspiracy theories (such as vulgar Marxism, "ideologism," and Critical Legal Studies) assert that the true explanation of a phenomenon consists of discovering the groups of people or hidden interests which are interested in the occurrence of the phenomenon and which have plotted to bring it about.<sup>134</sup> To be sure, conspiracies do occur. As Popper conclusively showed, however, the fact that conspiracies rarely succeed ultimately disproves the conspiracy theory. Social life is too complex and the unforeseen consequences of social action too many to support conspiracy as the explanation of every social phenomenon.<sup>135</sup> Institutions originally designed for a certain purpose often turn against their creators. Thus, even if the law of human rights was originally conceived as an ideological tool against communism, today human rights have achieved a universal scope and inspire the struggle against all types of oppression.<sup>136</sup> In other words, the circumstances surrounding the origins of human rights principles are irrelevant to their intrinsic value and cannot detract from their beneficial features.

## V. CONCLUSION

The human rights movement has resisted the relativist attack by emphasizing that social institutions, including international law,

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132. *Id.*

133. Cf. the statement by the All Africa Council of Churches/World Council of Churches (1976), cited by Haile, *supra* note 17, at 584 (describing the system of checks and balances that prevented gross abuses of human and civil rights in traditional African societies); the statement by the Arab Lawyers' Union at their meeting of December, 1983, reprinted in 9 *Hum. Rts. Internet Rep.* 564 (1984) ("The basis of the legitimacy of any regime or system of government is related to its effective observance of human rights, particularly those set forth in the Universal Declaration."). See also Nickel, *supra* note 48, at 45 (human rights appeal to many peoples, not just to Westerners).

134. 2 K. Popper, *supra* note 70, at 94.

135. *Id.* at 95.

136. South Africa is a case in point. Maybe in 1948 the framers of the Universal Declaration on Human Rights did not intend for it to apply to the black majority in South Africa. Maybe they thought that democracy "among whites" was enough to comply with the Declaration. The international community has subsequently rejected that interpretation, however, and today the law and philosophy of human rights are the main bases for the claims for freedom by the black majority.

are created by and for the individual. Consequently, as far as rights are concerned, governments serve as but the agents of the people. International norms aim to protect individuals, not governments, by creating concrete limits on how human beings may be treated.<sup>137</sup>

I have suggested that cultural relativism is not, and ought not to be, the answer to human rights concerns. Supported neither by international law nor by independent moral analysis, cultural relativism exhibits strong discriminatory overtones and is to a large extent mistaken in its factual assumptions.

I also demonstrated that regardless of its historical origins, the international law of human rights cannot mean one thing to the West and another to the Third World. International human rights law embodies the imperfect yet inspired response of the international community to a growing awareness of the uniqueness of the human being and the unity of the human race. It also represents an eloquent body of norms condemning the effects of organized societal oppression on individuals. Fortunately, the Third World is now starting to play a role in the process of universalizing human rights. The significance of its new role will increase when governing elites cease to use authoritarian traditions as a shield against legitimate demands for basic human rights.

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137. For example, the purpose of the prohibition of the use of force, U.N. Charter, article 2, para. 4, is to spare humanity from the horrors of war—to prevent human suffering. Although the Charter articulates the rule as an inter-governmental prohibition, its humanitarian underpinnings should be kept in mind. Governments are thus made responsible for the maintenance of peace as agents of humanity, not merely for their own benefit.

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