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A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism

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**A WORLD MADE OF VIOLENCE AND
MISERY: HUMAN RIGHTS AS A FAILED
PROJECT OF LIBERAL
INTERNATIONALISM**

*Ibrahim J. Gassama**

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In the aftermath of World War II, the United States, guided by liberal internationalist principles, sought—successfully—to knit together a “free world” of allied powers that interacted with each other in a cooperative, rules- and institution-based way. This made intra-Western international politics a series of positive sum interactions that allowed us to contain and out-compete our communist adversaries. At the same time, a universalistic United Nations was, despite Cold War tensions, able to do some important humanitarian and peacekeeping work and

* Professor, University of Oregon School of Law. The author would like to thank Professor L. Hope Lewis for her comments and encouragement. Tyler Cox provided invaluable research assistance. The University of Oregon Law School summer research support made this Article possible. In Memoriam, my dear friend, Professor Keith Aoki.

help further the idea that even superpower competition should be conducted with some restraint.¹

INTRODUCTION

No international legal document trumps the Universal Declaration of Human Rights (“UDHR”) in the breadth of its expectations.² None could be faulted for being more vague as to how its expectations are to be fulfilled. In adopting the document in 1948, the United Nations (“UN”) General Assembly proclaimed the broad collection of rights to be “a common standard of achievement for all peoples and all nations.”³ This proclamation measured the aspirations of the document against its limitations. The process and form by which it came into existence as well as its substantive contents suggested the incoherence and dissonance that are its enduring legacy.

The first article of the UDHR obligates all human beings to “act towards one another in a spirit of brotherhood” based on the simple and quite mystical assertion that “[a]ll human beings are born free and equal in dignity and rights” and are “endowed with reason and conscience.”⁴ The document proceeds in another twenty-nine articles to identify a comprehensive set of obligations or claims upon society presented as rights belonging to every human being.⁵ Yet, despite its dire warnings about the horrific consequences of a culture of “disregard and contempt” for human rights and of a failure to protect human rights by the rule of law, the document and subsequent documents building upon the UDHR’s mandate have not had identifiable impact on the structures of violence and misery that continue to plague humanity.⁶

More than sixty years after the adoption of this venerated document, its place in the timeless universal struggle for human dignity is still secure

1. Matt Yglesias, *Debating Liberal Internationalism*, AM. PROSPECT (May 15, 2008), <http://prospect.org/article/debating-liberal-internationalism#yglesias>.

2. On Dec. 10, 1948, the General Assembly of the United Nations (“UN”) adopted and proclaimed the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

3. *See id.* at 71–72 & pmbl.

4. *Id.* art. 1.

5. *Id.* The UDHR is composed of thirty articles in addition to the Preamble. Article 29 deviates from the first twenty-eight articles by bringing up the notion of individual duties to the community and discussing in broad terms permissible limitations upon the rights outlined earlier. Article 30 is also a limitation of sorts against the possibility of rights discourse itself being employed to destroy rights and freedoms. *Id.*

6. *Id.* at 71–72 & pmbl.

enough to be celebrated around the world.⁷ The UDHR is accepted by many as the anchor of all subsequent elaboration of human rights standards.⁸ It is the foundation of a so-called international bill of rights and an enduring synthesis of centuries-long efforts to define and broaden our understanding of what human dignity means and how it should be nurtured.⁹ The UDHR continues also to play an inspirational role in the struggles of many who have to face tyrannical governments or intolerable human deprivations.¹⁰

However, in the midst of this celebration, the limits of what was achieved in Paris in the fall of 1948 ought to be acknowledged even if only to get a better sense of the possibilities and challenges facing the human dignity movement. This acknowledgement should begin with an understanding of its deeply political role as a project of liberal internationalism that skillfully employed the language of law to obscure its main function of preserving Western power and privileges.¹¹

7. See Declaration on the sixtieth anniversary of the Universal Declaration of Human Rights, G.A. Res. 63/116, at 1–2, U.N. Doc. A/RES/63/116 (Feb. 26, 2009). The UN, as well as various international, regional, governmental, and non-governmental bodies, including educational institutions, regularly observe the anniversary of this document. See, for example:

On 10 December (2008), Human Rights Day, the Secretary-General launched a year-long campaign in which all parts of the United Nations family are taking part in the lead up to the 60th birthday of the . . . [UDHR] on Human Rights Day 2008. With more than 360 language versions to help them, U.N. organizations around the globe are using the year to focus on helping people everywhere to learn about their human rights. The UDHR was the first international recognition that all human beings have fundamental rights and freedoms and it continues to be a living and relevant document today.

The Universal Declaration of Human Rights: 1948–2008, UN.ORG, <http://www.un.org/events/humanrights/udhr60/> (last visited Feb. 12, 2012); see also Dalai Lama, *Message on the 50th Anniversary of the Universal Declaration of Human Rights*, OFFICE OF HIS HOLINESS THE DALAI LAMA (Dec. 7, 1998), <http://www.dalailama.com/messages/world-peace/universal-declaration>.

8. See LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 205–08 (2007) [hereinafter HUNT, *INVENTING HUMAN RIGHTS*]; see also HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 133 (3d ed. 2008) [hereinafter STEINER ET AL.].

9. See HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 205–08.

10. See Amartya Sen, *The Power of a Declaration*, NEW REPUBLIC (Feb. 4, 2009, 12:00 AM), <http://www.tnr.com/article/books/the-power-declaration>.

11. See generally JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 164–84 (2005) on the broader issue of the role of international law in the rhetoric of international relations. They argue that “international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.” *Id.* at 3. Their arguments point the way toward

A product of intensive, even painstaking negotiations among a sampling of westernized transnational elites of the time, the document was deliberately characterized as a declaration, a term that evokes all the solemnity and pomp of binding international obligations but none of its substantive legal force.¹² Its contents were offered as standards by which individuals and governmental authorities were to be judged henceforth even as those standards were described, without any hint of irony, as if they reflected current practices in many jurisdictions.¹³ The deception in terms of purpose and expectations, as well as unresolved tensions, between what was real and what was aspirational were forever locked in the document.¹⁴ Such are the consequences of political negotiations among unequals at a time of heightened global insecurity and the difficulties of trying to “concretize” rules designed to restrain power and politics under the cloak of legality.¹⁵

This Article examines the legacy of the rights scheme begun with this venerated document, now well into its sixth decade of existence, in terms of its continuing utility as a moral, political, and legal instrument in ongoing struggles to promote human dignity and reduce misery. For its proponents, the UDHR and its progenies¹⁶ have served two primary functions: firstly, to memorialize the timeless struggle for human freedom from communal oppression and secondly, to provide general directions toward a better life for human beings as individuals and as members of

an understanding that would put human rights within an appropriately limited perspective as argued in this article.

12. See HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 204; HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 414–15 (1968) (“Undoubtedly, the Declaration will occasionally be invoked by private and official bodies, including the organs of the United Nations. But it will not—and cannot—properly be invoked as a source of legal obligation.”).

13. The drafters employed the language of “reaffirming” faith in fundamental human rights at a time when all the parties around the table had troubling records of human rights violations, from slavery and racial discrimination in the United States, to colonialism among all the major powers, to pogroms and genocidal behavior by many others, and to the widespread oppression of women. The question that arises then is where does the faith they are reaffirming come from? Certainly not from the practice of nations. Eleanor Roosevelt and others defending the drafters’ approach, focused on the document’s role as an educational or inspirational document. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 235–37 (2001) [hereinafter GLENDON, *A WORLD MADE NEW*].

14. See HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 208.

15. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 5 (1991).

16. The term “progenies” is employed in this article to refer to the several core international human rights agreements that were developed after the UDHR to flesh out its provisions. Specifically, it refers to the two covenants, the ICCPR and the ICESCR.

diverse communities across the globe.¹⁷ Some might contend that merely by its creation, the UDHR succeeded in terms of its first function even if it has had, at best, mixed results in terms of the latter.¹⁸ However, this Article argues that UDHR and its progenies should be understood primarily as a key project of liberal internationalism¹⁹ in the immediate

17. See Sen, *supra* note 10.

18. See HUNT, INVENTING HUMAN RIGHTS, *supra* note 8, at 205 (“The Universal Declaration crystallized 150 years of struggle for rights.”).

19. Liberal internationalism offers a positive and benign interpretation of its aims, to wit that through the perpetuation and support of liberalism, the likelihood of international conflict is reduced and the international order is protected. To achieve this goal, liberalism must thrive at the national and international levels. At the national level, liberal institutions decrease a nation’s willingness to engage in acts of war through increased equality and constitutional protections, citizen involvement in government, legal protections of property, and market economies. This goal is achieved internationally through the creation of multinational cosmopolitan agreements and cooperative international organizations. The promotion of liberal institutions on these levels decreases the likelihood of international conflict, particularly between liberal states, and increases the stability on a global level, arguably, for the ultimate good. This theory has been championed by leaders such as Theodore Roosevelt who argued that it is the duty of liberal states to promote and protect peace, by force if necessary. Other important proponents include Woodrow Wilson and Franklin Roosevelt. See DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 33–73 (1990). See generally Michael Lind, *For Liberal Internationalism*, NATION (June 14, 2007), http://www.newamerica.net/publications/articles/2007/liberal_internationalism_5538. Lind distinguishes various tendencies within the liberal internationalist camp, identifying “democratic hegemonists” and “liberal imperialists” as two groups of “heretics” who threaten the legacy of “historic American liberal” internationalism. Lind, *supra*. According to Lind,

[G]enuine liberal internationalism . . . is neither a naïve idealism that ignores the realities of power nor a crude realism that ignores the power of ideals. While universal liberalism and universal democracy are its ultimate goals, the practical and immediate goal has been global peace. Enduring international peace is a necessary, though not sufficient, condition for liberal democracy. Why? In a world of recurring great-power conflicts or widespread anarchy, concerns about security may force even liberal democracies to sacrifice their freedoms to the imperatives of self-defense. This is what Woodrow Wilson meant when he said that the United States and its allies must make the world “safe for democracy.” A world safe for democracy need not be a democratic world. It need only be a world in which democracies like the United States are not forced by recurrent world wars to turn themselves into armed camps.

Id.; see also Anne-Marie Burley, *Law among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1914–28 (1992); Michael W. Doyle, *Liberal Internationalism: Peace, War, and Democracy*, NOBELPRIZE.ORG (June 22, 2004), http://nobelprize.org/nobel_prizes/peace/articles/doyle/; Yglesias, *supra* note 1.

post-World War II period whose main purpose was to constrain the nature of future challenges to the global order emerging after the carnage and dissonance of the period.²⁰ The laudable inspirational and substantive ideals contained in the document were not ends as such. They were a means toward another end rooted in Western pragmatic self-interest.²¹

As a critical piece of the project, the UDHR helped to define in ideological terms the period that followed the end of World War II, marking the beginning of a time of intense competition over the creation of a new world order.²² The rights contained in the document that were further developed in subsequent similar forms helped to secure the project and its patrons from radical political challenges.²³ As Stanley Hoffman has observed:

A situation of dependence or of superiority that is just a fact of life can be reversed through political action, but once it is solemnly cast in legal form, the risks of action designed to change the situation are much higher: law is a form of policy that changes the stakes, and often “escalates” the intensity, of political contests; it is a constraint comparable to force in effects.²⁴

20. This argument should be distinguished from the charge, rooted in the dispute over universalism and cultural relativism, that much of the substance of human rights derive from the western liberal tradition and as such are “inappropriate and inapplicable to their circumstances.” STEINER ET AL., *supra* note 8, at 512. This article does not engage that argument. The focus here is the channeling of emancipatory possibilities into the straight jacket of human rights regimentation. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 18–31 (2004) [hereinafter KENNEDY, *THE DARK SIDES*] (discussing how human rights is limited by its relationship to western liberalism). Unlike Kennedy, this Article addresses how the implementers of this project could be more effective in their tasks.

21. This Article argues that the fundamental end was maintaining western values, interests, or supremacy in the wake of post World War II challenges. See Chandra Muzaffar, *On Western Imperialism and Human Rights (“From Human Rights to Human Dignity,” 1999)*, in *THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND DOCUMENTS FROM ANCIENT TIMES TO THE PRESENT* 414–18 (Micheline R. Ishay ed., 2d ed. 2007) [hereinafter *THE HUMAN RIGHTS READER*]; see also Makau W. Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT’L L.* 589, 646–52 (1996) [hereinafter Mutua, *Ideology of Human Rights*].

22. Hardt and Negri see the UN as a critical component in post-World War II struggles over international order, culminating in a post-imperial global order where no nation is dominant but where transformational change is effectively suspended—the end of history. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 4–19 (2000); see also MOYNIHAN, *supra* note 19, at 73–119.

23. See Muzaffar, *supra* note 21, at 416.

24. Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 *PROC. AM. SOC. INT’L L.* 26, 34 (1963).

The success of this liberal international project can thus not be judged from the lofty rhetoric and veneration of human rights evangelists, but from the rigid maintenance of global socio-political hierarchy over the past decades with little change in the quality of life experience for the least of us and the reality of mass violence for all. Rights evangelization and regimentation channeled productive energies into carefully bordered channels of thinking and activities that have, in the main, protected the fundamental aspects of the status quo.²⁵

An appreciation of its functional origin as a project of liberal internationalism allows us to respond more effectively to the many who uncritically extol the UDHR's contributions over the past sixty plus years or explain its inadequacies with yet more initiatives to realize its fading promise to defend the dignity of every human being without reservations or limitations.²⁶ In particular, an examination of the decided inability of this enterprise to affect the vast category of economic and social relationships within and across nations is crucial.²⁷ As part of this effort, this Article looks critically at the recent move from rights talk to "goals" in the Millennium Development Goals ("MDG") exercise.²⁸ The overall task has been made more urgent by the extraordinary destruction of wealth within and across national borders that has accompanied the current global economic crisis.²⁹ The goal here is not merely a reaffirmation

25. Chantal Mouffe makes the point that "democratic politics must accept division and conflict as unavoidable, and reconciliation of rival claims and conflicting interests can only be partial and provisional." Chantal Mouffe, *Radical Democracy or Liberal Democracy*, in *RADICAL DEMOCRACY: IDENTITY, CITIZENSHIP, AND THE STATE* 19–26 (David Trend ed., 1996). This must also be true about global politics. Efforts to impose an end to history appear in many guises and require the same level of commitment from those who want to preserve possibilities. See also FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 55–69 (1992).

26. The proliferation of human rights nongovernmental organizations and human rights programs within educational institutions testify to this phenomenon.

27. See JEANNE WOODS & HOPE LEWIS, *HUMAN RIGHTS & THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS* 3–42 (2005) (discussing various human rights global narratives and themes in the global marketplace).

28. United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000) [hereinafter Millennium Declaration].

29. See, e.g., Edmund L. Andrews, *World Bank Says Global Economy Will Shrink in '09*, N.Y. TIMES, Mar. 8, 2009, at B1, available at <http://www.nytimes.com/2009/03/09/business/09bank.html> ("The bank said that developing countries, many of which had been growing rapidly in recent years, are being devastated by plunging exports, falling commodity prices, declining foreign investment and vanishing credit."); Peter Eavis, *For Europe, Few Options In A Vicious Cycle of Debt*, N.Y. TIMES (Jan. 11, 2012), <http://dealbook.nytimes.com/2012/01/11/for-europe-few-options-in-a-vicious-cycle-of-debt/>; Larry Elliott, *Global Financial Crisis: Five Key*

of realist skepticism about law's capacity to challenge power.³⁰ Rather, the goal here is to undermine the insanity behind happy-talk and expose the huge gap between such free floating rhetoric and harsh reality of everyday life for much of humanity. With humility, the Article urges a pragmatic reassessment of how we have confronted the enormous inequalities, violence, and misery that continue to plague our world.

There is much to be said for documenting humanity's long struggle to affirm the dignity of each individual.³¹ There can hardly be a project more worthy of our collective endeavors. The process of identifying and defining the components of what makes us human, captured by the UDHR and its progenies, is undeniably a necessary step in our evolution.³² Carried out honestly, these efforts to identify, define, and document should have significant lessons for more radical approaches to confronting inequality and abuses of power throughout the world. The hegemonic vision of liberal internationalists should not undermine or discredit this work. However, the limits of rights evangelization and regimentation must be understood in order to free the human spirit to do more to end misery and violence by other means consistent with human dignity.

I. GIVING DUE CREDIT: CONTRIBUTIONS OF THE UDHR

Even though its primary function as a project of liberal internationalism was to preserve the privileges of Western society, the UDHR and its progenies did make worthwhile contributions to the cause of reducing human misery through some of the rights rhetoric that it ushered. The simple act of making human rights an arena of legitimate struggle focused more attention and scrutiny on the human condition as opposed to the needs of the state.³³ Two specific important contributions in this regard were the promotion of a universal discourse on rights as a counterforce to state power, and support for the development of mechanisms and processes that would reduce violence and misery.³⁴ While these contributions should not be exaggerated, they should not be dismissed.

Stages 2007–2011, GUARDIAN (Aug. 7, 2011), <http://www.guardian.co.uk/business/2011/aug/07/global-financial-crisis-key-stages>.

30. See generally GOLDSMITH & POSNER, *supra* note 11, at 167–84 (arguing that many global problems cannot be solved by a reliance on international law because states act predominantly in their interests).

31. See HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 205.

32. See Muzaffar, *supra* note 21, at 414–15.

33. See LAUTERPACHT, *supra* note 12, at 61–62.

34. See Henry J. Steiner, *Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond*, HARV. MAG., Sept.–Oct. 1998, at 45.

A. Rights Discourse & Standard-Setting

As Professor Lynn Hunt puts it, “the Universal Declaration crystallized 150 years of struggle for rights.”³⁵ The UDHR was the first systematic expression of human rights in the most universal context.³⁶ Various national constitutions and laws had already established, defended, or promoted conceptions of human rights in limited geographic or other categorical manners. In the United States, the American Declaration of Independence and the United States Constitution did not apply to broad segments of the populations until a civil war, subsequent amendments, legislation, and rights struggles forced a more expansive national vision.³⁷ In France, the Declaration of the Rights of Man and Citizen led to a period of expansive interpretations of rights in France and its colonies,³⁸ but the subsequent reign of terror created a substantial backlash.³⁹ The Magna Carta and the English Bill of Rights were also essential antecedents.⁴⁰

But it was the UDHR, coming in the aftermath of a global conflict of extraordinary lethality and scope that ought to be credited with the

35. HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 205.

36. *Id.*

37. *See* The Declaration of Independence (U.S. 1776); U.S. CONST. The first ten amendments to the U.S. Constitution, called the Bill of Rights, outlined classic human rights protections, such as free speech and religious autonomy (First Amendment), protection against unreasonable search and seizure (Fourth Amendment), due process, double jeopardy, and self incrimination (Fifth Amendment), and right to counsel in criminal cases (Sixth Amendment). U.S. CONST. amends. I, IV, V, VI. Many other core protections came after the American civil war such as abolition of slavery (Thirteenth Amendment), equal protection of the laws (Fourteenth Amendment), and voting rights for African Americans (Fifteenth Amendment). U.S. CONST. amends. XIII, XIV, XV; *see also* HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 15–19.

38. *See* The French Declaration of the Rights of Man and Citizen (1789), *reprinted in* THE HUMAN RIGHTS READER, *supra* note 21, at 490–91; *see also* HUNT, *INVENTING HUMAN RIGHTS*, *supra* note 8, at 15–26, 126–75. The French Declaration led to significant acceptance of equality for racial and minorities as well as women. *Id.*

39. The reign of terror in France (1793–94) marked a period during the French Revolution when rival political factions in a struggle for power turned against each other violently, leading to widespread violence including mass executions. *See also* LYNN HUNT, *POLITICS, CULTURE, AND CLASS IN THE FRENCH REVOLUTION* 46–51 (1984) [hereinafter HUNT, *POLITICS, CULTURE, AND CLASS*]; SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 767–92 (1989).

40. *See* Magna Carta (1215) and The English Bill of Rights (1689), *reprinted in* THE HUMAN RIGHTS READER, *supra* note 21, at 483–87; *see also* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 254 (1993); Mary Ann Glendon, *John P. Humphrey and the Drafting of the Universal Declaration of Human Rights*, 2 J. HIST. INT’L L. 250, 254 (2000) [hereinafter Glendon, *Drafting of the UDHR*].

broadest mass marketing approach to the concept of rights. It sought nothing less than to broaden the expectations of these instruments to all of humanity defined without limitations or reservations.⁴¹ Following arguments outlined by President Franklin Roosevelt in his “Four Freedoms” address to the U.S. Congress in 1941,⁴² the UDHR asserted broadly that human rights were “the foundation of freedom, justice, and peace in the world.”⁴³ As such both peace between nations and progress within nations were linked inextricably to the recognition and promotion of human rights.⁴⁴ Without human rights, oppressed or necessitous people would rise to challenge their governments.⁴⁵ Civilization or human progress was thus linked; human rights culture, established. In other words, societies that fail to establish and defend human rights would not be considered civilized and would not succeed. The complex relationship between power and human rights was thus presented, albeit not fully developed, but enough to allow assertions of power to be subject henceforth to critical examination on an additional plane for legitimacy.⁴⁶ That this sleight of hand erased centuries of brutal reality was left for another day.⁴⁷

In keeping with Roosevelt’s theme, the UDHR recognized the intimate connections between civil and political violations on the one hand and economic and social violations on the other.⁴⁸ As Mary Ann Glendon puts it, “One of the most basic assumptions of the founders of the UN

41. See generally Glendon, *Drafting of the UDHR*, *supra* note 40, at 254; STEINER ET AL., *supra* note 8, at 134–39; Sen, *supra* note 10.

42. See President Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941), *in* 87 CONG. REC. 44 (1941).

43. See UDHR, *supra* note 2, pmbl.

44. *Id.*

45. *Id.*

46. See GLENDON, A WORLD MADE NEW, *supra* note 13, at 235–41.

47. See, e.g., ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WARS 1–8 (2005); IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II 143–58 (1997); BASIL DAVIDSON, AFRICAN CIVILIZATION REVISITED: FROM ANTIQUITY TO MODERN TIMES 8–46 (1991); FRANTZ FANON, THE WRETCHED OF THE EARTH 75–84 (Constance Farrington trans., 1963); CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC 255–82 (2004); PAUL M. KENNEDY, THE RISE AND FALL OF GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000, at 536–40 (1987); ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 292–306 (2006); THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: 1876–1912, at 15 (1991); RANDALL ROBINSON, AN UNBROKEN AGONY: HAITI, FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 252–67 (2007); HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 1–252 (1990).

48. See UDHR, *supra* note 2, pmbl.; see, e.g., *id.* arts. 3, 5, 17, 25.

and the framers of the Declaration was that the root cause of atrocities and armed conflict are frequently found in poverty and discrimination.⁴⁹ The UDHR promoted a conception of freedom not only essential to peace and justice, but one organically attached to social justice.⁵⁰ The end of poverty and other social injustice became part of its articulation of rights standards.⁵¹

Yet only five articles, articles twenty-two through twenty six, placed near the end of the document, outlined notions of rights we could describe as socioeconomic.⁵²

Gaining acceptance of rights articulated in the UDHR was promoted as only the beginning of efforts to give them universal recognition and programmatic definition in the world community.⁵³ These rights are still in no sense close to being realized more than six decades later.⁵⁴ This is not just because they were thinly described and explicitly deprived of the full force of law in any sense. Failure should also be attributed to core disagreements over the role of law-mediated competition where preservation of the status quo was the sine qua non. The brief interlude of cooperation among major powers that had allowed for the superficial consensus on a universal rights declaration quickly gave way to reality of Manichean competition over raw power within the international community.⁵⁵ However, while the East-West rivalry famously sought to privilege one aspect of the UDHR over the other, all sides were in agreement on one point: they rejected a substantive place for law as law in the resolution of inter-

49. GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 238.

50. *See* UDHR, *supra* note 2, pmbl.; *see, e.g., id.* arts. 3, 5, 17, 25

51. *Id.*

52. *See* UDHR, *supra* note 2, at 75–76. Article 22 asserts the right of everyone to social security. Article 23 recognized that everyone possesses the “right to work, to free choice of employment, to just and favorable conditions of [work and remuneration]; . . . to equal pay for equal work; . . . [and] to join trade unions.” Article 24 recognized “a right to rest and leisure.” Article 25 affirmed the right to an “adequate” standard of living, incorporating a right to food, health care, housing, social security, and disability care. Article 26 proclaims a right to education for all, including compulsory elementary education and access to technical and professional education.

53. Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT’L L. 903, 911–12 (2008).

54. *See* Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, in STEINER ET AL., *supra* note 8, at 311; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* xi–xii (1999) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*].

55. Phillip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L., 365, 374–77 (1990).

national human rights disputes.⁵⁶ The United States was no more enamored of the role of law as law in the international sphere than were its adversaries.⁵⁷

Even though work continued among cosmopolitan elites for richer and more binding expressions of universal human rights, the UDHR became essentially moribund even as a rhetorical instrument for change for about two decades.⁵⁸ For those at the bottom of society everywhere, these were lost decades. The difficulties of building a universal consensus to reduce human misery under the UDHR scheme continue to the present.⁵⁹

Exaggerated divisions over civil and political rights on the one hand and economic and social rights on the other helped to define the UDHR scheme in those lost decades.⁶⁰ Western nations that privileged rights discourse as part of their political structures and practices claimed great difficulty accepting rights responsibility outside of the traditional civil and political arena even as they worked to expand the welfare state.⁶¹ They were loath to accept legally binding governmental responsibility to reduce social and economic inequality.⁶² Even conceding that there were practical difficulties with embracing these additional burdens, Western objections to economic and social rights were, as they remain, fundamentally ideological.⁶³ The easy assumptions of the “Four Freedom” speech,

56. This is evident in the choice of a Declaration, lacking binding legal obligation, for the core document. The parties then struggled for decades over more binding elaborations of the rights outlined in the UDHR. The divisions and discord exposed by the development and ratification of the two post UDHR international convenants limited their legal impact. See GOLDSMITH & POSNER, *supra* note 11, at 107–34.

57. Tai-Heng Cheng, *Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 268 (2008).

58. Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social, and Cultural Rights*, 9 HUM. RTS. Q. 332, 335–40 (1987) [hereinafter Alston, *Out of the Abyss*].

59. See U.N. MILLENNIUM PROJECT, A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 5 (2005); Anup Shah, *Today, Over 21,000 Children Died Around the World*, GLOBAL ISSUES (Sept. 24, 2011), <http://www.globalissues.org/article/715/today-over-22000-children-died-around-the-world>.

60. Alston, *Out of the Abyss*, *supra* note 58, at 340–45.

61. *Id.* at 343–44.

62. Alston, *supra* note 55, at 366–67.

63. See Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1–2 (2006). Neier echoes a main point of economic and social rights skeptics when he argues:

The concern I have with economic and social rights is when there are broad assertions . . . of a right to shelter, or housing, a right to education, a right to social security, a right to a job, and a right to health care. There, I think, we get

that all rights were intimately connected and that freedom from fear and freedom from want were inexorably linked and of the same weight, did not gain much traction when the struggle against communism became existential.⁶⁴

The division worsened as the Soviet Union, its allies, and many in the emerging Third World adopted and wielded a discourse that claimed to privilege economic and social rights.⁶⁵ It would turn out that their claims were mostly bogus, designed to shield ruthless ruling cliques from outside critique, a convenient rationalization for holding on to power and destroying opposition.⁶⁶

Thus at a time of increasing complexity and demands for a new social and economic order within and across nations, ruling elites subordinated rights discourse into their conceptions of power.⁶⁷ Western nations, led by the United States, retreated into a conception of a public-private divide in which economic and social issues were allocated primarily to the private sphere.⁶⁸ This retreat was more in theory than in practice, at least where the socioeconomic issues concerned were considered to be domestic in nature and operation.⁶⁹

into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.

Id. at 1; see also CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221–39 (2001); Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35, 36–37 (1993).

64. See Samuel S. Kim, *Global Human Rights and World Order*, in *THE UNITED NATIONS AND A JUST WORLD ORDER* 356–64 (Richard A. Falk et al. eds., 1991) [hereinafter *THE UNITED NATIONS AND A JUST WORLD ORDER*].

65. See Richard N. Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 VA. J. INT'L L. 55, 60–62 (1980).

66. Horst Gemmer et al., *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, 12 B.C. THIRD WORLD L.J. 241, 242 (1992); Hope Lewis, *Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy, and the Human Rights Movement at 60*, 24 MD. J. INT'L L. 296, 296–99 (2009).

67. See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974); Mohammed Bedjaoui, *No Development Without Peace, No Peace Without Development*, in *THE UNITED NATIONS AND A JUST WORLD ORDER*, *supra* note 64, at 178–83.

68. See STEINER ET AL., *supra* note 8, at 280–82.

69. Witness how the Democratic Party and its allies in the United States have fought to hold off attempts to privatize or limit social security, medicare, and other welfare programs favored by the American middle class. See Ellen R. Shaffer, *Who's Sticking Up for the Middle Class?*, HUFF. POST (July 13, 2011), http://www.huffingtonpost.com/ellen-r-shaffer/whos-sticking-up-for-the-_b_895163.html.

It took about two decades after the UDHR before the next major step toward universal recognition of human rights was advanced in the global arena. In 1966, work was completed on two treaties that covered the terrain mapped out by the UDHR in greater detail.⁷⁰ The International Covenant on Civil and Political Rights (“ICCPR”) and its twin, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), were a concession to the ideological divide that had greeted the UDHR.⁷¹ It took another ten years before each received enough ratification to become part of the body of explicit and binding international law.⁷² Under international law, these covenants, unlike the declaration, were supposed to be solemnly binding on the parties to them.⁷³

B. Rights Realization: Implementation and Enforcement

The UDHR and its progenies have nurtured a vast self-replicating army of human rights conceptualizers and enforcement agents over the past six decades. Their biggest contributions have been in Western societies where they infused social structures and political processes with additional legitimacy to expand and deepen civil and political rights.⁷⁴ National and transnational groups working in these societies found added support for rights realization in the UDHR and its derivatives.⁷⁵ Over time, developing countries like India and post-Apartheid South Africa that self-consciously embraced a Western legal heritage followed suit.⁷⁶

70. See, e.g., G.A. Res. 2200A (XXI) A-C, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16 1966).

71. See STEINER ET AL., *supra* note 8, at 271–73.

72. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.C. 3 [hereinafter ICESCR].

73. ICESCR *supra* note 72, art. 29, para. 3; see also ICCPR, *supra* note 73, art. 51, para. 2.

74. Domestic human rights concerns were important considerations in American and European approaches to international human rights. See, e.g., STEINER ET AL., *supra* note 8, at 1131–43; K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 80–82 (1999); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 483–87 (2002).

75. See STEINER ET AL., *supra* note 8, at 1123–24; Heyns & Viljoen, *supra* note 74, at 493.

76. STEINER ET AL., *supra* note 8, at 1123–24. See also judicial opinions such as *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545, A.I.R. 1986 S.C. 180 (India); *State v. Makwanyane* 1995 (3) SA 391 (CC) at 7–17, paras. 12–25 (S. Afr.); *Treatment Action Campaign v. Minister of Health* 2002 (5) SA 721 (CC) at 78, para. 135 (S. Afr.).

In the regional settings, Europe has developed a network of supranational protections through institutions, instruments, and procedures to supplement national protections. The Council of Europe, the European Court of Human Rights, and the European Union, together with a host of other binding regional agreements, have given substance to the meaning of human rights for most Europeans.⁷⁷ The crisis that accompanied the breakup of the former Yugoslavia resulted in a broadening and deepening of the European understanding of human rights for Europeans.⁷⁸ After initial failures, the region, with the leadership and support of the United States, has essentially imposed a binding collective responsibility to act to defend the human rights of all who live within the political jurisdiction of the region.⁷⁹ Military force and concrete economic support have buttressed the expansion of a human rights culture.⁸⁰ Indeed, European activists have pushed the boundaries and experiences of the accomplishment beyond continental borders.⁸¹

The regional contributions of this movement have been much less satisfying in other regions of the world. The African experience is still little better than hapless mimicry.⁸² The Latin American experience continues

77. See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, June 1, 2010, 213 U.N.T.S. 221; European Social Charter, Feb. 2, 1965, 529 U.N.T.S. 89; Single European Act, Feb. 17, 1986, 25 I.L.M. 506; Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]; Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) [hereinafter Maastricht Treaty].

78. The Conference on Security and Cooperation in Europe (“CSCE”) formed in 1973 to deal with East-West matters through largely non-formally binding diplomatic dialogue was transformed in 1995 into the Organization for Security and Cooperation in Europe (“OSCE”) with a staff of thousands and a mandate that extends beyond Europe. See OSCE, www.osce.org (last visited Feb. 12, 2012).

79. See *Banković et al. v. Belgium et al.*, App. No. 52207/99, Eur. Ct. H.R. (2001), available at 41 I.L.M.517.

80. For example, the European Instrument for Democracy and Human Rights (“EIDHR”) was started in 2006 to promote human rights outside EU countries. See Council Regulation 1889/2009, Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, 2006 O.J. (L 386) 1, 1–11 (EC) [hereinafter EIDHR Regulation]; Michael Elliott, *Viewpoint: How Libya Became a French and British War*, TIME (Mar. 19, 2011), <http://www.time.com/time/world/article/0,8599,2060412,00.html>.

81. See, e.g., EIDHR Regulation, *supra* note 80; Steven Blockmans & Ramses A. Wessel, *The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?*, 14 J. CONFLICT & SEC. L. 265, 269–71 (2009); see also *Issa et al. v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004).

82. See, e.g., African Charter on Human and People’s Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982).

to be of more value to academics than to those who face domestic and transnational oppression.⁸³ At this point, it is difficult to make a generalization about a pan-Asian human rights culture. Each of the major national entities in Asia appears to be forging unique national traditions in human rights protection.⁸⁴ The idea that development of a human rights culture must await national economic progress has been promoted with considerable success by autocratic Asian government leaders.⁸⁵ However, as Professor Ghai has argued, “fruitful Asian perspectives on human rights must therefore transcend obfuscation of culturalism, locate human rights in the contingencies of their political economy, and urge struggle domestically as well as globally since no economies now are purely national.”⁸⁶

Social and economic rights have not fared as well. The ICESCR was never granted the same stature in operation that the ICCPR received.⁸⁷ Substantively, the Covenant reaffirmed the core economic and social rights identified in the UDHR. Arguably, it gave them more content and provided states as well as human rights advocates with more specific expectations in areas of work, adequate and equal compensation, social security, physical and mental health, education, housing, and the like.

83. See American Declaration of the Rights and Duties of Man, *reprinted in* Inter-Am. Ct. H.R. Secretariat, Basic Documents pertaining to Human Rights in the Inter-American System, Org. of Am. States (July 2003), available at <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf>; see, e.g., Velásquez Rodríguez Case, Inter-Am. Comm'n H.R. (Ser. C) No. 4 (1988); Carson Osberg et al., *Updates from the Regional Human Rights Systems*, 18 HUM. RTS. BRIEF 65, 65 (2011); Press Release No. 3/12, Inter-Am. Comm'n H.R., 10 Years After Detentions in Guantanamo Began, the IACHR Repeats its Call to Close the Detention Center (Jan. 11, 2012), available at http://www.oas.org/en/iachr/media_center/PReleases/2012/003.asp.

84. See ASIAN PERSPECTIVES ON HUMAN RIGHTS 8 (Claude E. Welch & Virginia A. Leary eds., 1990); Yash Ghai, *The Asian Perspective on Human Rights*, HUM. RTS. SOLIDARITY (Oct. 6, 1993), <http://www.hrsolidarity.net/mainfile.php/1993vol05no03/2061/>. India, for example, has a vibrant judicial tradition in the western mold, with courts periodically intervening on diverse human rights matters. See *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545, A.I.R. 1986 S.C. 180 (India). China has no such tradition and appears to be determined to pursue a path that prioritizes economic development over traditional concerns over human rights. Even Japan, with a highly developed political and economic culture, has not been a key player in legal approaches to human rights promotion.

85. See Ghai, *supra* note 84.

86. *Id.*

87. See Office of the U.N. High Comm'r for Human Rights [OHCHR], Comm'n on Soc., Econ. & Cultural Rights, Statement to the World Conference on Human Rights on Behalf of the Comm., U.N. Doc. E/1993/22-E/C.12/1992/2, annex III (1992) [hereinafter OHCHR Statement]; STEINER ET AL., *supra* note 8, at 264, 280–82; Neier, *supra* note 63, at 1–3.

In the West, this Covenant has never been the equal of its twin. It has not been ratified by the United States and other Western nations that have ratified it have generally emphasized its programmatic nature, vagueness, and lack of justiciability in according it lesser status.⁸⁸ The non-Western nations that have paid rhetorical homage to its importance have generally lacked both the material resources and political commitments to give its provisions anything near the force of law.⁸⁹

Needless to say, this is an outcome that proponents of ICESCR do not accept. The official and popular position of the international human rights community is that the two covenants and the sets of rights they proclaim are “universal, indivisible, and interdependent and interrelated.”⁹⁰ Yet the language of the ICESCR betrays its second-class nature. It is a language of limitations and promises, not guarantees or demands. Article 2(1) of the ICESCR captures the fundamental lack of seriousness that borders on cruel deception:

Each state party to the present Covenant undertake to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁹¹

The UN took a tiny step toward some form of implementation by creating a Committee on Economic, Social, and Cultural Rights in 1985 charged with monitoring and promoting efforts by state parties to implement these rights.⁹² However, the Committee has no punitive powers and could not direct resources to nations needing help toward gaining com-

88. Ann M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 232 (2010); E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 73 (1978).

89. See Balakrishnan Rajagopal, *Pro-Human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 8 HUM. RTS. REV. 157, 169 (2007); see also *Gov't of S. Afr. v. Grootboom* 2001 (1) SA 4 (CC) at 31 (S. Afr.); *Olga Tellis*, (1985) 3 S.C.C. 545 (India); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1997 (1) SA 765 (CC) at 18 (S. Afr.).

90. See World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 37, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

91. ICESCR, *supra* note 72, at 49–50.

92. U.N. Eco. & Soc. Council [ECOSOC], *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ECOSOC Res. 1985/17 U.N. E/RES/1985/17 (May 28, 1985).

pliance.⁹³ It meets regularly, engages state parties in dialogues, and issues reports that are valuable largely because of the light they shed on the enormous scale of problems.⁹⁴

II. SUBSTANTIVE FAILURES OF THE UDHR ENTERPRISE

The most glaring failure of the UDHR regime has been in the socioeconomic realm. Its complete inability to tackle global economic inequality and resulting misery sufficiently exposes its essential irrelevance. Admittedly, its economic component was a grudging import into its architecture from the start.⁹⁵ Over time, the interests and rhetoric of liberal internationalism have never conceded power on this front.⁹⁶ This posture is quite understandable if preserving economic and political power is seen as the ends of the project in the first place. However, even in the sphere of civil and political rights, the UDHR regime should be considered a failure.

This section elaborates on the comprehensive substantive failure of the rights regime in all fields. However, before doing so, a brief comment on the difficulty of separating these categories in dealing with the failures is in order. Any human rights discussion that seeks to address so-called economic and social rights separately from civil and political ones or to privilege one set over the other has to confront a hard reality and a core doctrinal objection. The hard reality is that issues that are generally classified as civil and political always seem more urgent or desperate in comparison to those traditionally seen as economic and social. It is very difficult to ignore or put aside for even a brief moment images of ongoing violent international or civil conflict, ethnic cleansing, diverse crimes against humanity, government crackdown, terrorism, torture, disappearances, etc. These issues have more grip on our attention and, perhaps more importantly, are more easily captured for television presentation. In contrast, economic deprivations, except perhaps when captured as images of natural disasters or emaciated famine victims, tend to more quickly fade into the landscape of general human misery.⁹⁷

93. *Id.*

94. See Pascal Lamy, Dir.-Gen., World Trade Org., Keynote Speech at the Thematic Debate on the U.N. in Global Governance (June 28, 2011), available at http://www.wto.org/english/news_e/sppl_e/sppl198_e.htm (calling for the ECOSOC committee to be transformed into a council and accorded additional powers).

95. See Kim, *supra* note 64, at 361; Muzaffar, *supra* note 21, at 414.

96. Muzaffar, *supra* note 21, at 414.

97. See Randal C. Archibold, *U.S. Reduces Estimates of Homeless in Haiti Quake*, N.Y. TIMES, May 31, 2011, at A4, available at <http://www.nytimes.com/2011/06/01/world/americas/01haiti.html>; Mark Doyle, *Extreme*

The doctrinal objection is that human rights are, by official interpretation, supposed to be treated as indivisible, interrelated, interdependent, and equal.⁹⁸ This is a foundational belief in the human rights movement and is one that is defended vigorously, even if mainly in theory.⁹⁹

One way to reconcile these concerns, of course, is to always try to discuss human rights in their complex interrelatedness, interdependence, indivisibility, and equality. After all, that appears to be what was intended by the structure and promise of the UDHR before Cold War politics intervened to create largely unsupportable categorical and doctrinal divisions.¹⁰⁰ The problem with this approach is that deprioritized discussions of rights quickly get dominated in execution by the seemingly more urgent demands of the moment. Add to this the fact that Western heritage and socialization have conditioned many of us to see human rights as pertaining more to those issues classifiable as civil or political than economic and social.¹⁰¹ Torture, Abu Ghraib, Guantanamo, waterboarding, extraordinary renditions, Zimbabwe, Darfur, Eastern Congo, Gaza, and Myanmar all seem more urgent when seen in the classic civil and political perspective than as economic and social issues encompassing slow, quiet, and mostly out of sight suffering and deaths of millions.

This Article's examination of the current state of socioeconomic rights will begin with the note that a focus on socioeconomic issues serves primarily to highlight how central these considerations are to a thorough understanding of the promise and limits of the human rights age. Accepting the interconnected and indivisible nature of all aspects of human dig-

World: Dying, BBC NEWS (Feb. 2, 2011, 7:28 PM), <http://www.bbc.co.uk/news/world-africa-12343178>; Jane Perlez, *Officials Say Somali Famine Is Even Worse Than Feared*, N.Y. TIMES (Sept. 6, 1992), <http://www.nytimes.com/1992/09/06/world/officials-say-somali-famine-is-even-worse-than-feared.html?pagewanted=all>; Mary Beth Sheridan, *Clinton: Don't Cut Farm Aid for Africa*, WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/world/national-security/clinton-dont-cut-farm-aid-for-africa/2011/08/11/gIQAFNjx8I_story.html; Lesley Wroughton & Arshad Mohammed, *U.S. Gives \$17 Million More to Horn of Africa Famine*, REUTERS (Aug. 10, 2011, 5:21 PM), <http://www.reuters.com/article/2011/08/11/us-africa-famine-idUSTRE77A6JS20110811>.

98. See *Vienna Declaration*, *supra* note 90, ¶ 5; STEINER ET AL., *supra* note 8, at 370–74.

99. STEINER ET AL., *supra* note 8, at 370–74.

100. See GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 238–39.

101. See STEINER ET AL., *supra* note 8, at 283–85; Rhoda E. Howard & Jack Donnell, *Human Dignity, Human Rights, Political Regime*, 80 AM. POL. SCI. REV. 801, 806–07 (1986) (noting that liberal philosophers have often rejected the State's role in protecting economic and social rights); *About Us*, HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited Feb. 12, 2012) (focusing the organization's mission on rights that would be classified as either civil or political).

nity, a conversation about war should bring up the enduring socioeconomic misery that wars breed and reflect. When one thinks about, say genocide in Darfur, Rwanda, or the Congo, the horrors of Iraq or Myanmar, torture, disappearances, ethnic cleansing, or pervasive violence against women, one should also see long term intranational and transnational competition for scarce resources and the essential roles played by multinational corporations within the global economic system in maintaining, nurturing, and in some cases, promoting conflicts and ensuring misery.¹⁰² Better still, one should flip the considerations. Think first every day about socioeconomic deprivation—abject poverty; pervasive and unyielding gender oppression; global and communal competition for natural resources; and access to water, health care, and educational opportunities—then think about wars, ethnic cleansing, torture, disappearances, and other so-called civil and political violations that police the status quo.

A. Civil and Political Rights: A Celebration of Incoherence

Since World War II there have been more than one hundred wars, for the most part civil conflicts. In those conflicts, millions of people have been slaughtered, raped and forced to flee their homes and their countries.¹⁰³

Devotees of the human rights culture nurtured by the UDHR and its progenies have invested much greater resources in the civil-political realm than in the economic and social sphere.¹⁰⁴ Yet the comprehensive nature of their failures, even in this arena, is masked only by abundant faith and continuing zeal. Examining three sets of issues that define civil and political rights captures the breadth and depth of failure: genocide and crimes against humanity, torture, and violence against women.

1. Crimes against Humanity and Genocide

Crimes against humanity¹⁰⁵ may be considered the ultimate generalized expression of humanity's revulsion and rejection of certain evil behavior.

102. See RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 425–26, 428 (1994); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 231–36 (1972).

103. Richard J. Goldstone, *Foreword to WAR CRIMES: THE LEGACY OF NUREMBERG* 7 (Belinda Cooper ed., 1999) [hereinafter *WAR CRIMES*].

104. See STEINER ET AL., *supra* note 8, at 370; Muzaffar, *supra* note 21, at 414–18.

105. Crimes against humanity was first defined in the Nuremberg Charter, Article 6, as namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or

Genocide¹⁰⁶ may be considered a particular species of this prohibition. Both crimes arose out of longstanding efforts to discipline the conduct of international conflicts through law.¹⁰⁷ Crimes against humanity came to the fore at the post-World War II trials of defeated war criminals¹⁰⁸ while the identification of genocide awaited a convention¹⁰⁹ that was developed at the same time as the UDHR. Both crimes against humanity and genocide may today be said to represent a legal prohibition of the “worst of the worst”—an expression of what must absolutely be prevented if we are to have a baseline of human rights culture. The two crimes intersect and bind the fields of human rights and humanitarian law in keeping with the core liberal internationalist assertion that links international peace and security to human rights.¹¹⁰ Both crimes, like the crime of torture, are generally considered to be *jus cogens*.¹¹¹

To the degree that the liberal internationalist rights scheme makes any claim of substantive seriousness, it should be reflected in its actions

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.

U.N. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter]. This extraordinarily broad humanitarian intervention in support of human rights emanating from the specific situation of World War II has been carried forward in subsequent definitions of the crime. *See, e.g.*, Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

106. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Prevention Convention]. Article II of the Convention defines genocide as any of a series of “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” *Id.* art. 2; *see also* Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 3, 4, S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993); Rome Statute, *supra* note 105.

107. Both crimes challenged the right of the state to wage wars without limits.

108. *See* Nuremberg Charter, *supra* note 105, art. 6(c).

109. Prevention Convention, *supra* note 106.

110. UDHR, *supra* note 2, at 71–72 (“Whereas recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”). The UDHR Preamble goes on to link “barbarous acts which have outraged to conscience of mankind” to “disregard and contempt for human rights.” *Id.* pmb.; *see also* ICCPR, *supra* note 72, pmb.; ICESCR, *supra* note 72, pmb.; U.N. Charter pmb., art. 73.

111. Convention of the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining the concept of *jus cogens* or a peremptory norm of general international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”). While no comprehensive authoritative list of such norms exist, genocide, crimes against humanity, and torture would appear to satisfy all of the elements.

against these two highly evocative crimes. Yet, when one considers the widespread atrocities of our post-World War II age—Bosnia, Rwanda, Sudan, Eastern Congo, Sierra Leone, Cambodia, Burma (Myanmar), North Korea, and Afghanistan under the Taliban are some of the cases that come easily to mind—the incapacity of the rights regime to make a difference ought to shock one's conscience.¹¹² These cases do not in any way represent the totality of instances of sustained gross violations of human rights that meet the elements of crimes against humanity and, in some cases, genocide. The utter inability of the liberal internationalist regime to impact the origin, course, or resolution of these grievous atrocities is striking.¹¹³ Such comprehensive ineffectiveness cannot be dismissed as merely unfortunate failures of implementation. It cannot be unreasonable to expect that the UDHR and its progenies, sixty years hence, would at least have developed a credible role in preventing the recurrence of the most grievous of international human rights violations.

The response of the rights regime to these atrocities seems to be general acceptance of them as part of life. This fact may not be apparent given the huge amount of attention and resources poured into endless discussions, negotiations, occasional deployment of peacekeepers and, of course, post-atrocity tribunals.¹¹⁴ This does not just refer to the fact that

112. Barbara Harff, *No Lessons Learned From the Holocaust? Assessing the Risk of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57, 60 (2003); see WAR CRIMES, *supra* note 103, at 7–8.

113. The Obama administration issued a presidential directive on August 4, 2011, creating a so-called “high-level Atrocities Prevention Board within the U.S. government to provide early warning of impending atrocities and human rights crisis abroad and to recommend early action to prevent such crimes.” *US: Presidential Directives a Step to Ensuring “Never Again”*, HUMAN RIGHTS WATCH (Aug. 4, 2011), <http://www.hrw.org/news/2011/08/04/us-presidential-directives-step-ensuring-never-again>; see also Helene Cooper, *Obama Takes Steps to Help Avert Atrocities*, N.Y. TIMES, Aug. 3, 2011, at A11, available at <http://www.nytimes.com/2011/08/04/us/politics/04policy.html>. The directive would have added little to the efforts to prevent mass murder in Bosnia or Rwanda since in both cases, high-level decision-makers had ample evidence of impending criminality. See, e.g., AMNESTY INT’L, THE 1994 REPORT ON HUMAN RIGHTS AROUND THE WORLD 251–53, 319–21 (1994); HUMAN RIGHTS WATCH, WORLD REPORT 1996—RWANDA (Jan. 1, 1996), available at <http://www.unhcr.org/refworld/docid/3ae6a8af2c.html>; Videotape: Forsaken Cries: The Story of Rwanda (Amnesty Int’l USA 1997) [hereinafter Forsaken Cries].

114. On the tribunals, see Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 106; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994); Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 1, 1–13 (Cesare P.R. Romano et al. eds., 2004); see also Rupert

the Khmer Rouge murdered with alacrity while the world was absent or that the UN and world powers deliberately ignored mounting evidence of the preparations for genocide in Rwanda¹¹⁵ or that intervention in Bosnia came only after the massacre at Srebrenica in 1995.¹¹⁶ More importantly, the plain facts are that those who contemplate, nurture, or engage in organized and systematized violence that leads to crimes against humanity or genocide are completely unimpressed or unaffected by the human rights regimentation of our time.¹¹⁷ The eerie similarity between the propaganda to promote genocide in Rwanda and Nazi Germany,¹¹⁸ the shocking sameness to the violent practices of repressive governments¹¹⁹ and rebel groups around the world, and the unbridled flow of weapons to

Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 6–10 (2008).

115. See PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 148–49 (1998); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 234–37 (1995); see also Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMPLE INT'L & COMP. L.J. 1, 176–77 (1997) [hereinafter Mutua, *Never Again*]; Forsaken Cries, *supra* note 113.

116. Over 7,000 men and boys were murdered by the Bosnian Serb soldiers after they took over the town that had been declared a safe area by the UN. See *SREBRENICA: A CRY FROM THE GRAVE* (Thirteen/WNET 1999); see also Ibrahim J. Gassama, *World Order in the Post-Cold War Era: The Relevance and Role of the United Nations after Fifty Years*, 20 BROOK. J. INT'L L. 255, 277–83 (1994); Mutua, *Never Again*, *supra* note 115, at 181; *Serbia Apologizes for 1995 Massacre*, N.Y. TIMES, Mar. 31, 2010, at A8.

117. GERARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE*, at xi, 130 (2006); Alison Des Forges, *Documenting Horror: The Administration of the Rwandan Genocide*, in *WAR CRIMES*, *supra* note 103, at 139–53; Tim Johnston, *U.S. Seeks New Tack on Burma*, WASH. POST, Apr. 12, 2009, at A13.

118. See GOUREVITCH, *supra* note 115, at 93–98; Des Forges, *supra* note 117, at 136–53.

119. The Arab spring, popular revolts in the Arab world that gathered steam in 2011, is a case in point. All of the regimes reacted with the same massive display of force and unbridled violence. Libyan dictator, Ghadaffi, was apparently prepared to take actions of genocidal proportions in the rebel-dominated city of Benghazi until international military actions stopped him. While the regimes in Tunisia and Egypt succumbed in response to domestic and international pressures, others in Syria, Yemen, and Bahrain have not held back on the use of raw violence to retain power. See Ian Black & Nour Ali, *Syria Protests: Troops Renew Attacks on Pro-Democracy Demonstrators*, GUARDIAN, Aug. 9, 2011, at 21; Nathan Brown, *Hope and Change*, FOREIGN POLICY (May 18, 2011), http://www.foreignpolicy.com/articles/2011/05/18/hope_and_change; Dan Murphy, *No Evidence of Libya Viagra Rape Claims. But War Crimes? Plenty*, CHRISTIAN SCI. MONITOR (June 24, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0624/No-evidence-of-Libya-Viagra-rape-claims.-But-war-crimes-Plenty>.

areas of conflict affirm the global acceptance, and sometimes even promotion, of large-scale atrocities.¹²⁰

Governments, international institutions, and multinational business interests have failed to subordinate other interests to the prevention of these crimes.¹²¹ Even when the existing international machinery can no longer ignore atrocities and have to respond, the responses are precisely limited to ensure that more enduring and profitable interests are protected.¹²² For example, the vaunted crimes tribunals do not reach the colonial powers that stoke ethnic or tribal divisions.¹²³ Nor do they inquire into the role of multinational economic institutions or transnational business interests in fostering these conflicts.¹²⁴ Such inquiry would come too close to the status quo protection function of the liberal international regime.

2. Torture

If one were to ask a representative number of people committed to human rights values which if any right among, say those declared in the UDHR had priority in importance, torture would surely rank high on the list . . . If anything is a human right, then it's the right not to be tortured.¹²⁵

Torture could be considered the one true thing in the international human rights scheme until the Bush administration's enhanced interroga-

120. Jean Mukimbiri, *The Seven Stages of the Rwandan Genocide*, 3 J. INT'L CRIM. JUST. 823, 824 (2005).

121. See, e.g., Katie Redford & Beth Stephens, *The Story of Doe v. Unocal, Justice Delayed But Not Denied*, in HUMAN RIGHTS ADVOCACY STORIES 433, 433–62 (Deena R. Hurwitz et al. eds., 2009).

122. International or hybrid crimes tribunals are generally given quite limited mandates as to whom they may pursue. See Charles Chernor Jalloh, *Special Court For Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 3, 417–18, 448–50 (2011); see also Julie Mertus, *Only A War Crimes Tribunal: Triumph of the "International Community," Pain of the Survivors*, in WAR CRIMES, *supra* note 103, 229–42 (highlighting other limitations of these responses to large scale atrocities).

123. For example, the Rwandan crimes tribunal ("ICTR") did not reach the role of former colonial powers such as Belgium and France in the conflict. See LINDA MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE* 24–25 (2000); Paul Schmitt, *The Future of Genocide Suits at the International Court of Justice: France's Roles in Rwanda and the Implications of the Bosnia v. Serbia Decision*, 40 GEO. J. INT'L L. 585, 594–96 (2009).

124. GREG CAMPBELL, *BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES* 20–23 (2002); John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 468–70 (2000).

125. STEINER ET AL., *supra* note 8, at 224.

tion program confirmed and exposed the soft underbelly of this supposed peremptory norm and the hypocrisy of Western rhetoric. Article 5 of the UDHR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹²⁶ This prohibition was reaffirmed in Article 7 of the ICCPR which adds, in Article 4, that no derogation from this norm was permissible under the covenant.¹²⁷ To prevent any misunderstanding of the regime’s position on this matter, a separate international agreement prohibiting torture was concluded in 1984.¹²⁸ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) provided a comprehensive definition of torture even as it left room for even deeper expression of humanity’s collective abhorrence of this conduct.¹²⁹ The CAT was explicit that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹³⁰ It further rejects using an order from a superior officer or a public authority as a justification of torture.¹³¹

Even though the United States ratified the convention in 1994 and passed domestic legislation implementing the agreement,¹³² the atmosphere and security conditions emanating from the September 11, 2001 attacks by Al Qaeda could not sustain even rhetorical adherence to the treaty.¹³³ The formal assault on the torture norm began with lawyers doing what they were asked to do, that is, to provide a legal justification for

126. UDHR *supra* note 2, at 73. All four Geneva Conventions also prohibit torture, defining the term and incorporating it within the category of grave breaches. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

127. ICCPR, *supra* note 72, at 53.

128. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) [hereinafter Torture Convention].

129. *Id.* Article 1(1) defines torture as “any act by which severe pain or suffering . . . is intentionally inflicted on a person.” *Id.* art. 1(1). Article 1(2) stated that the definition was “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.” *Id.* art. 1(2). Thus states could adopt definitions of torture that go further than the international consensus contained in the CAT.

130. *See id.* art. 2(2).

131. *See id.* art. 2(3).

132. *See* Torture Act, 18 U.S.C. § 2340 (2004).

133. *See* Memorandum from Jay Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto Gonzalez, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum], *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

a widespread transnational program of torture.¹³⁴ This evisceration of the norm was accomplished by the usual process of redefinition and differentiation.¹³⁵ However, no one misunderstood what was being done, even if it was called “enhanced interrogation” and limited only to “high-value targets.”¹³⁶ Indeed, long before high officials such as President George W. Bush and Vice President Richard Cheney admitted that they had authorized the torture of detainees, the public was largely on board with the program.¹³⁷ In any case, there was a more established, more broadly accepted torture regime existing within the rubric of the so-called extraordinary rendition program.¹³⁸

In truth, the public, with the assistance of Hollywood, had long been prepared to understand that official pronouncements on torture were

134. See, e.g., *id.* The Bybee Memorandum infamously restricted the definition of torture and its expansive interpretation of the powers of the U.S. president in the national security arena caused belated controversy. In response to the controversy, subsequent memos tried to walk back these understandings. However, leading figures in the Bush administration, including President Bush and Vice President Cheney, have remained firm and unapologetic. They have done so without adverse consequences.

135. See *id.* Former Attorney General Michael Mukasey defended the use of torture by calling it “harsh interrogation” in response to criticism by U.S. Senator John McCain. See Marc A. Thiessen, *Mukasey Responds to McCain’s Op-Ed*, WASH. POST: POSTPARTISAN BLOG (May 12, 2011, 5:10 PM), http://www.washingtonpost.com/blogs/post-partisan/post/mukasey-responds-to-mccains-op-ed/2011/05/12/AFhhVOIG_blog.html. For a spirited defense of torture by any other name, see Jennifer Rubin, *Sen. John McCain Gets His Facts Wrong On EITs* [Enhanced Interrogation Techniques], WASH. POST: RIGHT TURN BLOG (May 13, 2011, 12:00 PM), http://www.washingtonpost.com/blogs/right-turn/post/sen-john-mccain-gets-his-facts-wrong-on-eits/2011/03/29/AFE4AS2G_blog.html.

136. See Memorandum from Steven G. Bradbury, Office of Legal Counsel, U.S. Dep’t of Justice to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency (May 10, 2005) (discussing whether “certain specified interrogation techniques” including waterboarding, may be used on a “high value” Al Qaeda detainee); see also Peter Finn & Julie Tate, *CIA Says It Misjudged Role of High-Value Detainee Abu Zubaida, Transcript Shows*, WASH. POST (June 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/15/AR2009061503045.html>.

137. See Greg Miller, *Cheney OK’d Harsh CIA Tactics*, L.A. TIMES (Dec. 16, 2008), <http://articles.latimes.com/2008/dec/16/nation/na-cheney16>; Paul Steinhauser, *Poll: Don’t Investigate Torture Techniques*, CNN POLITICAL TICKER BLOG (May 6, 2009, 12:33 PM), <http://politicalticker.blogs.cnn.com/2009/05/06/poll-dont-investigate-torture-techniques/>.

138. *Fact Sheet: Extraordinary Rendition*, AM. CIVIL LIBERTIES UNION [ACLU] (Dec. 6, 2005), <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition>; see also Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106.

“less than meets the eye.”¹³⁹ Once “bad guys” were properly defined and presented, torture, law, and human rights did not apply to them. The understanding that the rights regime does not apply in all cases has long been accepted by governments as well as ordinary people.¹⁴⁰

The United States was by no means the only Western country that has been forced to acknowledge the limit of institutional adherence to the torture prohibition. The United Kingdom and Israel have also had their commitments tested in crisis.¹⁴¹ Of course, far beyond the direct contradictions reflected in the practices of these Western countries in the face of national emergencies, the routine disregard of the comprehensive edifice against torture has not been a secret.¹⁴² For a long time, torture was tolerated domestically in assorted local police agencies, jails, prisons, and other public institutions in these countries.¹⁴³ In the international arena, torture was routinely farmed out to cooperative regimes, mostly in the Third World.¹⁴⁴ Indeed it would appear that in some cases, the torture relationship was the primary basis of cooperation between the West and

139. Arguably, one of the more popular American television dramas of the post-September 11th period was “24” which depicted extraordinary feats of bravery accompanied by shocking violence on the part of the “good guys.”

140. Emilie M. Hafner-Burton & Kiyoteru Tsutsu, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 412–13 (2007); John Quigley, *Government Vigilantes at Large: The Danger of Human Rights from Kidnapping Terror Suspects*, 10 HUM. RTS. Q. 193, 213 (1993).

141. See, e.g., Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 164 (1978) (finding that British authorities had engaged in inhuman and degrading treatment but not torture against IRA suspects); HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel 53(4) P.D. 817, paras. 1, 23 [1999] (Isr.).

142. See, e.g., HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998); INDEP. COMM’N ON THE L.A. POLICE DEPT. [CHRISTOPHER COMM’N], REPORT OF THE INDEP. COMM’N ON THE L.A. POLICE DEPT’ T 29–60 (1991); John Floyd & Billy Sinclair, *Police Misconduct: A Growing Epidemic?*, JOHNTFLOYD.COM (Feb. 24, 2011), <http://www.johntfloyd.com/comments/february11/Houston-Police-Brutality.htm>.

143. Perhaps it is with due appreciation of this reality that the U.S., for example, added reservations to its acceptance of its international obligations regarding torture or cruel, inhumane or degrading treatment, or punishment. These reservations limited the definitions of these terms.

144. See HUMAN RIGHTS WATCH, *Getting Away With Torture: The Bush Administration and Mistreatment of Detainees* 33–38 (2005), available at <http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf> (discussing examples of extraordinary rendition); John F. Burns & Alan Cowell, *British Panel to Examine Libya Rendition Reports*, N.Y. TIMES, Sept. 5, 2011, at A11, available at <http://www.nytimes.com/2011/09/06/world/europe/06britain.html>; Rod Norland, *Files Note Close C.I.A. Ties To Qaddafi Spy Unit*, N.Y. TIMES, Sept. 2, 2011, at A1, available at <http://www.nytimes.com/2011/09/03/world/africa/03libya.html?pagewanted=all>.

disfavored regimes like those of Ghaddafi in Libya and Assad in Syria.¹⁴⁵ The occasional hue and cry against particular revelations of torture focused on the usual disfavored suspects.¹⁴⁶ Many instances were resolved as simply exceptions to the rule.¹⁴⁷

However, it took the U.S. Justice Department's torture memorandums and the immunity granted subsequently to official American torturers to blow open the insubstantiality of the whole system of prohibition that had buttressed the anti-torture norm.¹⁴⁸ We are left with the question: if this is what happens to one of the most important human rights in the breach, what do rights really represent?

3. Gender Oppression

Tragically, women are most often the ones whose human rights are violated. Even in the late 20th century, the rape of women continues to be used as an instrument of armed conflict. Women and children make up a large majority of the world's refugees. And when women are excluded from the political process, they become even more vulnerable to abuse. I believe that now, on the eve of a new millennium, it is time to break our silence. It is time for us to say here in Beijing, and the world to hear, that it is no longer acceptable to discuss women's rights as separate from human rights.¹⁴⁹

No area of human rights law and activism captures the drama and insubstantiality of the UDHR regime better than women's rights. Over the past sixty plus years, a plethora of international agreements, declarations, resolutions, and the like—backed by a network of organizations and

145. See HUMAN RIGHTS WATCH, *Getting Away With Torture*, *supra* note 144; Burns & Alan Cowell, *supra* 144; Norland, *supra* note 144.

146. See Editorial, *Malign Neglect*, N.Y. TIMES, May 21, 2011, at WK7, available at http://www.nytimes.com/2011/05/22/opinion/22sun1.html?_r=1.

147. Kenneth Roth, Op., *The Books Aren't Closed on Bush's Torture Policy*, WASH. POST, July 11, 2011, at A17, available at http://www.washingtonpost.com/opinions/the-books-arent-closed-on-bushs-torture-policy/2011/07/11/gIQA3v0e9H_story.html. Kenneth Roth, head of Human Rights Watch, has criticized the Obama administration for refusing to hold those responsible for torture during the Bush administration accountable. He argues that "Obama's deliberate suppression of this shameful past is wrong. It reflects bad policy, a dereliction of presidential responsibilities and a continuing disregard for international law. It treats torture as a policy option—one that can be turned on or off at presidential will." *Id.*

148. See *A Guide to the Memos on Torture*, N.Y. TIMES, <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (last visited on Jan. 22, 2012); *Accountability for Torture*, ACLU, www.aclu.org/accountability/released.html (last visited Jan. 22, 2012).

149. Hillary Rodham Clinton, First Lady of the U.S., Remarks to the U.N. 4th World Conference on Women Plenary Session (Sept. 5, 1995).

seemingly perpetual gatherings—affirmed and reaffirmed the fundamental equality of men and women.¹⁵⁰ “Women’s rights are human rights” is a mantra repeated often.¹⁵¹ Beginning with the UN Charter itself, the formal edifice in support of women’s equality extends through the UDHR and the two covenants.¹⁵² The regime’s structural defenses culminated in the development of the comprehensive and innovative Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).¹⁵³

In spite of all this and the innumerable international conferences and pronouncements on the subject, the fact remains that gender inequality, the oppression of women, and violence against women are the most common and consistent features of the global society today.¹⁵⁴ This reality unites governments and non-governmental authorities, traditional as well as popular cultures, Left and Right, across the world. Indications of the acceptance of the formal and operational inequality of women abound whether the issue is the fate of women and girls under the Taliban in Afghanistan, religious hierarchies in general, sex-selective abortions or infanticide of baby girls, domestic violence in every society, political representation, or pornography.¹⁵⁵ The most striking aspects of this reality are not the insistent routine denunciations of gender discrimina-

150. See ICCPR, *supra* note 72, arts. 2(1), 3; ICESCR, *supra* note 72, arts. 2(2), 3; UDHR, *supra* note 2, art. 2.

151. See, e.g., Clinton, *supra* note 149.

152. See U.N. Charter art. 1, para. 3; see, e.g., ICCPR, *supra* note 72, at 49–50.

153. The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW].

154. See STEINER ET AL., *supra* note 8, at 175–85.

155. See, e.g., Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 19, Violence against Women*, U.N. Doc. A/47/38, 11th Sess. (1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; see also U.S. DEP’T OF STATE, THE TALIBAN’S WAR AGAINST WOMEN (2001), available at <http://www.state.gov/j/drl/rls/6185.htm> (discussing how the Taliban restricts the rights of women in Afghanistan under its repressive regime); Rebecca Conway, *Rape, Mutilation: Pakistan’s Tribal Justice for Women*, REUTERS (Aug. 12, 2011, 6:08 PM), <http://www.reuters.com/article/2011/08/12/us-pakistan-women-idUSTRE77B63I20110812> (discussing how women are killed or disfigured due to honor killings or local tribal justice); Muneeza Naqvi, *Despite Rapid Growth, India Let Its Girls Die*, ASSOC. PRESS, May 4, 2011, available at <http://abcnews.go.com/International/wireStory?id=13524008#.TzgS4Rx2hNo> (discussing how in India girls are less favored than boys and sometimes selective abortion occurs once the child’s sex is found).

tion or violence against women, nor stirring calls for action. It is the broad-based acceptance or “normalization” of this state of affairs.¹⁵⁶

Wars are not authorized by the UN Security Council to protect women; governments are not expelled and diplomatic recognition is not withdrawn for the systematic abuse of women. Female heads of state or heads of government, except for the few royals, are a rarity.¹⁵⁷ No major international financial institution had a woman at its head until 2011 when Christine Lagarde of France was selected in an emergency to head the International Monetary Fund, replacing a male executive director facing serious sexual violence charges.¹⁵⁸ Major domestic and international business entities, as well as non-profits, are still largely controlled by males.¹⁵⁹ Executive, legislative, and judicial institutions worldwide remain the preserve of men across the globe.¹⁶⁰ Women are affirmatively excluded from power throughout the world, and efforts to include them must struggle to overcome entrenched legal, political, economic, and social impediments.¹⁶¹

156. As such the following statement of stunning horror can be made without hope of contradiction: “Even the government has accepted that it has failed to save millions of little girls.” Naqvi, *supra* note 155. The Indian Home Secretary, Gopal Krishna Pillai, confirmed the truth of the charge: “Whatever measures that have been put in over the last 40 years have not had any impact.” *Id.* A recent article about violence against women in Pakistan noted that the Human Rights Commission of Pakistan claimed almost 800 women were murdered through “honor killings” and about 2900 women were victims of rape. Conway, *supra* note 155.

157. STEINER ET AL., *supra* note 8, at 179–83; Andrew Reynolds, *Women in the Legislatures and Executives of the World: Knocking at the Highest Glass Ceiling*, 51 *WORLD POL.* 547, 558 (1999).

158. See Lagarde, *Taking Over IMF, Vows to Diversify Board*, *ECON. TIMES*, (July 7, 2011, 6:47 AM), <http://economictimes.indiatimes.com/news/politics/nation/lagarde-taking-over-imf-vows-to-diversify-board/articleshow/9132487.cms>; see also John Eligon, *Judge Denies Bail to I.M.F. Chief in Sexual Assault Case*, *N.Y. TIMES*, May 16, 2011, at A1, available at <http://www.nytimes.com/2011/05/17/nyregion/imf-chief-is-held-without-bail.html?pagewanted=all> (discussing the former head of the I.M.F. facing sexual assault charges).

159. Nancy J. Adler, *Global Leadership: Women Leaders*, 37 *MGMT. INT'L REV.* 171, 171–75 (1997), available at <http://www.jstor.org/pss/40228426>.

160. See STEINER ET AL., *supra* note 8, at 179–83; Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 23, Women in Political and Public Life*, U.N. Doc. A/52/38, 16th Sess. (1997) [hereinafter *General Recommendation No. 23*], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23>.

161. See *General Recommendation No. 23, supra* note 160, paras. 20–23.

CEDAW was an innovative response to pervasive gender discrimination and oppression that has had only very limited positive results.¹⁶² CEDAW properly recognized the confluence of social, economic, and political forces that act publicly and privately to maintain the structures and processes of oppression.¹⁶³ The convention demolished the civil-political and social-economic divides and challenged the private-public dichotomy.¹⁶⁴ Its blunt, broad-based, and comprehensive approach could be seen as a capstone of rights regimentation, making it the most comprehensive substantive extension of liberal internationalism. CEDAW is also one of the most widely ratified human rights treaties, as well as the one with the most reservations.¹⁶⁵ Its ineffectiveness is tragic and con-

162. CEDAW, *supra* note 153, pmb1. “On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the UN General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it.” *Id.* The Convention had 187 parties as of August 2011. The United States is one of seven countries that is not a party to CEDAW. *Id.*; see Mark Leon Goldberg, *CEDAW in the Senate*, U.N. DISPATCH (Nov. 18, 2010), <http://www.undispatch.com/cedaw-in-the-senate> (stating that the U.S. has signed CEDAW but the Senate has not ratified it); see also Darren Rosenblum, *What’s Wrong With “Women’s Rights,” and Why the US Should Ratify CEDAW Anyway*, FEMINIST LAW PROFESSORS BLOG (Nov. 30, 2010), <http://www.feministlawprofessors.com/2010/11>.

163. See CEDAW, *supra* note 153, art. 1.

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Id.

States Parties shall take in all fields, in particular in the political, social, economic[,] and cultural fields, all appropriate measures, including legislation, to [ensure] the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

See also *id.* art. 3.

164. See Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dollmeyer ed., 1993).

165. See, e.g., Declarations, Reservations and Objections to CEDAW, Kingdom of Saudi Arabia’s Reservations (Oct. 2000), available at http://www.bayefsky.com/html/saudiarabia_t2_cedaw.php.

1. In case of contradiction between any term of the Convention and the norms of [I]slamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.

firms the limited utility of this approach.¹⁶⁶ The CEDAW Committee may be more passionate and creative in its responses but it has been just as ineffectual as all the other institutions created to promote the illusion of rights progress under the banner of liberal internationalism. As much as the substance and processes of CEDAW capture the dynamic of oppression between men and women, it still only grazes the core issue of whether it is possible to change the trajectory of misery and violence in the world without challenging liberal internationalism's stranglehold on thought and action.

B. Economic Inequality

We live in a world of unprecedented opulence of a kind that would have been hard even to imagine a century or two ago. There have also been remarkable changes beyond the economic sphere. The twentieth century has established democratic and participatory governance as the preeminent model of political organization. Concepts of human rights and political liberty are now very much a part of the prevailing rhetoric . . . [a]nd yet we also live in a world with remarkable deprivation, destitution[,] and oppression.¹⁶⁷

The economic and social rights promises of the UDHR and the ICESCR are not close to being realized after six decades of human rights regimentation.¹⁶⁸ The passage of time has not enhanced the structure and processes envisioned by the UDHR in the sphere of economic and social rights. For one thing, the efforts to concretize these aspirations have not been embraced by most governmental authorities, the work of many in

2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.

Id.

166. See, e.g., Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/National Black Women in the United States*, 76 OR. L. REV. 567, 612–16 (1997); Sifa Mtango, *A State of Oppression? Women's Rights in Saudi Arabia*, 5 ASIA-PAC. J. HUM. RTS. & L. 49, 65–67 (2004); Karen Musalo, Elisabeth Pellegrin & S. Shawn Roberts, *Crimes without Punishment: Violence against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 191–92 (2010); Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 623–25 (2002).

167. SEN, DEVELOPMENT AS FREEDOM, *supra* note 54, at xi.

168. See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 762–64 (2005) [hereinafter Alston, *Ships Passing*]; Pogge, *supra* note 54, at 311.

civil society notwithstanding.¹⁶⁹ In many societies where such mandates have received quasi-legal acceptance, there has been little evidence of progress.¹⁷⁰ In those societies where there has been measurable progress toward economic security, governments are reluctant to give such progress the security of legally binding commitment.¹⁷¹

In recognition of the persistence of misery after more than six decades of rights regimentation, world authorities under the auspices of the UN embarked on a new direction in 2000. In September 2000, world leaders proclaimed the MDGs at the UN Millennium Summit attended by 189 heads of state and government.¹⁷² While employing the solemn language of a compact among nations (but staying within the confines of a non-legally binding declaration), the MDGs represent a final concession that the language and processes of law suffusing the rights discourse have been exhausted and a return to politics, or the explicitly political, is necessary.¹⁷³

1. Capturing the Landscape of Misery

Desperate women bind their stomachs to deaden hunger pains, eating next to nothing so children can be fed.¹⁷⁴

To get a full picture of the failure of the liberal international approach in the economic and social arena, it is important to review the enormity of socioeconomic deprivation afflicting the world today. There is no bet-

169. See OHCHR Statement, *supra* note 87, annex III, paras. 5, 7; Alston, *Ships Passing*, *supra* note 168, at 755.

170. See *Indian States Have More Poor Than 26 Poorest African Nations*, TIMES INDIA (July 12, 2010, 4:18 PM), http://articles.timesofindia.indiatimes.com/2010-07-12/india/28276383_1_measure-ophi-multidimensional-poverty-index; see also Michael R. Carter & Julian May, *One Kind of Freedom: Poverty Dynamics in Post-Apartheid South Africa* 26 (Univ. of Wis. Working Paper No. 427, 1999), available at http://pdf.usaid.gov/pdf_docs/PNACL429.pdf.

171. Robert J. Samuelson, Op., *The Welfare State Wins the Budget War*, WASH. POST (Aug. 7, 2012), http://www.washingtonpost.com/opinions/the-welfare-state-wins-this-budget-war/2011/08/07/gIQA4fuE1I_story.html (discussing the uncertainty regarding social security, welfare, and other public programs in the U.S.'s most recent budget debates).

172. Millennium Declaration, *supra* note 28, para. 1.

173. The MDGs comprise these eight goals to be achieved by 2015: Eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development. *Id.* at 1–8.

174. David Randall & Nada Issa, *A Grotesque Symbol of Starving Africa*, INDEP. (July 17, 2011), <http://www.independent.co.uk/news/world/africa/a-grotesque-symbol-of-starving-africa-2314969.html>.

ter source to begin with than the UN Development Program (“UNDP”).¹⁷⁵ According to the UNDP, “every hour 1200 children die away from the glare of media attention. This is the equivalent of three tsunamis a month, every month.¹⁷⁶ The causes of death will vary, but the overwhelming majority can be traced to a single pathology: poverty.”¹⁷⁷ Unlike the tsunami, the report argues, the pathology of poverty is preventable. “With today’s technology, financial resources and accumulated knowledge, the world has the capacity to overcome extreme deprivation. Yet, as an international community we allow poverty to destroy lives on a scale that dwarfs the impact of the tsunami.”¹⁷⁸

There is an even more telling statistic about global poverty and it is an enduring one: One-fourth of the developing world—about 1.4 billion people—live on the equivalent of less than \$1.25 a day.¹⁷⁹ Another 1.7 billion lived on less than \$1.45 a day¹⁸⁰—at least before the current global economic crisis.¹⁸¹ Indeed, these proportions have been with us now for decades.¹⁸² Boring deeper, we find that the 40 percent of humanity

175. “UNDP is the United Nations’ global development network, an organization advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.” *About Us*, U.N. DEV. PROGRAMME [UNDP], http://www.beta.undp.org/content/undp/en/home/operations/about_us.html (last visited Feb. 12, 2012).

176. A reference to the 2004 Indian Ocean tsunami that killed over 300,000 people, leaving millions homeless.

177. UNDP, HUMAN DEVELOPMENT REPORT 1 (2005), available at <http://hdr.undp.org/en/reports/global/hdr2005/>.

178. *Id.*

179. Shaohua Chen & Martin Ravallion, *The Developing World is Poorer Than We Thought, But No Less Successful in the Fight Against Poverty* 30 (Dev. Research Grp., World Bank, Working Paper No. 4703, 2008); Isabel Ortiz & Matthew Cummins, *Global Inequality: Beyond the Bottom Billion—A Rapid Review of Income Distribution in 141 Countries* 11 (U.N. Children’s Fund, Working Paper, 2011), available at http://www.unicef.org/socialpolicy/files/Global_Inequality_REVISIED_-_5_July.pdf; see generally GLOBAL INEQUALITY: PATTERNS AND EXPLANATIONS 73–96 (David Held & Ayse Kaya eds., 2007).

180. Chen & Ravallion, *supra* note 179, at 30.

181. The focus on the persistence of misery understandably falls on so-called developing societies but the spread of poverty does not stop at the borders of the rich nations. *Set to Drive 53 Million People Into Poverty in 2009*, U.N. NEWS CTR. (Feb. 13, 2009), <http://www.un.org/apps/news/story.asp?NewsID=29897&Cr=financial&Cr1=crisis>; see also Martin Ford, *Could We Have Civil Unrest and Riots in the U.S. as a Result of Extreme Inequality?*, HUFF. POST (July 22, 2011, 12:35 PM), http://www.huffingtonpost.com/martin-ford/could-we-have-civil-unres_b_906478.html.

182. See Robert H. Frank, *Income Inequality Too Big To Ignore*, N.Y. TIMES, Oct. 16, 2010, at BU5, available at <http://www.nytimes.com/2010/10/17/business/17view.html>; Anup Shah, *Poverty Facts and Stats*, GLOBAL ISSUES (Sept. 20, 2010),

that lives on less than \$2 a day account for only 5 percent of global income, while the richest 10 percent account for 54 percent of global income.¹⁸³ For less than the amounts we have spent on failed money center banks since October 2008 we could have lifted most of those living in abject poverty above that \$1 threshold.¹⁸⁴ Unfortunately, abject poverty has never risen to the definition of a crisis under the liberal internationalist vision.¹⁸⁵ Writing about immense suffering in East Bengal, Peter Singer said, “the decisions and actions of human beings can prevent this kind of suffering. Unfortunately, human beings have not made the necessary decisions.”¹⁸⁶ The material cost to the status quo would be too much. Furthermore, according to UN:

Women bear a disproportionate burden of the world’s poverty. Statistics indicate that women are more likely than men to be poor and at risk of hunger because of the systematic discrimination they face in education, health care, employment[,] and control of assets. Poverty implications are widespread for women, leaving many without even basic rights such as access to clean drinking water, sanitation, medical care and decent employment. Being poor can also mean they have little protection from violence and have no role in decision making.¹⁸⁷

www.globalissues.org/article/26/poverty-facts-and-stats; *2011 World Hunger and Poverty Facts and Statistics*, WORLD HUNGER EDUC. SERV. (Dec. 4, 2011), <http://www.worldhunger.org/articles/Learn/world%20hunger%20facts%202002.htm>.

183. UNDP, *2006 Annual Rep. Global Partnership for Development* 8 (June 2006), available at <http://www.undp.org/publications/annualreport2006/english-report.pdf>; see Jim Cason, *Africa: Nearly Half Sub-Saharan Africa’s Population Live in “Extreme Poverty”*, ALLAFRICA (Apr. 29, 2001), <http://allafrica.com/stories/200104300001.html>. The writer quoted a World Bank Report that placed the number of sub-Saharan Africans living on less than \$1 a day at over 300 million, with expectations that the number will increase by at least 5 million by 2015. See WORLD BANK, *WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY* 5 (2001).

184. *G20: Global Bailout Enough to End World Poverty for 50 Years*, OXFAM (Apr. 1, 2009, 3:05 PM), <http://www.oxfam.org.uk/applications/blogs/pressoffice/2009/04/01/g20-global-bank-bailout-is-enough-to-end-world-poverty-for-50-years/>.

185. See, e.g., PAUL FARMER, *THE USES OF HAITI* 45–58 (1994); Pogge, *supra* note 54, at 311.

186. Peter Singer, *Famine, Affluence and Morality*, in 1 PHIL. & PUB. AFF. 229, 229 (1972).

187. *Women, Poverty & Economics*, U.N. WOMEN, http://www.unifem.org/gender_issues/women_poverty_economics (last visited on Jan. 16, 2012). The report adds that:

According to some estimates, women represent 70 percent of the world’s poor. They are often paid less than men for their work, with the average wage gap in 2008 being 17 percent. Women face persistent discrimination when they apply

According to economist Amartya Sen, women are impacted by pervasive discrimination involving a complex combination of socioeconomic factors.¹⁸⁸ Sen identifies an excess mortality of women in a region ranging from North Africa to Asia, traceable to discrimination in terms of medical care, food, and social services.¹⁸⁹ He argues that to overcome such pervasive discrimination, the economic and social value of women should be elevated.¹⁹⁰ Education, gainful work outside the home, and property rights meaning a greater share of family economic resources are essential, according to Sen.¹⁹¹

2. The MDGs as a Recognition of the Limits of Rights Regimentation in the Struggle against Misery

Faced with the persistence of misery and unwilling to acknowledge the brutal reality that power does not concede to the demands of the weak even when such demands are wrapped up in legalism, world leaders compromised on further deception. MDGs' September 2000 solution featured eight goals and eighteen quantifiable targets to be measured by sixty indicators.¹⁹² Such precision allows faith to arrest and convict experience.

Human rights advocates have long tried to elevate socioeconomic issues to the same stature as civil and political issues in the discourse of human rights with very little success.¹⁹³ The MDGs represent capitulation on this front. The Millennium Declaration marked the abandoning of pretences that the socioeconomic provisions of the UDHR and the ICESCR could be obtained through the force of law as traditionally conceived.¹⁹⁴ Not so, say its promoters.¹⁹⁵ Advocates argue that the MDGs

for credit for business or self-employment and are often concentrated in insecure, unsafe[,] and low-wage work. Eight out of ten women workers are considered to be in vulnerable employment in sub-Saharan Africa and South Asia, with global economic changes taking a huge toll on their livelihoods.

Id.; see also STEINER ET AL., *supra* note 8, at 179 (“According to virtually every indicator of social well-being and status . . . women fare significantly and sometimes dramatically worse than men.”).

188. See Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS (Dec. 20, 1990), <http://www.nybooks.com/articles/archives/1990/dec/20/more-than-100-million-women-are-missing/>.

189. *Id.*

190. *Id.*

191. *Id.*

192. See U.N. MILLENNIUM PROJECT, *supra* note 59, at xviii–xix.

193. See Pogge, *supra* note 54, at 311.

194. Of course, the UN bureaucracy, among others, tries gamely to obscure this point: “Governments that pursue development hand-in-hand with human rights stand a better

are consistent with the rights outlined in the UDHR.¹⁹⁶ But the approach to development contained in the MDGs, couched in the political terminology of goals, recognized the limitations of the rights approach. The implications of this shift from rights to goals, as such from law to politics, should not be glossed over. It is important to recognize when a battle has been lost.

The critical move away from the rhetoric of binding obligations is contained in the second paragraph of the Millennium Declaration:

We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.¹⁹⁷

The collective responsibility to the world, even when cast as a “duty . . . to all the world's people” is still separate and distinct from their more specific and politically ensured national responsibilities.¹⁹⁸ The MDGs obligations are cut from the same cloth as those stated in the older economic, social, and cultural rights agreements. Of course, in the hierarchy of liberal internationalist discourse, the latter were not in any case the Holy Grail of rights.

Leave it to the UN to finesse the surrender of rights: “[T]he Millennium Development Goals and human rights have ultimately a common

chance of reaching the Millennium Development Goals (‘MDGs’).” *Human Rights and MDGs in Practice*, OHCHR (Aug. 25, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/HRAndMDGsInPractice.aspx>. By incorporating human rights principles into national development strategies and fulfilling their human rights obligations, governments are more likely to be successful in meeting the MDGs (to reduce poverty, hunger and disease; promote gender equality, education, environmental sustainability; and global partnerships) and in realizing the U.N. Charter’s vision of a more equal and just world.” *Human Rights are the Basis for Achieving the MDGs*, OHCHR, <http://www.ohchr.org/EN/Issues/MDG/Pages/FoundationforEngagement.aspx> (last visited Jan. 23, 2011); see also Salil Shetty: *Human Rights Are Key To MDG Success*, AMNESTY INT’L (Sept. 23, 2010), <http://www.amnesty.org/en/news-and-updates/salil-shetty-human-rights-are-key-mdg-success-2010-09-23>.

195. See Tarja Halonen, *Our Aspirations Must Become Achievements: From the Millennium Summit to 2015*, 44 U.N. CHRON. 10, 10 (2007), available at <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2007/themdgsareweontrack/ouraspirationsmustbecomeachievementsfromthemillenniumsummitto2015>.

196. See Salil Shetty: *Human Rights Are Key To MDG Success*, *supra* note 194; Halonen, *supra* note 195, at 10.

197. Millennium Declaration, *supra* note 28, para. 2.

198. *Id.*

objective” in preserving and protecting human dignity.¹⁹⁹ The UN recognized that the MDGs “emanate from the political commitments made by leaders.”²⁰⁰ The turn to goals was a capitulation to power politics and what was seen as the durability, inevitability, and triumph of liberal internationalism and its neo-liberal economic policies. The MDGs were adopted at a time when economic globalization was generating substantial wealth without significant impact on the portion of the world existing in abject poverty.²⁰¹ In that context, it may have been expedient to gain political support for sustained global efforts to tackle misery by reducing the legal content of demands by have-nots on the haves. As the UN has acknowledged, “human rights have not yet played a significant role in supporting and influencing MDG-related activities Some voices have criticized the MDGs themselves, questioning whether human rights standards have been lowered.”²⁰² It is actually a positive development that the UN was forced to defend its MDGs approach by admitting “the harsh reality . . . that in spite of the best human rights norms and laws, mass poverty and deprivation continue to plague the world.”²⁰³

Unfortunately, judged from its mid-point achievements, the MDGs and their concession to realism have fared no better.²⁰⁴ The international human rights and development network now claims, more than a decade into the MDGs initiative, that the large disparities that continue within and across countries constitute an emergency.²⁰⁵ Development emergen-

199. See OHCHR, *The Millennium Development Goals and Human Rights* 7 (2008) [hereinafter OHCHR, *The Millennium Development Goals*], available at http://www.un-kampagne.de/fileadmin/downloads/news3/final_human_rights_and_mdgs_brochure.pdf.

200. *Id.* at 1.

201. See Ortiz & Cummins, *supra* note 179, at 1–11; World Bank, *Economic Growth in the 1990s: Learning From a Decade of Reform* 7–10 (2005).

202. OHCHR, *The Millennium Development Goals*, *supra* note 199, at 1.

203. *Id.* at 2; see Marina Ponti, *The Millennium Development Goals and Human Rights*, U.N. MILLENNIUM CAMPAIGN, <http://www.unspecial.org/UNS679/t27.html> (last visited Aug. 8, 2011). See generally GRAHAM HANCOCK, *LORDS OF POVERTY: THE POWER, PRESTIGE, AND CORRUPTION OF THE INTERNATIONAL AID BUSINESS* (1989) for a well-delivered attack on the international or foreign aid bureaucracy whose members have done very well for themselves in the name of trying to do good for the world’s needy.

204. See Asha-Rose Migiro, *The Importance of the MDGs: The United Nations Leadership in Development*, U.N. CHRON. (Jan. 12, 2007), http://www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/issues2007/the_mdgsareweon-track/pid/4860?ctnscroll_articleContainerList=1_0&ctnlistpagination_articleContainerList=true.

205. See World Bank, *Global Monitoring Rep. 2009: A Development Emergency* 13–16 (2009); Press Release, U.N. Dep’t. of Pub. Info., Sub-Saharan Africa’s Progress To-

cies have long plagued the world. There is very little evidence to suggest that the explicitly political approach of the MDGs will fare any better than the legal regimentation of the UDHR and its progenies. However, the current global economic crisis will likely weaken political commitments to the MDGs even as it confirms the realities of extreme inequalities built on a vast power differential in the global community.²⁰⁶

The ongoing global financial and economic crises will undoubtedly reduce the commitment and capacity of wealthy nations to the MDGs.²⁰⁷ Poorer nations are likely to sink further down the poverty ladder. It now seems highly unlikely that the modest goals of the MDGs will be met by 2015.²⁰⁸ Furthermore, the failure of the MDG campaign is unlikely to result in a reinvigorated economic and social rights movement. The nations of the “developed world” are now too busy staving off a seemingly unending economic crisis, spending trillions globally just to preserve the current economic model.²⁰⁹ With advanced developing countries like China, Brazil, and India desperately holding onto their recent gains,²¹⁰ they too are not likely to champion a revived rights based approach to promoting human dignity in the economic and social sphere. In fact, many of these advanced developing countries are engaged in economic and trade relations with their less well-off counterparts in the developing world that appear to repeat the history of inequality and exploitation.²¹¹

wards Anti-Poverty Goals is Encouraging but Needs to be Accelerated to Meet 2015 Targets, U.N. Press Release DPI/2517 T (Sept. 2008) [hereinafter U.N. Press Release].

206. See Rania Antonopoulos, *The Current Economic and Financial Crisis: A Gender Perspective* 4 (UNDP, Working Paper No. 562, 2009), available at http://www.levyinstitute.org/pubs/wp_562.pdf; U.N. Press Release, *supra* note 205.

207. *Id.*

208. *Sub-Saharan Africa “Not on Track to Meet MDGs by 2015,”* CITIZEN REPORTER (July 8, 2011, 10:39 PM), <http://thecitizen.co.tz/news/4-national-news/12666-sub-saharan-africa-not-on-track-to-meet-mdgs-by-2015.html>.

209. Neil Fullick, *Insight: Debt Relief Replaced With Recession Fear*, REUTERS (Aug. 3, 2011, 4:46 AM) <http://www.reuters.com/article/2011/08/03/us-global-economy-idUSTRE7721L120110803>.

210. See *China’s Economic Growth Slows Further*, TIME (Jan. 16, 2012), <http://www.time.com/time/business/article/0,8599,2104591,00.html>; Michael Schuman, *India vs. China: Whose Economy Is Better?*, TIME (Jan. 28, 2010), <http://www.time.com/time/world/article/0,8599,1957281,00.html>.

211. See U.N. Econ. Comm’n for Latin Am. & the Caribbean [ECLAC], *Foreign Direct Investment in Latin Am. and the Caribbean 2010*, at 47–59 (2011), available at <http://www.eclac.org/publicaciones/xml/0/43290/2011-323-LIEI-WEB.pdf>; Marla Dickerson, *Latin America Lures Investors from India*, L.A. TIMES (June 9, 2007), <http://articles.latimes.com/2007/jun/09/business/fi-mexindia9>; Michael Gerson, Op., *China’s African Investment: Who Benefits?*, WASH. POST (Mar. 28, 2011), http://www.washingtonpost.com/opinions/chinas-african-investments-who-benefits/2011/03/28/AF8G7mqB_story.html; Okwiri Ambooka, *Africa: India and China*

III. WHY THE UDHR FAILED AS A LIBERAL INTERNATIONALIST ENTERPRISE

The central liberal internationalist premise is the value of a rules-based international order that restrains powerful states and thereby reassures their enemies and allies alike and allows weaker states to have sufficient voice in the system that they will not choose to exit.²¹²

In its essence, liberal internationalism represents the idea that “the cause of the United States [or of the Western world] is the cause of humanity.”²¹³ Quite often, it takes the form that the United States is the last best hope of humanity and the world demands America’s leadership. In this vein, this Article describes the UDHR as a liberal internationalist project. This characterization might offend proponents of the UDHR who could interpret it as a normative evaluation. However, the liberal internationalist heritage of the UDHR should not of itself affect an assessment of its contributions to human dignity and prosperity. To the degree that this heritage interferes with or negates efforts to tackle the reality of human violence and misery, it should be faulted and exposed.

The development of human rights as the preferred plane of contention was a critical move in support of liberal internationalist efforts to maintain power and constrain the development of post war challenges to its preeminence.²¹⁴ The rhetoric of rights was thus employed in service of politics or politics by other means.²¹⁵ However, hidden within the soft soporific rhetoric of rights rooted in the law was a tough concerted political struggle to maintain Western influence and dominance.²¹⁶ The adop-

Lead New Investment In Africa, ALLAFRICA (Oct. 29, 2011), <http://allafrica.com/stories/201110311578.html>; Deborah Brautigam, *Africa’s Eastern Promise—What the West Can Learn From Chinese Investment In Africa*, FOREIGN AFF. (Jan. 5, 2010), <http://www.foreignaffairs.com/articles/65916/deborah-brautigam/africa%E2%80%99s-eastern-promise>; Jorge Heine & R. Viswanathan, *The Other BRIC In Latin America: India*, AM. Q., Spring 2011, <http://americasquarterly.org/node/2422>; Amartya Sen, *Quality of Life: India vs. China*, N.Y. REV. BOOKS (May 12, 2011), <http://www.nybooks.com/articles/archives/2011/may/12/quality-life-india-vs-china/?pagination=false>.

212. Slaughter, *Debating Liberal Internationalism*, *supra* note 1; see Lind, *supra* note 19.

213. Rhieff, *Debating Liberal Internationalism*, *supra* note 1.

214. See Yglesias, *Debating Liberal Internationalism*, *supra* note 1; Muzaffar, *supra* note 21, at 414–18.

215. Muzaffar, *supra* note 21, at 414–18.

216. A classic example here is Western intervention in the Congo that resulted in the brutal execution of Congolese nationalist leader Patrice Lumumba and the rise to power of one of Africa’s most despicable despots, Mobutu Sese Seko. See LUDO DE WITTE, THE

tion of the MDGs framework has helped to remove the mask of rights and to free post-World War II politics from its liberal internationalist straight-jacket.

Why has the rights regimentation project of liberal internationalism failed so comprehensively? In this section, this Article places the UDHR and post-World War II human rights discourse squarely within the specific dynamic struggle for power and dominance in the post-war environment and the much broader context of power struggles throughout human history. This Article rejects the liberal internationalist narratives that tell us basically that this time is different, that society has made or is in the process of making the world anew.

In developing this argument, this Article specifically challenges Professor Glendon's interpretation of the Melian Dialogue²¹⁷ to support the contributions and purposes of the UDHR. The era of rights regimentation has not represented a fundamental break from our collective horrid past—from Athenian power politics or history in general. There is no end to history in sight. Rights discourse and regimentation have not and cannot be the foundation for ending violence and misery in our world. A less sentimental perspective would locate the UDHR and its progenies, as well as the MDGs initiative, within the ongoing serious and often deadly business of global political struggles for power and domination. While the rhetoric of rights might be of tactical aid to some in this struggle, it is not salvation. This understanding is essential to the work that needs to be done to make sustained improvement to the lives of the most vulnerable human beings. First comes power. Power rules. Power begets rights (or privileges), however defined. It does not help those at the bottom of global society to suggest that the rules of global human interactions changed fundamentally in the 1940s when they clearly have not.

A. A World Made New? Liberal Internationalist Dreaming

When the Athenian Navy was poised to invade tiny Melos in 416 B.C., the terrified islanders sent emissaries to try to reason with the masters of the sea. The Athenians' scornful rebuff has echoed down the centuries: "You know as well as we do that right, as the world goes, is only

ASSASSINATION OF LUMUMBA 27–45 (Ann Wright & Renée Fenby trans., 2001); Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and its Consequences*, 10 OR. REV. INT'L. L. 327, 327–60 (2008); Christian M. Sernat, *Assassination as a Means of Intervention—The Death of Lumumba—The Rule of Amin*, 10 CASE W. RES. J. INT'L L. 197, 200 (1978). Other examples from Latin America, Europe and Asia abound.

217. See GLENDON, A WORLD MADE NEW, *supra* note 13, at xv–xxi.

in question between equals in power, while the strong do what they can and the weak suffer what they must.”

History has provided plenty of support for that brutal dictum, from the enslavement and the massacre of the Melians to the present day. Yet, centuries later, in the wake of atrocities beyond Greek imagining, the mightiest nations on earth bowed to the demands of smaller countries for recognition of a common standard by which rights and wrongs of every nation's behavior could be measured. The moral terrain of international relations was forever altered . . . when the United Nations adopted the Universal Declaration of Human Rights without a single dissenting vote.²¹⁸

A World Made New, Professor Mary Ann Glendon's seminal work on the UDHR presents a classic liberal internationalist accounting of the human rights project even as it seeks to respond to some of the familiar criticisms of this perspective. Professor Glendon builds her work around two major themes: (1) that the UDHR was the product of a historical process that saw the desires and demands of the weak (poor people within countries and weaker states in the international community) triumph over the interests and concerns of the powerful, and (2) that the UDHR was the product of a diverse group of individuals who, by and large went outside the scope of their official mandates to produce a unifying charter for humanity.²¹⁹ The first represents a substantive rationale for the liberal internationalist project while the second speaks to the process of legitimization. Professor Glendon is wrong on both counts.

Glendon begins by positing the UDHR as a concession by the great powers in the immediate post-World War II period (the United States, the Soviet Union, and the United Kingdom) to demands by the much larger group of weaker nations for a common universal standard to judge state behavior domestically as well as internationally.²²⁰ In her interpretation, the UDHR “marked a new chapter in a history that began with the great charters of humanity's first rights moment in the seventeenth and eighteenth centuries.”²²¹ She argues that the UDHR was a triumph of ideals from the bottom up: from eager weaker nations to reluctant major powers, and from the masses of humanity to the governments of the world.²²² Even when she concedes that the “United States and the Soviet

218. *Id.* at xv.

219. *Id.* at 32–34.

220. *Id.*

221. *Id.* at xvii.

222. *Id.* at 10. Professor Glendon argued in the same vein when she stated that in the planning for the UN, the “Great Powers were not going to take the initiative in making human rights a centerpiece of their post war arrangements.” *Id.*

Union could not resist treating the Declaration as an arsenal of political weapons,²²³ she does so to serve this narrative of the good future triumphing over the bad past.

A World Made New also presents the UDHR as a compromise reached by a diverse group of international actors who, while serving as official representatives of their nations, somehow also embodied the historic common concerns of humanity.²²⁴ In particular, Glendon focuses on the extraordinary leadership of Eleanor Roosevelt, who was tasked by President Truman after the death of President Roosevelt, to lead United States efforts to create the world's first comprehensive human rights document.²²⁵ Glendon portrays her in essence as the leader of a small but diverse band of humanitarians who may be dubbed "internationalistas."²²⁶ In her account, these representatives of the cosmopolitan elite led a battle to salvage the hopes of humanity from the dark past of power politics.²²⁷

Glendon's work is an important chronicle of the contributions of diverse extraordinary individuals under the leadership of a truly unique woman. These dedicated persons strived to address vital questions of how humans relate to each other and why we have so readily perpetrated atrocities and tolerated misery in our midst.²²⁸ However, the work did not do sufficient justice to the centrality of Western influences in the process and to the fundamental constraints and weaknesses of the whole enterprise. In brief, Eleanor Roosevelt and the other able negotiators and drafters had to work within parameters of cosmopolitan tinkering prescribed by the governments that sent them to the conference.²²⁹ Their final product had to meet the interests and expectations of their respective governments.²³⁰

The constraints upon the delegates were especially significant as for all practical purposes the Cold War between East and West had begun and the schism was rapidly growing.²³¹ Recall Winston Churchill's famed

223. *Id.* at xviii.

224. *Id.*; see also Glendon, *Drafting of the UDHR*, *supra* note 40, at 251; Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1158 (1998) [hereinafter Glendon, *Knowing the UDHR*].

225. See GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 21–34.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 31. A recommendation that "members of the permanent Human Rights Commission should be named by the UN on the basis of their individual qualifications, rather than appointed by member states," was rejected. *Id.*

230. *Id.* at 27–32.

231. See, e.g., GEORGE KENNAN, *MEMOIRS, 1925–1950*, at 547–59 (1967).

1946 “Iron Curtain” speech in which he cast the Anglo-American alliance as the foundation for liberty.²³² That speech elicited a sharp response from the Soviet Union and marked a wholesale return to the past.²³³ Indeed, it should not be forgotten that the Berlin blockade was occurring even as the UDHR was being adopted and that apartheid in South Africa was officially established in 1948, the year of the UDHR’s adoption.²³⁴ These events alone should clue us as to the place of the rights enterprise within the whole schema of ongoing and rapidly deteriorating global power and politics. The point is not only that one side of the East-West divide never bought into the rhetoric of legally-mediated rights, but that even those that committed to advancing such a vision had a more important war to fight and win.

Glendon’s work also emphasizes the diverse background of key players in the drafting of the UDHR in order to make the case that the results of the process legitimately represented the perspectives and interests of humanity as a whole.²³⁵ She brings to light critical advocacy and leadership roles played by delegates from less powerful Western countries like Australia and Canada, as well as emerging Third World countries such as Lebanon and the Philippines.²³⁶ This perspective is not unimportant, yet should only be taken so far. These individuals represented important and legitimate perspectives but it must be understood that their advocacy was in the service of political positions and interests within their communi-

In summary, we have here a political force committed fanatically to the belief that with U.S. there can be no permanent *modus vivendi*, that it is desirable and necessary that the internal harmony of our society be disrupted, our traditional way of life be destroyed, the international authority of our state be broken, if Soviet power is to be secure. This political force has complete power of disposition over energies of one of the world’s greatest peoples and resources of the world’s richest national territory, and is borne along by deep and powerful currents of Russian nationalism.

Id. at 557.

232. Winston Churchill, *Sinews of Peace Address at Westminster College* (Mar. 5, 1946).

233. See Joseph Stalin, *Reply to Churchill* (Mar. 14, 1946).

234. Thio Li-ann, *The Universal Declaration of Human Rights at 60: Universality, Indivisibility and the Three Generations of Human Rights*, 21 *SING. ACAD. L.J.* 293, 296–97 (2009).

235. Glendon, *Knowing the UDHR*, *supra* note 224, at 1157–58.

236. Important actors like Charles Malik from Lebanon, Carlos Romulo from the Philippines, Hernan Santa Cruz of Chile, and John Humphrey from Canada joined Roosevelt and other representatives from major powers to hash out a compromise that was to become the foundation of the modern human rights movement. GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 31–45.

ties. These individuals were engaged in promoting political visions that were by no means uncontested. Their interests were aligned with the liberal internationalist vision and adopting the rhetoric of rights was only the beginning of their struggles for influence and power.²³⁷ It cannot be a surprise that once in power, many of those who had employed rights rhetoric and processes to gain power held on with vengeance and had little difficulty practicing violence or ignoring misery.²³⁸ They did not buy their own rhetoric. That was left to those outside trying to get in.

Glendon's narrative serves an important function in liberal internationalist advocacy. Its principal objective is to make the Western perspective the global cause as if ordained by nature or god. As her text demonstrates, the UDHR was a Western initiative.²³⁹ To be more accurate, it was a Western cosmopolitan initiative that was promoted by people, not all of whom Westerners by birth but certainly were so by heritage or interests.²⁴⁰ This is not to suggest that the ideas or the vision projected by the UDHR were uniformly approved in all quarters of Western society or categorically dismissed outside Western society. Nor does this suggest that its origin in liberal internationalism should disqualify the document and its progenies from being accepted as a worthy enterprise or accomplishment of humanity.

It is necessary to recognize and appreciate its origins as ideology in order to better explain both its promise and limitations.²⁴¹ By recognizing the UDHR as emanating principally from liberal internationalist imagination, we could, for example, choose to do the hard work of explaining that if we are to realize many of its substantive goals, some of the material privileges of Western society may have to be reduced. Or recogniz-

237. See generally DAVIDSON, *supra* note 47, at 8–46; MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 3–34 (1996); ALI A. MAZRUI & MICHAEL TIDY, *NATIONALISM AND NEW STATES IN AFRICA* (1984); Patrick Chabal, *The African Crisis: Context and Interpretation*, in *POSTCOLONIAL IDENTITIES IN AFRICA* 29, 47–49 (Richard Werbner & Terence Ranger eds., 1996); Makau Mutua, *What Does Kenya's Political Class Excel At?*, *SUNDAY NATION*, Jan. 25, 2009, at 15 (tracing Kenya's political crisis all the way back to Kenya's first post-independence administration).

238. BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATIONS-STATE* 162–65, 207–08 (1992); Hafner-Burton & Tsutsui, *supra* note 140, at 407–15; Lennox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime under International Law*, 1 *RUTGERS RACE & L. REV.* 231, 262–73 (1999).

239. GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 33–45; see also Mutua, *Ideology of Human Rights*, *supra* note 21, at 646–52; Muzaffar, *supra* note 21, at 414–18.

240. GLENDON, *A WORLD MADE NEW*, *supra* note 13, at 33–45.

241. See MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 1, 3 (2002).

ing its deeply political past might allow those who still care about its substantive goals sufficient flexibility to build common cause with others. We are not talking about religious faith here. We are engaged in political struggles, hoping for concrete outcomes that could move the lot of the least of us from perpetual and terrifying misery into tolerable subsistence.

B. Same Old World: The Limits of Liberal Internationalism

Athenians: “[W]e recommend that you should try to get what is possible for you to get, taking into consideration what we both really think; since you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.”

Melians: “Then in our view (since you force us to leave justice out of account and to confine ourselves to self-interest)—in our view it is at any rate useful that you should not destroy a principle that is to the general good of all men—namely . . . fair play and just dealing.”

Athenians: “What we shall do now is to show you that it is for the good of our own empire that we are here.”

Melians: “And how could it be just as good for us to be the slaves as for you to be the masters?”

Athenians: “You, by giving in, would save yourselves from disaster; we, by not destroying you, would be able to profit from you.”

Melians: “So you would not agree to our being neutral, friends instead of enemies?”

Athenians: “No, because it is not so much your hostility that injures us; it is rather the case that, if we were on friendly terms with you, our subjects would regard that as a sign of weakness in us, whereas your hatred is evidence of our power.”²⁴²

1948 did not change history. The fundamental lessons of the “Melian Dialogue” remain unaltered by time or human experience. Professor Glendon’s interpretation of the core role of the UDHR does not account for its intimate connections to overarching political struggles for power and influence and the imperatives of hegemony.²⁴³ If law is thought of as settled or concretized politics, then the creation of the UDHR in the af-

242. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 358–66 (M.I. Finley, ed., Rex Warner trans., 1954).

243. See, e.g., MOYNIHAN, *supra* note 19, at 160–62.

termath of World War II was a continuation of politics by other means; an effort to settle politics at a point of maximum advantage to Western interests. More specifically, the development of the UDHR allowed proponents at that crucial moment in world history, to try to restructure the terrain of political conflict and ensure hegemony. Undoubtedly, they were interested in reducing the prospects of future wars, especially of the all-consuming globalized carnage variety they had just witnessed. Yet still, they sought to do this by selling a vision of a post war social order that would limit the unpredictability of raw power politics. They turned to the idea of law. The UDHR was a component of this strategy. Recourse to law and legal processes as they conceived it could indeed help to settle some outstanding and emerging disputes. However, and more importantly, it could remove many others from active challenges, especially by newer actors on the world stage.²⁴⁴ This could be seen as an effort to manage complexity—gradually adjusting the international order to deal with the challenges posed by decolonization and the spread of communism.²⁴⁵

This turn to law already had a long history in American international relations. President Theodore Roosevelt promoted global governance after his excursion in Cuba and presidency.²⁴⁶ President Woodrow Wilson labored with mixed success to recreate a world order around the short-lived League of Nations, the unfortunately named Permanent Court of Justice, and the more enduring International Labor Organization.²⁴⁷ The successful conclusion of World War II and the resulting relative superiority of American power provided impetus for a return to this Wilsonian impulse.²⁴⁸ The UDHR was only one of many “Wilsonian” or “Rooseveltian” international social order initiatives.²⁴⁹ The Nuremberg trials, the Genocide Convention, the UN, the World Bank, the IMF, and the

244. As the demands for independence from colonial rule and for a New International Economic Order showed, the strategy never received legitimation at the time. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 2–3 (Richard Philcox trans., 1963); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 26–28 (1974); Declaration on the Establishment of a New International Economic Order, *supra* note 67, paras. 1–3; Bedjaoui, *supra* note 67, at 178–83.

245. See KENNAN, *supra* note 231, at 547–59.

246. See MOYNIHAN, *supra* note 19, at 1–2, 33–54; *Roosevelt Drafts League of Nations*, N.Y. TIMES (Dec. 14, 1918), <http://query.nytimes.com/mem/archive-free/pdf?res=F40F17FF385D147A93C6A81789D95F4C8185F9>.

247. MOYNIHAN, *supra* note 19, at 33–68.

248. See *generally id.*; JAMES MACGREGOR BURNS, *ROOSEVELT: SOLDIER OF FREEDOM 1940–1945*, at 604, 607–09 (1971); DAVID TRAXEL, *1898: THE BIRTH OF THE AMERICAN CENTURY* 319 (1998).

249. MOYNIHAN, *supra* note 19, at 33–68.

GATT are other prominent examples of initiatives to manage complexity, restrain challenges, and maintain western superiority.²⁵⁰

The language of law, including the promotion of legal standards and the creation of legal structures, was sold as essential to prevent future destructive conflicts within and across national boundaries. The Chinese revolution of 1949 and the Cuban revolution of 1959 epitomized the sort of change that was alarming and disfavored.²⁵¹ Transforming a raw and dynamic political order convulsing with brutal violence into a more stable legal order was clearly in the interests of the United States and its allies.²⁵² For one thing, it ratified the conduct and outcome of the war that had been conducted with exceptional brutality.²⁵³ For another, it would confirm their superior position in the emerging post war political order. Law helped to coat the Western world's actions and policies with timeless righteousness.

This move toward international legal regimentation also had the added benefit of reinterpreting history, bringing to fore not necessarily specific aspects of the past (whether slavery, colonization, Manifest Destiny, or imperialism), but the generalized antiseptic idea of the West as a league nurtured and guided by the ideals founded in documents such as the

250. *Id.*; see generally THE UNITED NATIONS AND A JUST WORLD ORDER, *supra* note 64, at 356–64. On economic globalization and the history and role of the World Bank, the IMF and the World Trade Organization, see JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 10–13 (2002).

251. Alistair Cooke, *Castro In Control Of Cuba*, GUARDIAN (Jan. 3, 1959), <http://century.guardian.co.uk/1950-1959/Story/0,,105498,00.html> (“The Liberals among the South Americans in the United Nations are toasting the great day and calculating the present arithmetic of tyranny in Latin America. The present score seems to be, as one man put it, ‘four down and four to go.’”); Satya J. Gabriel, *Capitalism, Socialism, and the 1949 Chinese Revolution: What Was The Cold War All About?*, CHINA ESSAY SER. (Aug. 1998), <http://www.mtholyoke.edu/courses/sgabriel/economics/china-essays/1.html>; *The Cuban Revolution at 50: Heroic Myth and Prosaic Failure*, ECONOMIST (Jan. 30, 2009), <http://www.economist.com/node/12851254>.

252. This was the project that motivated President Wilson after World War I and it continued with more success after World War II. The human rights project was grafted on to the security architecture represented by the United Nations and the economic structures promoted by the emerging international economic institutions. See HARDT & NEGRI, *supra* note 22, at 4–19; see also ERIC J. HOBBSBAWM, ON EMPIRE: AMERICAN, WAR, AND GLOBAL SUPREMACY 30–35 (2008).

253. See Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/236, at 188 (Dec. 11, 1946) (directing “the Committee on the codification of international law established by the General Assembly . . . to treat as a matter of primary importance . . . the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.”).

Magna Carta, the French Declaration of the Rights of Man, the American Declaration of Independence, and the United States Constitution.²⁵⁴

This idea of law also paved a very narrow and bounded pathway to the future, limiting possibilities for changing the new post-war international order. The rhetoric of law as the acceptable path through the post war environment—a future where conflicts would be mediated by objective international legal standards rather than recourse to war—was also attractive to some outside the West.²⁵⁵ Some leaders of relatively weaker nations and many seeking emancipation from foreign domination, including some not aligned with the United States, saw possibilities of a better deal in a world with clearer international structures and more binding rules of operation.²⁵⁶ They attached themselves to the rhetoric.²⁵⁷

The principal adversaries of the West, the Soviet Union and China, interpreted the turn to law as fundamentally the continuation of power politics by other means and they acted accordingly.²⁵⁸ They could not have shared Glendon's optimism. Interestingly, some in Britain, the United States' main ally, saw the promotion of law in this context as soft-headed but could not afford sharp differences with the United States.²⁵⁹

Left to the whims and caprices of governments, politicians, bureaucrats, as well as emerging multinational corporate interests, the UDHR would not likely have attained any significant mark in human affairs. Governments and their functionaries understood its limits and made sure that it was not a legally binding document under international law by adopting it as a declaration.²⁶⁰ The multinational corporations ranging the world in constant search for commodities that fueled the comfort of the emerging post-war middle class, couldn't care less.²⁶¹ Indeed, the reality

254. See HELEN JACKSON ET AL., A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES, at v (1994) (referring to the "sad story" of American treatment of Native Americans); CHALMERS JOHNSON, THE SORROWS OF EMPIRE 2–9 (2004) (discussing a "new American empire" built on military "expropriation of . . . valuable land for bases, extraterritorial status for . . . troops who commit[] crimes," amongst others); PAKENHAM, *supra* note 47, at 15; HUGH THOMAS, THE SLAVE TRADE (1997); TRAXEL, *supra* note 248, at 319–19.

255. See GLENDON, A WORLD MADE NEW, *supra* note 13, at 235–41.

256. *Id.*

257. *Id.*

258. They employed the rhetoric of law and rights as they crushed dissent at home and within their spheres of influence. See Kim, *supra* note 64, at 356–64.

259. Winston S. Churchill, The Council of Europe Address (Aug. 17, 1949).

260. Many legal scholars argue that the UDHR as a whole or at least some of its provisions have attained the force of law as part of customary international law. See, e.g., STEINER ET AL., *supra* note 8, at 137.

261. Anderson, *supra* note 124, at 468–70; Redford & Stephens, *supra* note 129, at 433–62.

of the immediate aftermath of the UDHR was a world filled with escalating violence, tempered only by the lofty rhetoric of the time.²⁶²

Perhaps the fact that much of the evil of what was happening was seen primarily in the context of the Manichean struggle between good and evil, allowed for the sort of revisionist conclusions offered by Professor Glendon. Conceivably, the Cold War provided a pass since those involved were only sort of temporarily deviating from past and future goodness.

It was left largely to civil society to claim and reclaim the vision of the UDHR and to attempt to force feed some substance and truth into its thin outlines. Over the decades, some have pursued its signal purpose to put the dignity and welfare of humanity at the core of the business of governments.²⁶³ Their work and their wailings have served to give testament to the harsh reality of human existence. While important and necessary, their struggles do not constitute progress if the goal was to change things fundamentally for the better.

Whatever measure of success they may claim has been in areas far from those who most need the promises of the UDHR and its progenies. The numerous covenants, conventions, treaties, agreements, protocols, resolutions, and other similar indicia of accomplishments by lawyers and diplomats and activists have not prevented recurring genocide, crimes against humanity, ethnic cleansing, widespread torture, famine, trafficking, and the like from happening. A world of abject poverty, millions of people dying from preventable ills, environmental exploitation and destruction, and unfettered violence remain a well-tolerated part of our global order.²⁶⁴ This is the real legacy of the liberal international sales job.

CONCLUSION

Finally, in many contexts, transforming a harm into a “human rights violation” may be a way of condoning or denying rather than naming and condemning it. A terrible set of events occurs in Bosnia. We could think of it as sin and send in the religious, as illness and send physicians, as politics and send the politicians, as war and send the military. Or we could think of it as a human rights violation and send the law-

262. KENNEDY, *supra* note 47, at 536–40.

263. Today more than 3,500 non-governmental organizations are registered with the United Nations system. *See At Your Service*, U.N. DEP'T OF ECON. & SOC. AFF. NGO BRANCH, <http://csonet.org/> (last visited Feb. 12, 2012).

264. *See generally* THE CASE AGAINST THE GLOBAL ECONOMY 140–50 (Jerry Mander & Edward Goldsmith eds., 2001); STIGLITZ, *supra* note 250, at 10–13.

yers. Doing so can be a way of doing nothing, avoiding responsibility, simultaneously individualizing the harm and denying its specificity.²⁶⁵

To rely on the suggestions of sentiment rather than on the commands of reason is to think of powerful people gradually ceasing to oppress others, or ceasing to countenance the oppression of others, out of mere niceness rather than out of obedience to the moral law. But it is revolting to think that our only hope for a decent society consists in softening the self-satisfied hearts of a leisure class. We want moral progress to burst up from below, rather than waiting patiently upon condescension from the top.²⁶⁶

Professor Kennedy's observations about the role of lawyers and rights discourse points to an understanding of how to help without constraining or foreclosing other possibilities.²⁶⁷ Law does not and should not have hegemony as society seeks to deal with the harsh realities of power—how it is accumulated and wielded—across many tangents, in varieties of forms and processes. It is important to recognize the limits of ideological or other faith based efforts that could easily be manipulated to protect the status quo even when the result is unrelenting violence and misery.

Professor Rorty's suggestion of a politics of pragmatic and purposeful sentimentality over pure reason appears to be a weaker strategy given the enormity of the problems we face. However, it has the virtue of honesty compared to the salvation preached by rights evangelists. It may well be that Melians properly chose not to be enslaved by the Athenians. Yet, their appeal to reason was not an answer to disproportionate power.

Our choices today should not be reduced to either an acceptance of the status quo of misery and violence or a pursuit of the Holy Grail of rights regimentation. Even an appeal to sentiments leaves open possibilities not yet apparent to us.

The situation is dire. The UDHR as a post-World War II liberal internationalist project chronicled human suffering and the timeless struggle to defend human dignity and change the course of history. However, the UDHR rights-based approach has helped to obscure the intimate connections between power, violence, and human rights discourse. It has failed to adequately provide a way to reduce global inequality and resulting human suffering. It has allowed many to pay lip service as the world continues to sink further into the abyss. The more recent, politically-based

265. KENNEDY, *THE DARK SIDES*, *supra* note 20, at 34.

266. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *THE HUMAN RIGHTS READER*, *supra* note 21, at 413; see 3 RICHARD RORTY, *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS* 181–82 (1998).

267. KENNEDY, *THE DARK SIDES*, *supra* note 20, at 34.

MDGs approach confirmed the failure of the rights project but it too has not offered a path out of misery and endemic. The bottom fifth of humanity persist in miserable subsistence, millions continue to traverse the seas and deserts of our globe unwilling to suffer and die quietly, even as thousands of children perish quietly everyday of deprivation. Yet the world continues to tinker around the edges of despair.

The era of rights—rights discourse and rights regimes—ushered by the UDHR helped us to define the problem and the challenges. But that era's fundamental weakness was contained in its foundational purpose—to preserve the core vision and material advantages of liberal internationalists. Rights discourse was an important tool in this endeavor but rights-realization was not its end. Now as the seductive power of rights regimentation is exhausted, the world community must confront the tough political choices that are necessary in order to reduce the power differentials that have sustained global inequality within and across borders. As the decades roll on and the UDHR and similar documents of the era are brought out for periodic veneration, society could take some comfort in the fact that their ideals have continued to find resonance among the oppressed. These documents, however, by and large remind us of what could have been and the enormity of the challenges still facing humanity. Our world was not made new in 1948. It remains still a world of violence and misery.