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HUMAN RIGHTS AND STATE "SOVEREIGNTY"

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For us, disposed to commemoration (and committed to the decimal system), the approaching turn of the 20th century, and of a half-century of human rights, inspires celebration. It also invites inventory. It would be fitting to look back upon the International Human Rights Movement—from its conception during the Second World War and its birth at Nuremberg and San Francisco (1945), through its troubled, frustrating years during the Cold War, to its promises in the changed world order—and to take stock of its remarkable successes and discouraging failures. Others might be inspired to project a human rights agenda for the next century¹ and a program designed to remove the abiding defects in international human rights standards and the daunting obstacles to their effective implementation.

A student of international law and politics might venture a "retrospective" of a different character. I suggest that a half-century of human rights has been the cause, or the result, or both, of radical change in the international state system, in the character of international law, and in its relation to national constitutions and to the spread of "constitutionalism." Those changes, I conclude, have undermined common assumptions about the state system, including the assumed axiom of the system: state "sovereignty."

Elsewhere, I have expressed the view that, as applied to states in the international system, "sovereignty" is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology.² A political idea describing the locus of ultimate legitimate authority in national society, "sovereignty" has been transmuted into an axiom of the inter-state system, which has become a barrier to international governance, to the growth of international law, and to the realization of human values. I suggested the need to "deconstruct" the concept, strip it of its myth, identify its essentials,

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¹ See, e.g., HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John Lawrence Hargrove eds., 1994).

² Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y INT'L L. NEWSL., Mar. 1993, reprinted in Proceedings of the Canadian Council of International Law, Oct. 1992.

retain only its valuable values.

In these pages I suggest that a principal cause—or beneficiary—of derogations from the mythology of sovereignty has been the International Human Rights Movement, with important impact on the international political system, and on international law as we have long learned and taught it.

THE ASSUMPTIONS OF "SOVEREIGNTY"

Among the traditional assumptions sometimes deemed implicit in international "sovereignty," one might identify the following:

- that the state system is committed exclusively to state values, principally to state autonomy and the impermeability of state territory, and to the welfare of the state as a monolithic entity;
- that international law is based on the consent of states, and is made only by states and only for states;
- that the international system and international law do not (may not) address what goes on within a state; in particular, how a state treats its own inhabitants is no one else's business, not the business of the system, not the business of any other state;
- that a state may concern itself with what goes on inside another state only as that impinges on its own state interests. (Therefore, a state may presume to afford "diplomatic protection" to its diplomats or its nationals, not to other human beings.)
- that international law cannot be "enforced": a state can only be persuaded, induced, to honor its international obligations and will do so only when it is in its national interest to do so;
- that a state's sovereignty shields its constitutional system from international influences.

My thesis in these pages is that a half-century of international human rights reflects—or has effected—important derogations from those assumptions. In particular:

- that the international system, still very much a system of independent states, has moved beyond state values towards human values³

³ See generally LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES (1995).

and towards commitment to human welfare broadly conceived;
—that an international law of human rights has penetrated the once-impermeable state entity and now addresses the condition of human rights within every state;
—that the international law of human rights now includes important norms to which some states have not consented;
—that the international system has developed institutions for enforcing human rights law against "sovereign" states and has sometimes encouraged states to "intervene" in other states in support of human rights;
—that international law has importantly influenced—and been influenced by—national constitutions and constitutional systems.

THE CHANGING VALUES OF THE STATE SYSTEM

At mid-century, the international system began a slow, hesitant move from state values towards human values. Until the Second World War, the system of states was a "liberal" system of independent, "impermeable," "monolithic" states. Its cardinal principle, and its principal value, was that states should leave each other alone. At mid-century, after terrible war, the system produced unprecedented law to that end: the United Nations Charter (Article 2(4)) outlawed war and other uses of force by any state against the territorial integrity or political independence of another state.

I do not suggest that commitment to the principle that states should be let alone did not inure to the benefit of individual human beings. Wars did not only overwhelm states; they killed people. Conquest by another state did not overwhelm only state interests; being conquered did not commonly bring to the inhabitants less misery, more benign rule, greater democracy, or better conditions of living. But the benefits of a system in which states were let alone were seen in state terms, with the individual an incidental, indirect beneficiary, and often not a beneficiary at all.⁴

⁴ At mid-century, the international system also took large steps towards a law of cooperation. Bretton Woods produced international financial institutions—the World Bank, and the International Monetary Fund. Other specialized agencies, UNESCO, WHO et al., were created to promote other interests. Older treaties of Friendship, Commerce and Navigation were supplemented and, to a significant extent, replaced by the General Agreement on Tariffs and Trade (GATT). Again, in this law of cooperation the participants were states, the policies were determined by the states, the anticipated benefits were seen in state terms; the human being, individual or in groups, was, at most, an indirect beneficiary.

Simultaneously, however, in a radical departure, the United Nations Charter heralded also the birth of international human rights. In the preamble to the Charter, the peoples of the United Nations reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Article 1 of the Charter declared it to be one of the purposes of the United Nations to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all." By Article 56 of the Charter all member states pledged themselves to take joint and separate action in cooperation with the Organization for the achievement of that purpose. The institutions projected by the Charter included a commission for the promotion of human rights (Article 68).

Thus, 1945 saw a small but clear, firm, bold step from state values toward human values, a small but clear derogation from state "sovereignty." The condition of human rights became a subject of international concern in principle, as well as, in fact, to an increasing extent. Slowly, imperceptibly, how any state treated any human being became, in principle and to some extent in fact, "of international concern," *everybody's* business. The international law of human rights penetrated the state monolith beyond repair.

The U.N. Charter pledged states to promote respect for human rights but it did not define them. Perhaps, in the wake of Adolf Hitler and the Holocaust, the framers assumed that human rights needed no definition. But the demand for an International Bill of Rights required that human rights be identified. For at least some of the "framers" of the Charter, human rights meant "liberal" rights, the rights of the individual in a liberal state. But almost from the beginning, the international law of human rights followed the movement within states from "the liberal state" to "the welfare state." In the years before the Second World War, for example, U.S. President Franklin Roosevelt's New Deal, drawing on European example, took the United States in small steps towards the welfare state. Then, in 1941, President Roosevelt proclaimed the "Four Freedoms," later accepted as Allied war aims, which included prominently "freedom from want."⁵ After the War, moreover, the international system itself inched toward becoming a "welfare system." By 1948, the international system was evincing concern

⁵ See President's Message to Congress, 87 CONG. REC. 44, 46-47 (daily ed. Jan. 6, 1941).

not only for victims of genocide and torture, but also of hunger;⁶ the Universal Declaration of Human Rights declared equal respect for what came to be known as "economic and social rights" as for "civil and political rights." In time, the international system proclaimed "a right to development."⁷ If, in principle, foreign assistance has remained voluntary, not a matter of binding obligation, the system, if not the law, has come to recognize such assistance as not pure altruism, but as a political and moral obligation.

The move from state values to human values, from a liberal state system to a welfare system, is hardly complete or universally accepted. But, I am satisfied, it is undeniable, irresistible, irreversible.

THE CHANGING SOURCES OF INTERNATIONAL LAW

International law, our law schools teach, derives from two principal "sources": customary law and treaty.⁸ Customary law derives from state practice;⁹ treaties are made by agreement between states.¹⁰ At bottom, it has been assumed, both depend on state consent, a strong reflection of state autonomy, "sovereignty." Of course, the requirement of consent is an obstacle to international regulation or governance. It favors *laissez-faire*, or, at best, law reflecting the common denominator of general agreement. Hence, international law is often described as "primitive."¹¹

Once, not long ago, international law was essentially customary law, most of it "vintage" law, long established. In the second half of the 20th century, law has been made principally by multilateral treaty, but most of that treaty-law was laid upon a bed of custom: the United Nations, principally through

⁶ The U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948, the Universal Declaration on December 10.

⁷ *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., 97th plen. mtg., U.N. Doc. A/Res/41/128 (1987).

⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987) [hereinafter RESTATEMENT].

⁹ "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Id.* § 102(2).

¹⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 6-80, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

¹¹ Even the law of "cooperation" which mushroomed after the Second World War was designed to promote cooperation, not to prescribe it, and had limited normative impact, aiming to protect state autonomy rather than to limit it. *See supra* note 4.

the International Law Commission, pursued a program of "codification and development" of customary law by multilateral treaty, such treaties generally reflecting much codification and some development.¹² New states, the majority of the states in the system today, joined the process of codification and development, but they could not escape previously established customary law, the rules of the "club" they had eagerly joined. All states, old and new, however, could refuse to be bound by newly developing customary law; the foundation of the law appeared to remain "consent," or at least "non-dissent."¹³

Human rights law has shaken the sources of international law, reshaped its character, enlarged its domain. Human rights law is all new law, at most half a century old.¹⁴ Human rights law has been established largely by treaty—the U.N. Charter and international human rights covenants and conventions—but without any foundation or context of custom. Human rights treaties continue to increase, a reflection of the system's steady drift toward human values. It is a reflection, too, of the new sensitivity of states and of the state system to pressures leading to consent. It is perhaps the only instance¹⁵ of a new body of international law born and grown in response to an idea, to public opinion—domestic and international opinion.¹⁶

There are now two major covenants and a growing number of conventions,¹⁷ and both covenants and many conventions are widely ratified. But

¹² Similarly, in the United States, the nineteenth century saw much statutory codification and some development of the common law.

¹³ By the "persistent objector" principle, a state that maintains its refusal to accept a principle of customary law during the process of its development is not bound by it. See RESTATEMENT, *supra* note 8, § 102 cmt. d.

¹⁴ The ILO began to promote labor conventions after the First World War. See *supra* note 4 and *infra* note 18.

¹⁵ Humanitarian law, the law designed to "humanize" war, was an earlier but narrower instance.

¹⁶ That is the subject of the Colloquium at The University of Georgia School of Law, March 4-5, 1994, the papers of which are published in this issue of the *Georgia Journal of International and Comparative Law*.

¹⁷ International Covenant on Civil and Political Rights, *opened for signature* December 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* December 19, 1966, 993 U.N.T.S. 3. As of early 1995 some 25 human rights conventions sponsored by the United Nations were in force. There are also well over a hundred conventions on conditions of labor and other social welfare issues sponsored by the International Labor Organization (ILO). Other specialized agencies of the United Nations,

some states have resisted adhering to those treaties, notably the United States, as well as some of the worst offenders against human rights, e.g., South Africa (until recently), and the People's Republics of China. Also, too many of the adherences to the covenants and conventions are riddled with reservations.

Hence the pressure, beginning at Nuremberg in 1945,¹⁸ to develop and achieve recognition for a "customary," "non-conventional" law of human rights (i.e., law not made by treaty) and there is now a significant, and increasing, amount of such non-conventional law of human rights.¹⁹ But though that law is not made by treaty, it is not "customary law" as once conceived; surely, it differs from traditional customary law in fundamental respects. Traditional customary law was not made; it resulted. Most of it was "always" there, in the "constitutional" law implicit in the conception of a system of states; in ancient custom antedating the modern state system; in a "common law" grown from the middle ages. That law was in place, the practice of states did not create it, state practice recognized the law as *having happened*.²⁰ Now, in our time, non-conventional law is being *made*, purposefully, knowingly, wilfully, and concern for human rights has provided a principal impetus to its growth, and the law of human rights is a principal instance of such non-conventional law.

And so, the Restatement declares that a state violates international law when it practices, encourages or condones any one of a series of human rights violations: genocide, slavery, extra-judicial killings or disappearances, torture or other inhuman treatment or punishment, systematic racial discrimination.²¹ The Restatement comments that there may be non-conventional human rights law in addition to that which it was prepared to

e.g., UNESCO, have also sponsored human rights conventions.

¹⁸ The Nuremberg Charter and the indictments under it charged Nazi leaders with, *inter alia*, crimes against humanity, not based on any treaty. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279; Formulation of the Principles recognized in the Charter of the Nuremberg Tribunal & in the Judgement of the Tribunal, U.N. GAOR, U.N. Doc. A/CN.4/5 (1949). The Nuremberg principles were unanimously affirmed by the U.N. General Assembly. G.A. Res. 95(I), U.N. GAOR, 1st Sess., Part II, 55th mtg., U.N. Doc. A/236 (1946).

¹⁹ See HENKIN, *supra* note 3, at 29 et seq.

²⁰ Hence, we commonly define customary law as built by practice *opinio juris*, with a sense of legal obligation. See *supra* note 9 and accompanying text. Practice with a sense of legal obligation can only exist if there is law before the practice.

²¹ RESTATEMENT, *supra* note 8, § 702.

recognize and restate at the time, and that more such law would doubtless come.²²

Where does this law come from? The Restatement, product of a conservative institution²³ and seeking the widest acceptance and recognition, supports the non-conventional human rights law it restates by invoking the traditional indicia of traditional customary law—state practice with a sense of legal obligation. But the Reporters of the Restatement admitted that the state practice supporting non-conventional human rights law looks different, is different.²⁴ Skeptics might insist that the non-conventional law of human rights is not “customary” in any traditional sense; it is not based on ancient axioms, or on traditional natural law, or on Roman law; it is not based on “custom” or on state practice at all.

Rather, I suggest, such law is “constitutional,” in a new sense.²⁵ The international system, having identified contemporary human values, has adopted and declared them to be fundamental law, international law. But, in a radical derogation from the axiom of “sovereignty,” that law is not based on consent: at least, it does not honor or accept dissent, and it binds particular states regardless of their objection.

How did this happen? Conceptually, it may have sneaked into the law on the back of another idea, “*ius cogens*.” At some time after the Second World War, the system accepted that there is supreme, peremptory law of greater weight than treaty or traditional customary law.²⁶ *Ius cogens*, too, is sometimes described as customary law and it is surely non-conventional (not made by treaty), but it is not customary in any other sense: it does not reflect ancient custom or traditional natural law; it has not been built by state practice. Also, it does not require consent of every state: it reflects “general” consensus, not unanimity; it binds the exceptional “eccentric” dissenter; the “persistent objector” principle does not apply.²⁷

And so, international non-conventional human rights law is *ius cogens*, or is like *ius cogens*.²⁸ Indeed, if it is *ius cogens*, it may be the only example

²² *Id.* § 702 cmt. a, note 1; see also *infra* note 32.

²³ The RESTATEMENT is prepared and published under the auspices of the American Law Institute.

²⁴ RESTATEMENT, *supra* note 8, § 701, n.2.

²⁵ See *supra* note 17 and accompanying text.

²⁶ See Vienna Convention, *supra* note 10, at arts. 53, 64; RESTATEMENT, *supra* note 8, § 331(2) cmts. e, f.

²⁷ See *supra* note 13 and accompanying text.

²⁸ RESTATEMENT, *supra* note 8, § 702 cmt. n.

of *ius cogens* that has had universal acceptance as well as universal application.²⁹ As *ius cogens* (or a close kin), it is not the result of practice but the product of common consensus from which few dare dissent. And the few who might dare are compelled to obey, the cost of living in the state system at the end of the 20th century.

Why did this happen? I am persuaded that the principal catalyst for this radical derogation from "sovereignty," this change in the politics of the system and in international human rights law, was the universal reaction to *apartheid* in South Africa. The Third World led, and others followed, in declaring *apartheid* intolerable, and they changed the rules of law-making in order to outlaw it: the lack of "practice," the persistent objection of the Republic of South Africa (the state principally affected) were no obstacle. Then the system swept under the new principle the crime of genocide, which no one dared justify. Slavery (unfortunately not yet eradicated) followed, since no state has dared claim that it is right and lawful to practice or to tolerate it. Similarly, no state dared assert a right to commit extra-judicial killing or disappearance, or to practice torture or inhuman treatment. And so, states have been prepared to outlaw these in principle (even if some states may practice them in fact), and we have non-conventional human rights law. And there may already be (or may soon be) additional non-conventional rights which the Restatement was too cautious to recognize: rights to property, to gender equality, freedom from religious discrimination, and, in the changed world order after the Cold War, to democracy, even to some measure of individual autonomy in general and of freedom of enterprise.³⁰

THE NATIONAL ROOTS OF INTERNATIONAL HUMAN RIGHTS LAW

International human rights law is a revolutionary penetration of the once-impermeable state. But beyond the radical character of international human rights law in principle, the content of that law has drawn on (and in turn permeated) once-excluded sources, the domestic constitutional systems of states.

²⁹ The law of the U.N. Charter outlawing the use of force between states is commonly cited as an agreed principle of *ius cogens*. *Id.* at § 102 cmts. h, k. However, the character of the Charter as superior law was explicitly provided in the Charter itself (Article 103), before a general doctrine of *ius cogens* was recognized.

³⁰ See *supra* note 23 and accompanying text.

It began with the Universal Declaration of Human Rights, soon a half century old, one of the most important, most influential international instruments of the century.³¹ The Declaration did not draw on old international sources, or on ancient notions of natural law, or on Roman law, or on modern sources of international politics, not even on the 18th-19th century "international standard of justice" for foreign nationals.³² Rather, it derives wholly from contemporary national sources. For the rights that have been denominated "civil and political rights," the Declaration drew on liberal national constitutions, such as that of the United States (as interpreted in hundreds of volumes of the U.S. Supreme Court Reports), as well as on European constitutions and laws. For "economic and social rights" it drew on the welfare systems initiated in the 19th century by Western European states.³³ Tired controversies, and political sniping, should not be allowed to conceal the essential consensus (by states East and West, North and South) that international law includes both "generations" of rights. The Universal Declaration recognizes civil and political, and economic and social rights equally, and all these rights are "universal": all are rights of all human beings, all are accepted by all states. Both categories have been converted into legally binding covenants; at least some of each have become, or have contributed to, non-conventional ("customary") law.

International human rights derive from national constitutional rights.³⁴ The international law of human rights and national constitutional law inspire and influence each other and become increasingly similar. National and

³¹ *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948). It is perhaps the most important document, excepting only the U.N. Charter.

³² Under customary international law, a state is obligated to treat foreign nationals in accordance with an international standard of justice, and is responsible to the state of the person's nationality for any violations of that standard. The state of nationality is entitled to afford the person its diplomatic protection. RESTATEMENT, *supra* note 8, § 711.

³³ It has not, as is commonly believed, drawn on "communism." In other words, "not Marx, but Bismarck's" (the Prussian Iron Chancellor who in the 19th Century established the rudiments of a welfare state).

³⁴ Human rights are moral-political claims by an individual against his/her society. Originating in the 17th century, the idea of rights was adopted in eighteenth century constitutions, notably those of the United States (and its constituent states) and of France, and others followed their lead. Constitutional polities, notably those of the United States and its states, developed the idea of rights in their constitutional jurisprudence. Inevitably, in recognizing human rights and attempting to define and catalogue them, international law had to look at national constitutions and their developments.

international rights systems govern the same persons and the same activities and interests, serve the same purposes, pursue the same values. The state system of independent, impermeable states has a new face, and international law, once shielded from national legal systems, has important new constitutional law features.

ENFORCING HUMAN RIGHTS LAW

Enforcement has always been seen as the weak link in the international legal system, and it is surely the weak link of international human rights law. Resistance to "enforcement" is the last bastion of "sovereignty," and efforts to achieve new means of enforcement have seen the least progress in the movement to shed some old state values in order to promote human values. But there has been some progress in enforcement of international law generally, and human rights law has been a particular focus for developing novel inducements to comply.

The international state system, we know, has never sought to develop an executive arm or a comprehensive judiciary to enforce international law and obligations. Instead, international law is maintained by "horizontal enforcement": states are induced to honor their obligations by various political forces, including the anticipated reaction of the state victim of a violation. The U.N. Security Council, by its authority to maintain international peace and security, can in effect enforce the law of the U.N. Charter outlawing the use of force, but the Council was not intended to be, and has not become, a police body to enforce international law generally. The International Court of Justice is finally, after 50 years, busy, but it hardly provides a pervasive, comprehensive judicial system to enforce international law. A largely unofficial network of arbitration and other dispute-settlement arrangements contributes importantly to the rule of law in transnational affairs, but does not add up to an enforcement system.

Perhaps because of the special character of the international law of human rights, because the victims of violations are not states but the violating state's own inhabitants, "horizontal enforcement" is generally inapplicable and the international system has had to develop an "enforcement system," largely unprecedented. Skeptics scoff at the primitive character of "human rights enforcement," but even "self-reporting," the requirement that a state party to a covenant or convention report on its compliance to a committee established pursuant to the treaty, is a derogation from "sovereignty." Accepting the obligation to report admits that it is the business of other states whether the

reporting state is respecting the law. An increasingly activist Human Rights Committee³⁵ continues to confront protests from "sovereignty." Moreover, nearly 80 states, more than half the states parties to the Covenant, more than a third of the states of the world, have adhered to the Protocol, thereby submitting to international "adjudication" by the Human Rights Committee of complaints by their own citizens. More than 70 states have submitted in principle to investigation (surely an intrusion upon "sovereignty") under the Convention Against Torture.³⁶ In major regions of the world (Europe, the Americas), states have submitted to comprehensive systems of enforcement by commission, court, and political bodies, unthinkable to "sovereignty" just a few years ago. Also, states that only recently were themselves shouting "sovereignty" are now clamoring to be admitted to the European institutions, to be subject to screening and judgment by the European Commission and adjudication by the European Court. Slowly, other regions (Africa, parts of Asia), may yet follow that path away from "sovereignty."

There has also been enforcement by individual states. In principle, "diplomatic protection" is no longer for nationals only. In principle, I believe, a state party to a multilateral treaty can offer diplomatic protection to a person whose rights are violated by another state party.³⁷ In principle, any state can "protect" any victim of a violation of non-conventional law that creates obligations "*erga omnes*."³⁸ All states have "intervened," and have called on others to intervene, to enforce the non-conventional prohibition against *apartheid*, as shown by the decades of pressure for sanctions against South Africa. Long before the U.S. Congress legislated sanctions against *apartheid*, it enacted laws to deny foreign assistance and the transfer or sale of arms to governments guilty of consistent patterns of gross violations of

³⁵ Created pursuant to the International Covenant on Civil and Political Rights, *supra* note 17, at Part IV, arts. 28-45.

³⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 20, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1987) (entered into force June 26, 1987).

³⁷ Surely, if a convention has an "International Court of Justice" clause, any state party can bring to the Court any dispute with another party as to the application or interpretation of the convention.

³⁸ *Barcelona Traction, Light & Power Co., Ltd. (Belg. & Sp.)*, 1970 I.C.J. 3 (Second Phase) (Judgment of Feb. 5).

internationally recognized human rights.³⁹

Human rights law is monitored also, in various forms and degrees, by political bodies, from the U.N. General Assembly to the U.N. Human Rights Commission (and its rapporteurs), and since early 1994 by the new U.N. High Commissioner for Human Rights.⁴⁰ In recent years, international concern for human rights has led to even more "intrusive enforcement," more stringent derogations from "sovereignty." Some violations, too many in our day, are grave enough to threaten international peace and security. Indeed, the concept of "international peace and security" has been expanded by concern for human rights. Local conditions, local atrocities were held to threaten international peace and security in Somalia, in Bosnia and in Cambodia; frustration of democracy has been the basis of sanctions against Haiti.⁴¹ Collective humanitarian intervention is now normal, giving no heed to cries of "sovereignty."

CONCLUSION

Law professors are a conservative lot. We teach what we were taught, and what we have long taught. Officials, citizens, think what they have long thought. Perhaps it is time for us to notice, to help others take note, that the international system has changed, that international law has changed, that they are no longer mesmerized by the shibboleth of "sovereignty." Above all, it should be recognized, "sovereignty" is not a right to insist on anarchy; surely, it includes the right to consent to be governed, to seek good international governance.⁴²

Human rights have revolutionized the international system and internation-

³⁹ The Comprehensive Anti-apartheid Act, 22 U.S.C. § 5002 (1988) (repealed 1993); compare, e.g., The Foreign Assistance Act of 1961, 22 U.S.C. § 2151n (1988) (§ 116 codified as amended) with Section 502B, 22 U.S.C. § 2304 (1988) and other legislation in SUBCOMMITTEE ON HUMAN RIGHTS & INTERNATIONAL ORGANIZATIONS, COMMITTEE ON FOREIGN AFFAIRS, HUMAN RIGHTS DOCUMENTS (1983).

⁴⁰ The office was established by resolution of the U.N. General Assembly. *High Commissioner for the Promotion and Protection of all Human Rights*, G.A. Res. 141, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/Res/48/141 (1994).

⁴¹ Louis Henkin, *Humanitarian Intervention*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, *supra* note 1.

⁴² In the United States, "We the people" asserted sovereignty not to maintain their natural liberty ("sovereignty") so as to be free from government, but to form and consent to a "more perfect union." U.S. CONST., pmb.

al law. The law now reflects human values in addition to state values, or allows human values to modify state values. We have seen a revolution in the content of international law to include a growing field directly relevant to the lives of five billion people, every one of them now a "subject" of international law. We have changed how international law is made: treaties are still the principal way to make law, but states have made non-conventional constitutional law to ordain basic values. Law is generally still made by states and requires state consent, but an occasional state cannot veto law that reflects the contemporary international political-moral intuition. We have drawn the content of the new international law from new sources, from national constitutional sources. On the horizon of the new century is international commitment to "constitutionalism," constitutional government, and the rule of law.

We have also revolutionized law enforcement. States can be shamed, and the system resorts increasingly to mobilizing shame. But there is also more "hard-nosed," more "real politik" enforcement, by adjudication,⁴³ and by state sanctions. When violations are grave enough to threaten international peace and security, there may be international sanctions and international tribunals; even collective military intervention under U.N. (or regional) authority cannot be excluded.

I do not wish to exaggerate. The changes I have identified are large in concept but still small in fact. The political system is still more sensitive to military and economic power than to human values. There is still resistance to human rights law, even after the Communist world disappeared, even after the Cold War ended. At the World Conference on Human Rights (Vienna, 1993) some states led the attack on the idea of human rights, and particularly on its enforcement, under the banner of "sovereignty" (or of cultural relativism, a euphemistic synonym). Resistance to establishing the Office of U.N. High Commissioner did not succeed, but became resistance to giving the High Commissioner a broad mandate and adequate resources. But the change of half a century is real, permanent, irreversible. There can only be more of it, which bodes better for human values and for human beings in the next century.⁴⁴

⁴³ In addition to adjudication by European and American human rights courts, look at national cases, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴⁴ The law and politics of human rights are not the only evidence of the erosion of "sovereignty" in international life. It was signaled, perhaps too subtly to be noted, when the U.N. Charter was ordained by the "We the peoples" (instead of by "We the governments")

A last word: I have stressed resistance by states that do not respect human rights, that flout its values, that resist its international enforcement. But there is resistance to international law and enforcement, cries of "sovereignty," even by countries that respect human rights and have effective national systems for their enforcement. The United States, too, invokes sovereignty as the text (or pretext) for resisting international governance, for non-cooperation, for "isolationism," for unilateralism, not the least on human rights issues.⁴⁵

That, too, I hope, will change. The United States set an example for others with bills of rights, with a constitutional tradition, constitutional institutions, constitutional methodology. We gave the world judicial review, the courts as the last resort for the individual and the bulwark of his/her rights, and the courts as the engine for continuing constitutional modernization. But we have been less willing to learn from others. We, too, have to accept international standards, the expression of the contemporary moral intuition, when they are higher than ours, e.g., to outlaw capital punishment for juvenile crimes, or to protect against inhuman or degrading treatment.⁴⁶ We have to pay a decent respect to the opinions of mankind by submitting to international scrutiny (e.g., by the Human Rights Committee, pursuant to the Protocol), to the International Court of Justice, to the Inter-American Court of Human Rights. We, too, exercising our sovereignty, must consent to be governed and help achieve good international governance for living in a decent world.

of the member states. It was signaled by the quest for more effective international governance during the years immediately following the Second World War. The United Nations' deeper concern with conditions inside countries includes not only local effects on international conditions, e.g., the environment, but also local conditions such as health, food, education, population controls, the economic and social development of individuals, groups and societies, and quality of life generally. Local non-governmental organizations have become part of the international political system, integral to international governance.

⁴⁵ We even invoke our constitutional system, the law-making power of Congress, as a reason for refusing to conclude treaties or to have them "self-executing," though the Constitution expressly provides for law-making by treaty. U.S. CONST. art VI; *see, e.g.*, the reservations attached to U.S. ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. § 4781 (daily ed. Apr. 2, 1992). *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

⁴⁶ *See* U.S. reservations, *supra* note 45. *See also* *Stanford v. Kentucky*, 492 U.S. 361 (1989).

