

REFLECTIONS ON REGIONAL HUMAN RIGHTS LAW

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INTRODUCTION

The principal purpose of the Colloquium, as can be seen from the great attention given to the papers presented by the second panel, was to discuss the uses of customary international human rights law in the defense of human rights before national courts. More generally, these discussions focused on the effectiveness of customary international human rights rules in influencing legislative and policy-making, administrative decisions and, particularly, judicial adjudication, at international and national levels. The initial and wider question of the feasibility of using custom as a source of human rights rules formed the underlying aspects of the debates in the Colloquium on the question of the sources for the international law of human rights. This included the issue of the relative importance of the actual practice of states and of *opinio juris* in the creation of a rule of customary international law.

The Colloquium's organizers wished to be complete in their coverage of custom as a source of human rights law and decided on a brief inquiry into the sources of regional human right rules.¹ This paper undertakes to give some information, accompanied by certain reflections, on the sources of law in regional human rights systems, recognizing the obvious fact that the regional enforcement of human rights in Europe and the Americas is based

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¹ For a valuable discussion of the reasons for "the advancement of human rights on a regional basis" see Weston, Lukes and Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 588 (1987). The authors set forth three basic elements favoring the appearance and growth of regional human rights systems: (1) "regions (by which we mean geographical areas or units marked by relatively high socioeconomic, cultural, political and juridical commonalities) tend toward homogeneity"; (2) the first element helps create "reciprocal tolerance and mutual forbearance"; and (3) it is more likely that violations of the rules will be investigated and remedied. *Id.* at 589, 590.

on adjudicatory institutions which administer treaty-based rights. A more modest start has been accomplished in Africa, with the creation of a fact finding commission alongside the regional treaty.²

I. SOURCES OF LAW FOR THE REGIONAL HUMAN RIGHTS SYSTEMS AND JUDICIAL INSTITUTIONS

A. *The Regional Systems*

The human rights conventions, in Europe and in the Americas, create institutions and give them an essentially judicial nature and role in interpreting, administering and applying an entire regime of rules which each of these treaties embodies.

The principal regional systems for the protection of human rights essentially rely on the rules set out in the regional conventions which created them. Nevertheless each convention in its preambular provisions links it to the Universal Declaration of Human Rights and, explicitly or otherwise, to the Charter of the United Nations. The European Convention³ in its preamble provides that, through the agreement to establish the treaty and its institutions, the "Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law" have resolved, "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration".⁴ The American Convention states in its preamble that the essential human rights of persons are not derived from their link of nationality with a state but "are based upon attributes of the human personality."⁵ These essential rights "therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law

² There is currently no active system for the implementation of human rights in Asia, either on a regional or sub-regional basis. On the Permanent Arab Commission on Human Rights established by the Arab League in 1968, see Weston, Lukes and Hnatt. *Id.* at 587.

³ The European Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, 224 (entered into force Sept. 3, 1953), *reprinted in* COUNCIL OF EUROPE, HUMAN RIGHTS IN INTERNATIONAL LAW, BASIC TEXTS 101 (1985) [hereinafter European Convention].

⁴ *Id.*

⁵ Draft Inter-American Convention on Protection of Human Rights, pmbl., OEA/Ser. L/V/II. 19, Booklet 13, at 1 (issued Aug. 1982) [hereinafter Draft Inter-American Convention].

of the American states."⁶ The preamble lists the Universal Declaration of Human Rights, together with the OAS Charter⁷ and the American Declaration of the Rights and Duties of Man⁸ and other international and regional instruments that are not mentioned by name, as documents in which the basic principles of human rights have been set forth.⁹

The African Charter on Human and Peoples' Rights (Banjul Charter)¹⁰, the African regional human rights convention mentions the Charter of the United Nations and the Universal Declaration of Human Rights in connection with the pledge made by the African States to promote international cooperation. Later in the preamble, the African States reaffirm in sweeping fashion "their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other international instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations."¹¹

In their preambular provisions, the regional human rights conventions recognize that their substantive provisions are influenced, inspired and even modeled after much of the content of the Universal Declaration of Human Rights and the human rights language in the preamble and in the body of the Charter of the United Nations, and the universal and regional human rights conventions and other international human rights instruments. It can be argued that the principles and rules of the instruments of the international human rights system were thus themselves sources for the provisions of the regional human rights conventions. The issue remains whether for regional purposes, that is, for purposes of particular regional and national policy makers and judicial institutions, the national law and the regional human rights system is the source of the entire applicable human rights system, or whether there are at least some universal rules and principles of human rights that have a higher status and thus constitute a minimum standard.

⁶ *Id.*

⁷ Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, U.N.T.S. 48.

⁸ American Declaration of the Rights and Duties of Man, adopted May 2, 1948, by the Ninth International Conference of American States, Bogota, Columbia, reprinted in Basic Documents Pertaining to the Inter-American System, OEA/ser. L/V/II.82, doc. 6 rev. 1 (1992) at 17.

⁹ Draft Inter-American Convention, *supra* note 5.

¹⁰ African Charter on Human and People's Rights, pmbl., approved in Nairobi by the Organization of African Unity (July 1981), reprinted in 21 I.L.M. 59 (1982) as Banjul Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3/Rev. 5.

¹¹ *Id.*

B. *The European System of Human Rights*

The provisions of the regional human rights conventions refer sparingly to additional sources of law. Certain references to international law are made in the European Convention on Human Rights. These references incorporate certain specific substantive rules and standards of nonconventional international law into the Convention.¹²

Article 7(2) of the European Convention does provide for the trial and punishment of persons for acts or omissions which were criminal when committed, "according to the general principles of law recognized by civilized nations."¹³ It has been suggested¹⁴ that the European Convention does not include a general provision on the use of general principles of law because it was assumed that the use of this source of law, which is to be found in Article 38(1)(c) of the Statute of the International Court of Justice would commence at some point.

Tyrer v. United Kingdom,¹⁵ a case which arose on the Isle of Man, concerned the applicability of Article 3 of the European Convention on torture or inhuman or degrading treatment to birching, a form of corporal punishment. The European Court of Human Rights was constrained by Article 63(3) to apply the Convention "with due regard . . . to local requirements" on the Isle of Man.¹⁶ The Court took note that judicial corporal punishment was not resorted to "in the great majority of the member States of the Council of Europe" and that "historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble to the Convention refers."¹⁷

The first article of Protocol I to the European Convention also contains a reference to international law. It states that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to

¹² In particular, see articles 7(1), 15(1) and 26 of the European Convention, *supra* note 3, at 105, 107, 110.

¹³ Art. 7(2), European Convention, *supra* note 3, at 105.

¹⁴ J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 160 (1988).

¹⁵ 26 Eur. Ct. H.R. (ser. A) at 1 (1978).

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 13.

conditions provided for by law and by the general principles of international law."¹⁸ The European Court of Human Rights in two judgments, *James v. United Kingdom* and the *Case of Lithgow*,¹⁹ apparently considered the reference to general principles of international law in Protocol I to be to the traditional rules of customary international law on state responsibility. In *James v. United Kingdom*²⁰ the European Court of Human Rights decided that the principles of customary international law involved applied to acts of a state toward aliens and not to its own nationals.²¹

C. *The Inter-American System of Human Rights*

The practice of the Inter-American Human Rights Commission and of the Inter-American Court of Human Rights provides some indication of their use of sources of law outside the Convention, when necessary. In one instance of particular significance, the *Roach and Pinkerton* case,²² a petition to the Inter-American Commission on Human Rights requested it to apply Article 1 of the American Declaration of the Rights and Duties of Man.²³ This case involved a petition brought by U.S. nationals against the United States on the question of the execution of children. The Commission found that "in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children."²⁴ The Commission then

¹⁸ European Convention, *supra* note 3, at 120.

¹⁹ The Case of James, 98 Eur. Ct. H.R. (ser. A) at 9 (1985); the Case of Lithgow, 102 Eur. Ct. H.R. (ser. A) at 4 (1984).

²⁰ 98 Eur. Ct. H.R. (ser. A) at 9 (1985).

²¹ *Id.*

²² *Roach & Pinkerton v. United States*, Case 9647, Inter-Am C.H.R., 925th Sess., March 27, 1987.

²³ O.A.S. Res. XXX adopted by the Ninth International Conference of American States, Bogota, 1945, OAE/Ser. L/V/I.4 Rev (1965). The American Declaration is accepted as the authoritative interpretation of Article 5(j), "the fundamental rights of the individual", of the Organization of American States (OAS) Charter and therefore is considered binding on the Member States of the OAS. The United States, a party to the OAS Charter, is considered to be bound by the American Declaration. The Inter-American Commission of Human Rights, as an institution created by the OAS, has been given the jurisdiction to deal with violations by OAS member states of the American Declaration. The American Convention on Human Rights also attributes adjudicatory functions to the Commission. Twenty-three States in the Americas are parties to the American Convention; the United States is not one of them.

²⁴ *Roach & Pinkerton v. United States*, Case 9647, Inter-Am C.H.R., 925th Sess., March 27, 1987.

stated that it had been convinced by the argument put forward by the United States that:

there does not now exist a norm of customary international law establishing eighteen to be the minimum age for imposition of the death penalty. Nevertheless, in the light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying domestic legislation in conformity with these instruments, the norm is emerging.²⁵

The Commission, however, also found that the U.S. had violated Articles I and II (right to equality before the law) of the American Declaration of the Rights and Duties of Man.²⁶

As a matter of practice, the regional human rights commissions and courts on occasion refer to regional declarations, to the U.N. Covenants on Human Rights, to certain universal multilateral treaties on particular aspects of human rights, and to instruments such as the conventions adopted under the aegis of the International Labor Organization (ILO).²⁷

II. THE INFLUENCE OF REGIONAL HUMAN RIGHTS INSTRUMENTS AND JUDICIAL PRACTICE OVER NATIONAL LEGISLATIVE AND JUDICIAL INSTITUTIONS AND OVER OTHER REGIONAL COURTS

A different but significant question is whether regional judicial practice influences national courts, other regional institutions and the international system. An important aspect of this question is whether the regional treaties and declarations are a source of law for national courts in their own internal human rights cases.

The general question of whether conventional law can be transformed into customary international law is obviously relevant to the application of the regional human rights conventions in national courts. The judgment of the

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Van der Mussele v. Belgium, 70 Eur. Ct. H.R. (ser. A) at 3 (1983); see also Andrew J. Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution*, 43 INT'L & COMP. L. Q. 537, 540 (1994).

International Court of Justice in the Nicaragua case²⁸ recognized the possibility of the transformation of U.N. Charter provisions and accompanying U.N. declarations into rules of customary international law.²⁹ The scope of use of the regional conventions would be enlarged if the sources for the creation of customary international law could be considered to include principles and rules derived from these conventions. These norms could then be applied by national courts in the region in instances where the regional convention itself cannot be invoked because of national constitutional impediments.

It is clear that the European Convention of Human Rights is directly applicable in the courts of some of the states which are parties to it, but only because the national constitutions of these countries provide for this.³⁰ In any case, the majority of states that are parties to the Convention have in some way incorporated it into their internal law.³¹ In Austria, the Convention is part of the federal constitution.³² In the Benelux countries, the Convention has a status superior to both prior and subsequently adopted

²⁸ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States, 1986 I.C.J. 14 (June 27)).

²⁹ See Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 96, 97 (1992). Here, the authors discuss the relative importance of actual state practice and of *opinio juris* in the formation of customary law. *Id.*

³⁰ Article 1 of the European Convention provides that the parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention, *supra* note 3. The European Court of Human Rights has not interpreted the words "shall secure" as obligating the member states to implement the Convention provisions into their internal law. See Rusen Ergec, *Le status interne de la Convention européenne des droit de l'homme et sa mise en oeuvre dans les pays d'europe Occidentale, Centrale et de l'Est*, in LA MISE EN OEUVRE INTERNE DE LA CONVENTION EUROPÉENNE DES DROIT DE L'HOMME 1, 4 (1994).

In contrast, the Court of Justice of the European Communities has incorporated the EC Treaties into the national laws of member states. In *Flaminio Costa v. ENEL* the CJEC declared: "by contrast with ordinary treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States" Case 6/64, 1964 E.C.R. 585, 592, 593. It is important to note, as did Rusen Ergec, citing F. Sudre, that while the purpose of EC law is integration, the law of the European Convention is one of harmonization. ERGEC, *supra* at 6.

³¹ For texts of the constitutions of 12 of the EU states that are parties to the European Convention of Human Rights, see LES CONSTITUTIONS DE L'EUROPE DES DOUZE (H. Oberdorf ed., 1992).

³² *Id.*

legislation.³³ French law has evolved to a similar position as that of the Benelux countries. This is also the case with respect to Spain and Switzerland.³⁴ Cyprus, Greece, Malta and Portugal, although dualist states, have legislatively given the Convention a status subject only to their national constitutions.³⁵ Other dualist states, Finland, Italy and Germany have incorporated the Convention into their legislation with the caveat that, constitutionally, the internal effect of the Convention is subject to being superseded by subsequent legislation.³⁶ The negating effect of subsequent incompatible legislation is tempered in Italy and Germany, as it is in the United States, by judicial construction through which seeming inconsistencies are reconciled.³⁷

Neither the United Kingdom nor the Scandinavian countries have incorporated the European Convention into their internal law,³⁸ as required constitutionally for the Convention to be directly applicable in national courts and administrative tribunals.

In the U.K. the courts have applied the principle that the legislator must be presumed not to have wished to adopt legislation contrary to the state's international obligations. P.J. Duffy has even advanced the possibility that the Convention is part of the English Common Law where there is no clear precedent in the law and either one of the following facts exists: (1) the Convention's provisions can be said to represent customary international law; or (2) the Convention provision can be said to be part of public policy.³⁹ Andrew J. Cunningham suggests that while there is no evidence of an express acceptance of European Convention provisions as declaratory of customary international law and thus applicable as part of the common law, this has been done in fact in a number of cases. He adds that, "[c]onstant reference to the European Convention in those decisions thus constitute[s] evidence of the State's perception of the status of these obligations in customary international law."⁴⁰

³³ *Id.*

³⁴ See ERGEC, *supra* note 30.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See SOREN STENDERUP JENSEN, THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SCANDINAVIAN LAW 74, 186 (1992).

³⁹ P.J. Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585 (1980).

⁴⁰ Cunningham, *supra* note 27, at 564, 565.

It would appear that in the United Kingdom particularly, in view of its constitutional and judicial systems, the use of the European Convention of Human Rights and the European Commission and Court of Human Rights constitutes the closest opportunity individuals have to having recourse to a constitutional court dealing with human rights. Constitutional courts, on a national level, already exist in Germany and Italy, and pressure is mounting in some other European countries for their establishment. It is true that in dealing with human rights issues with respect to which parties invoke the European Convention, British courts maintain great discretionary powers in applying the European Convention, since it has not been enacted into internal law. Nevertheless, a significant number of cases brought in British courts seek the application of provisions of the Convention.⁴¹

In France, provisions of the European Convention on Human Rights have been raised in cases before the *Cour de Cassation*, particularly in cases involving criminal procedure, and before the *Conseil d'Etat*. French courts have generally interpreted the Convention's provisions restrictively; in general, arguments based on Convention provisions have been unsuccessful in both the regular courts and the administrative courts.⁴² However, in the

⁴¹ See, e.g., *R. v. The Radio Authority Ex Parte Amnesty International British Section, Queen's Bench Division*, reprinted in THE TIMES, July 20, 1995. In a matter involving a statute preventing the transmission of a particular advertisement said to be of a political nature, the applicant argued that because the freedom to communicate "exists and is recognized in English Common Law and in Article 10 of the European Commission of Human Rights the statute should be construed in such a way as to limit so far as possible the inroad which it makes upon the recognized freedom." *Id.* The court agreed with the argument but nevertheless found for the other party. Other recent cases in which provisions of the European Convention on Human Rights were raised in the defense were taken into account but were not applied are: *Derbyshire County Council v. Times Newspapers Ltd.*, [1992] 3 All E.R. 65 (English C.A.) (freedom of speech); and *Raziastaraie v. Secretary of State for the Home Department*, [1995] (English C.A.) (standard of proof in an immigration case).

⁴² A 1995 case concerned a French statute which made the deposit of 100,000 francs by each party presenting candidates for an election non-reimbursable if the party did not obtain at least 5% of the vote. The *Conseil d'Etat* considered that the law was compatible with Articles 13 and 14 of the European Convention which guarantee the non-discriminatory treatment of the rights set forth in the convention and assures an effective remedy to all persons whose rights have been violated. *M. Meyet et autres, Conseil d'Etat*, 17 February 1995, available in WESTLAW. Other recent judgments of the *Conseil d'Etat* in which provisions of the European Convention were considered include: *M. Sari*, decided on 2 June 1995 (the Convention has invoked unsuccessfully to prevent expulsion of foreigners from France), available in WESTLAW; and *Epoux Barry, Commune de Mortefontaine en-Thelle*

past fifteen years, the courts have had to take notice of the fact that the European Court of Human Rights has found against France in areas such as the rights of aliens and the tapping of telephones. The influence of European Court judgments on the highest French courts and indeed on French legislation is on the increase.⁴³

The Court of Justice of the European Communities (CJEC), since the end of the 1960s, has been actively concerned with the protection of human rights in the areas within its jurisdiction.⁴⁴ In the well known case of *Stauder v. City of Ulm*,⁴⁵ the CJEC declared that it considered itself bound by principles and rules common to the legal systems of Member States. In a 1970 judgement⁴⁶, the CJEC stated:

. . . respect for the fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.⁴⁷

Subsequently, the CJEC widened its view on the sources for its decisions on matters in which the rights of individuals were involved. In *Nold, Kohlen- und Baustoffgrosshandlung v. Commission*⁴⁸ the Court recognized that "international treaties for the protection of human rights on which Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community

decided on 3 March 1995 (Article 13 of the Convention was invoked unsuccessfully by the appellants to demand judicial recourse against a decision by the mayor of a commune, refusing a building permit), available in WESTLAW.

⁴³ See Eva Steiner, *The Application of the European Convention on Human Rights by the French Courts*, 6 KING'S COLLEGE L. J. 49 (1995-1996).

⁴⁴ The Treaty of Rome, officially the Treaty Establishing the European Communities, March 25, 1957, does not contain a set of provisions on human rights, although certain of its provisions do set forth the basic rule of non-discrimination among persons. In its early years the CJEC did not take into account individual rights under national constitutions which were raised before it.

⁴⁵ Case 26/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112.

⁴⁶ Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] E.C.R. 1125, translated in [1972] 1 C.M.L.R. 255.

⁴⁷ *Id.*

⁴⁸ Case 4/73, 1974 E. Comm. Ct. J. Rep. 491.

law.”⁴⁹ In summarizing the CJEC’s practice in the 1970s and 1980s, Paolo Mengozzi has suggested that, “[f]undamentally, the Court’s method is to construct general principles of Community Law by drawing from the common constitutional traditions of the Member States and from international treaties.”⁵⁰

The Treaty on European Union (Maastricht Agreement)⁵¹ has converted the tendency to make use of European Convention provisions into an obligation. Article F(2) of the Treaty’s Common Provisions provides:

[T]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.⁵²

The language in the Treaty on European Union is perhaps some evidence of the perceived difficulty in relying on international customary law to furnish rules on human rights. It is argued that the principal reason for the relative resistance to relying on custom as a principal source of rules on human rights is that the internal practice of states with respect to individuals, notably toward their own nationals, often does not meet the standards established in either fundamental national instruments such as constitutions and basic legislation or in General Assembly declarations and universal conventions on human rights.

The dual requirement of proof of the actual conduct of states (“general practice”) and of their legal commitment to the rule which emerges from the conduct⁵³ characterizes the traditional view on the establishment of a rule of customary international law. The commitment of states to such a rule can be expressed by way of international and national declaratory instruments. It can be argued that, in contrast, the establishment of a general principle of

⁴⁹ *Id.* at 507.

⁵⁰ PAOLO MENGOTZI, *EUROPEAN COMMUNITY LAW* 185 (P. Del Duca trans., 1992); see P.J.G. KAPTEYN and P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 165-169 (2nd ed., L.W. Gormley ed., 1989).

⁵¹ Treaty on European Union, Feb. 7, 1992, reprinted in 31 I.L.M. 247 (1992).

⁵² *Id.* at art. F(2).

⁵³ See Statute of International Court of Justice, opened for signature June 26, 1945, art. 38(1)(c), 59 Stat. 1055.

law under Article 38(1)(c) of the Statute of International Court of Justice requires only its recognition by states in their national constitution, legislation and other policy instruments.⁵⁴ The language in Article F(2) of the Treaty on European Union suggests first that the provisions of the European Convention on Human Rights are based on constitutional traditions which the member states have in common, and second that in view of the source for the Convention's provisions, they will be "respected . . . as general principles of Community law."⁵⁵

III. THE NATURE OF THE EFFECT OF PRINCIPLES AND RULES OF INTERNATIONAL HUMAN RIGHTS LAW ON REGIONAL HUMAN RIGHTS LAW

A. *Categories and Hierarchies of Human Rights*

Human rights have been categorized in treatises and other works of legal scholars, in declarations of international institutions, in multilateral conventions and in reports and more informal documents of national and international groups of lawyers. In one such classification human rights are categorized by generation: political and civil rights are considered first generation rights; economic, social and cultural rights are second generation rights; and more recent formulations like the right to development are third generation rights. These and other classifications of categories of rights can be placed in desired hierarchies. One such hierarchy of rights is based on the primacy of certain human rights, which are either simply considered to be more basic or which are declared to be peremptory rights (*jus cogens*).

While neither the United Nations Charter nor the universal human rights conventions contain more than very limited mention of hierarchies of international law norms, and in particular rules on human rights, national legal and political systems often take ideological positions on the relative importance of human rights and apply them in a hierarchical manner. Groups of states put divergent emphases on the importance of universal civil and political rights on the one hand and economic, social and cultural rights on the other.

In defending the values of the various categories of universal human rights, whatever their sources, it is tempting for a "Westerner" to assert that

⁵⁴ See generally, Simma and Alston, *supra* note 29.

⁵⁵ Treaty on European Union, *supra* note 51.

the human rights which are enshrined in United Nations Declarations and in U.N. inspired conventions are objectively universal in nature and must be applied as a minimum standard in every territorial political entity throughout the world. Under this view, the primacy of universal human rights extends directly to the national level and also applies to regional human rights systems. Under this approach, regional human rights law can play useful auxiliary roles. One such role is that of supplementing universal rules, so long as no regional rule violates the spirit of the former. Another important role is that of providing efficient implementation of human rights principles and rules through fact-finding and adjudicating institutions. While the United Nations system of implementation of human rights is still tentative and modest, Europe and the Americas have created effective human rights commissions and courts.

Clearly, concepts of "higher norms", "basic rules", or *jus cogens* all proceed from a hierarchical conception of human rights. The usual assumption is that these concepts are universal in nature and form a set of principles and rules from which neither national nor regional human rights systems can derogate. The task of determining these rules is "exceedingly difficult. It is fraught with personal, cultural and political bias and to make matters worse, has not been addressed by the international community as a whole, perhaps because of the improbability of reaching a meaningful consensus."⁵⁶ In fact, it is argued that the very standards against which Western governments and Western controlled international organizations, Western based NGOs and Western media, academics, lobbyists for special interests and others wish to measure current regional and national principles and rules on human rights throughout the world are nothing more than contemporary Western values. These values are set forth in the various United Nations instruments which were adopted at a time when the current majority of the international community of states could not participate in the decisions.

This is too facile a view since there are differences in certain values even within the groups of states, including the Western group. The disagreements over the death penalty is a vivid example of divergences between the United States on the one hand, and Europe and much of Latin America on the other hand.

⁵⁶ Theodor Meron, *On a Hierarchy of International Human Rights*, 80 A.J.I.L. 1, 4 (1986).

B. The Vienna Conference on Human Rights: Convergence and Divergence

The World Conference on Human Rights,⁵⁷ held in Vienna in 1993, concluded with the adoption of the Vienna Declaration and Programme of Action, without a vote. Three paragraphs of this twenty-six page resolution are particularly relevant to the issue of the place of regional human rights law. The eighth preambular paragraph provides rather loose general references to the United Nations human rights instruments as providing a common standard. It begins:

Emphasizing that the Universal Declaration of Human Rights which constitutes a common standard of achievement for all peoples and all nations is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international and Political Rights instruments, in particular the International Covenant on Economic, Social and Cultural Rights⁵⁸

The second and third pronouncements of the Vienna Conference, of particular relevance to regional human rights law, are set forth in paragraphs 32 and 37 of the Vienna Declaration as follows:

32. The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.⁵⁹

37. Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments and their protection⁶⁰

⁵⁷ U.N. Doc. A/CONF. 157/24 (Part I) June 14-25, 1993 [hereinafter the Vienna Conference].

⁵⁸ *Id.*

⁵⁹ *Id.* at 29.

⁶⁰ *Id.*

Prior to the Vienna Conference, the regional groups of states had met, pursuant to a General Assembly Resolution calling for the regional meetings to be convened.⁶¹ The documents produced at those meetings in the form of declarations were characterized by the inclusion, in differing proportions, of general statements of policy in the areas of human rights in the widest sense, including the issues of self-determination and non-interference in the internal affairs of states, and the affirmation of the importance of certain specific human rights. This mix of provisions was reflected to a large extent in the declaration and programme of action agreed to at the Vienna Conference.

It is interesting to note that no regional meeting was held for the group of European countries and others. One might presume that such a meeting was not necessary as this group's views were already reflected in the United Nations declarations and conventions and would form the core of the Vienna Declaration and Programme of Action produced by the World Conference.

The representatives of the African States adopted the Tunis Declaration⁶² in which they reaffirmed their commitment to the principles declared in the Universal Declaration of Human Rights, in the two U.N. Covenants and the African Charter on Human and Peoples' Rights.⁶³ In paragraph 2, the Tunis Declaration adds that the universality of human rights is undoubted and that the protection and promotion of these rights constitute a duty for all States, whatever their political, economic or cultural system.⁶⁴ The Charter adds the caveat that it is not possible to prescribe a model at the universal level because one cannot ignore the historical and cultural realities of each particular nation and the traditions, norms and values of each people.⁶⁵ The Declaration then adopts the principle of the indivisibility of human rights.⁶⁶

The Latin American and Caribbean States met and adopted the San José Declaration on Human Rights.⁶⁷ The first operative paragraph of the San José Declaration reaffirms their commitment to "full observance of the human rights established in the Universal Declaration and in universal and

⁶¹ G.A. Res. 46/116 (1991).

⁶² Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights, U.N. Doc. A/CONF. 157/AFRM/14 (1992) [hereinafter the Tunis Declaration].

⁶³ *Id.* at para. 1.

⁶⁴ *Id.* at para. 2.

⁶⁵ *Id.* at para. 5.

⁶⁶ *Id.* at para. 6.

⁶⁷ World Conference on Human Rights, U.N. Doc. A/CONF. 157/PC/58 (1993).

regional human rights instruments"⁶⁸ The Declaration emphasizes cooperation between the United Nations system and the inter-American system of human rights. Another major theme is that the "interdependence and indivisibility of civil, political, economic, social and cultural rights are the basis for consideration of the question of human rights".⁶⁹

The discussions in meetings of Asian states in the period prior to the World Conference revealed some active opposition to acceptance of the human rights rules and principles in Western-based United Nations declarations, conventions and other instruments, as always universally applicable and superior to national and regional norms and practices. At the ASEAN⁷⁰ meeting on human rights, the member states⁷¹ agreed to a declaration which was issued as the Kuala Lumpur Declaration of Human Rights.⁷² In one of the preambular paragraphs, it is stated that "the peoples of ASEAN reaffirm the observance of the United Nations Universal Declaration of Human Rights Charter"⁷³ More significant, however, are the earlier preambular statements:

[T]he peoples of ASEAN recognize that human rights have two mutually balancing aspects; those with respect to rights and freedom of the individual and those which stipulate obligations of the individuals to society and state;⁷⁴

[T]he peoples of ASEAN accept that human rights exist in a dynamic and evolving context and that each country has inherent historical experiences and changing economic, social and cultural realities and value system[s] which should be taken into account.⁷⁵

⁶⁸ *Id.* at para. 1.

⁶⁹ *Id.* at para. 3.

⁷⁰ ASEAN is an acronym for the Association of South-East Asian Nations.

⁷¹ The members of ASEAN are: Indonesia, the Philippines, Malaysia, Singapore, Thailand, Brunei and Vietnam. *Id.*

⁷² The Kuala Lumpur Declaration is reprinted in Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts On the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 142 (1995-96).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

A significant element in the operative articles of the Kuala Lumpur Declaration is the emphasis placed on obligations of the individual and the discretion of the state in determining the scope of particular human rights and enforcing them. This power of the state is included even in the four articles of the Declaration which deal with "Fundamental Human Rights." While the first sentence of Article 7 declares that "[E]very one has the right to life . . .,"⁷⁶ the second sentence conditions the scope of this right to what is provided for in the national law.⁷⁷ The same approach is taken with respect to the "right to property, liberty and security of person . . ." in Article 9.⁷⁸ Several articles set forth duties of member states in relation to economic development and social justice.⁷⁹

The press releases and press reports of the regional meeting for Asian countries prior to the World Conference clearly give a picture of a divided group. As reported in a UN Information Service release,⁸⁰ several states, including Indonesia, Malaysia, China and Singapore, strongly favored "a flexible approach to the concept of human rights, one that would take into account Asia's cultural and political specificity. Singapore called for a 'balance between the ideal of universality and the reality of diversity.'"⁸¹ Malaysia reportedly stated that a "balance between the rights of the individual and those of the community" was sought.⁸²

⁷⁶ *Id.* at art. 7.

⁷⁷ *Id.*

⁷⁸ *Id.* at art. 9.

⁷⁹ The final provision of the Kuala Lumpur Declaration of the ASEAN member states reinforces the philosophy that individual rights must be subject to community or collective rights:

Each member state and its citizens shall endeavor to exercise the aforementioned rights and duties subject only to such limitations as are determined by law in respect of these rights and duties to meet the just requirement[s] of morality, public order and the general well-being of society. *Id.*

⁸⁰ Press Release HR/3774, 31 March 1993 (on file with author).

⁸¹ *Id.*

⁸² *Id.* Other statements during the meeting reportedly were critical of the emphasis placed on the rights of states to take into account their economic and social needs in deciding on the human rights to be given protection. One such statement from the Philippine Alliance of Human Rights Advocates was reported to include the following assertion: "[W]hile cultural and religious specificities have an impact on universal standards, they cannot be used as a pretext to justify their violations." The Japanese representative was reported to have made a strong statement against "sacrificing human rights for development." *Id.*

The Bangkok Declaration⁸³ contains language on "the universality, objectivity and non-selectivity of all human rights"⁸⁴ These words are balanced by the following in the second phrase of the paragraph: "the need to avoid the application of double standards in the implementation of human rights and its politisation."⁸⁵ The third phrase in the paragraph enigmatically attempts to return to the ideas of the first phrase by stating that "no violation of human rights can be justified."⁸⁶ Paragraph 9 of the Declaration⁸⁷ recognizes the view expressed by Indonesia and others, which had been included in the ASEAN states' Kuala Lumpur Declaration, as follows:

While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.⁸⁸

The rights of women⁸⁹ and of the child are the only specific types of "traditional" human rights taken up in the Bangkok Declaration; this would appear to reflect the controversial nature of the content of these human rights in some member states and is at least an attempt to reassure other regions of the commitment of the Asian countries to these particular basic human rights.

The right to development is elevated to the status of "universal and inalienable right and an integral part of fundamental human rights."⁹⁰ Paragraph 17 of the Bangkok Declaration also attributes the establishment of the rights to development to the Declaration on the Right to Development.⁹¹

⁸³ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, U.N. A/CONF. 157/ASRM/8 (April 7, 1993) [hereinafter the Bangkok Declaration].

⁸⁴ *Id.* at para. 7.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at para. 9.

⁸⁸ *Id.*

⁸⁹ No reference is made in paragraph 22 to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. Doc. A/34/46 (1980).

⁹⁰ The Bangkok Declaration, *supra* note 83.

⁹¹ The Bangkok Declaration, *supra* note 83, at para. 17. The majority of the provisions of the Declaration are clearly political in nature; a number of these stress concepts of self-determination. Some provisions concern the right to development and certain economic issues; others are concerned with the various aspects of non-discrimination.

While the Bangkok Declaration accepts the general precept that "human rights are universal in nature" and appears to defer to the Universal Declaration of Human Rights and the U.N. Charter, it seems to be more concerned with giving voice to the "significance of national and regional particularities and various historical, cultural and religious backgrounds" in the creation of particular norms of human rights.⁹²

The approach of a number of Asian states appears to favor the practice and custom of individual states and of states in a particular region as one of the essential sources of human rights law. Rather than accept rules which largely reflect the experience and values of countries in other regions and have been introduced into United Nations instruments, these countries argue for specific rules which take into account the values of their own societies.

The international community's reaffirmance in the Vienna Declaration of its support for the universally applicable instruments of human rights is far from being a promise to consider every U.N. convention or declaration as law to be applied. The preamble reaffirms the international community's "commitment to the purposes and principles" in the U.N. Charter and the Universal Declaration of Human Rights.⁹³ The preamble also specifies that the, "Universal Declaration of Human Rights, which constitutes a common standard of achievement . . . is the source of inspiration and has been [the] basis . . ." for U.N. standard setting in its human rights instruments.⁹⁴ The Declaration's view on the role of regional law is set forth above.⁹⁵ The Vienna Declaration calls on regional arrangements to "reinforce universal human rights standards."⁹⁶

It can be argued that the Vienna Declaration's general admonitions to states and regions to reinforce universal human rights standards is sufficiently non-specific so as to accommodate the Bangkok Declaration's insistence on the recognition that while human rights are universal in nature their application must take into account "national and regional peculiarities."⁹⁷

⁹² The spokeswoman for the many NGOs represented at the meeting in Bangkok is reported to have expressed concern at "the emphasis placed in the declaration on 'regional specificities' and what she perceived as the absence of an unequivocal statement regarding the universality and indivisibility of human rights". Press Release, UN Information Service, April 2, 1993.

⁹³ United Nations World Conference on Human Rights: Vienna Declaration, pmbl., 32 I.L.M. 1661 (1993).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See The Bangkok Declaration, *supra* note 83, at para. 8. See also *supra* note 92 and accompanying text.

C. Models for Regional Human Rights Systems

A regional system modeled after the approach taken in the Kuala Lumpur and Bangkok Declarations could consist of a loose arrangement of categories of human rights, derived from generally-agreed to United Nations conventions and declarations. The content of the regional human rights norms, whether or not they are set forth in a particular convention, would reflect the contemporary values and practice of states in the region. Regional institutions would apply regional standards on human rights emanating from the legislation, policies and internal practice of the states in the region.

In contrast, the European and Inter-American models rely on the unification of norms of human rights in their respective regional human rights conventions. These conventions serve as the basic source of law for the regional adjudicatory institutions. The regional human rights conventions also have a strong harmonizing influence on national law and policy.

In the process of drafting regional conventions, under this model, consensus is reached among the states on rules that will be applied uniformly by the regional adjudicatory institutions. An underpinning to that consensus is the acceptance by member states of the substance of the "basic" universal rules of human rights set forth in the Universal Declaration of Human Rights, in the U.N. Charter and in the U.N. system's conventions on human rights.