

THE RULE OF LAW IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

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Our abiding commitment to the rule of law is the very bedrock of our civilization. It is what makes all else possible, from the flowering of the arts to the steady advance of the sciences. The idea that men must govern themselves not by the arbitrary commands of a ruler but by their own considered judgment, is the means whereby chaos is replaced by order. Balanced by the peaceful resolution of differences, the rule of law and the institutions of representative democracy are what stand between civilization and barbarism. It is through law-governed liberty that mankind has been able to achieve so much.

*Margaret Thatcher*¹

¶ 1 It is a commonplace that long lists of rights are empty words in the absence of a legal and political order in which rights can be realized. That was so well understood by the architects of the Universal Declaration of Human Rights that they endowed the 1948 document with features not usually seen in bills of rights: a right “to take part in the government of [one’s] country”; a right to “a social and international order in which the rights and freedoms set forth in this Declaration can be realized”; an acknowledgment that everyone’s rights are limited by the need for “meeting the just requirements of morality, public order and the general welfare in a democratic society”; and an express recognition of the importance of the rule of law.²

¶ 2 With the passage of time, the political realism of the men and women who drafted the Universal Declaration has been forgotten or ignored by many human rights advocates. The aim of this essay, therefore, is to recall the history of the rule-of-law provisions of the UDHR with the hope of shedding some light on current controversies over the respective roles of nation-states and international bodies in bringing human rights to life.

¶ 3 The Universal Declaration of Human Rights is based on an idea that came into its own during World War II: the idea that there are a few common standards of decency that can and should be accepted by people of all nations and cultures. By war’s end, there had been calls from a number of quarters for some kind of “international bill of rights.”³ Accordingly, one of the first acts of the newly created United Nations was to instruct its

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1 Margaret Thatcher, *Follow the Leader*, AM. OUTLOOK, Spring 2000, at 23.

2 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at Art. 21, 28, 29, and Preamble (3) (1948).

3 The account of the Declaration’s history that follows is based on MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

eighteen-member multinational Human Rights Commission to draw up a set of principles that all member states could pledge to implement.

¶ 4 The Commission might well have contented itself with preparing a list of rights culled from existing constitutions were it not for the participation of two remarkable lawyers: Canadian John Humphrey, the first Director of the United Nations Human Rights Division, and René Cassin, Charles de Gaulle's chief legal adviser, who represented France on the Human Rights Commission. Thanks to Humphrey, who compiled the first draft of the Declaration on the basis of extensive cross-national research, references to elements of the rule of law were pervasive in the document from the very outset.⁴ And thanks to Cassin, who used his civil-law training to endow Humphrey's draft with an interpretive structure, the rule of law became a hermeneutical key to the entire document. The efforts of these two men assured that the Declaration would be an integrated text whose parts were related to one another, and whose interpretation was meant to be guided by the general principles contained in its preamble and concluding sections.

¶ 5 Explaining the structure of the Declaration for the benefit of persons accustomed to simple lists or "bills" of rights, René Cassin compared it to the portico of a temple.⁵ The seven clauses of the Preamble are the steps leading up to the entrance. The basic principles of dignity, liberty, equality, and brotherhood, proclaimed in the first two articles,⁶ are the foundation blocks for four columns of rights: rights pertaining to individuals as such; rights of individuals in relation to each other and to various groups; spiritual, public and political rights; and, finally, economic, social and cultural rights. Crowning the portico is a pediment consisting of three concluding articles that place rights in the context of limits, duties, and the social and political order in which they are to be realized.

¶ 6 The Declaration's preamble and proclamation clause, together with Articles 1 and 2, belong to what in civil-law terminology is called the "general part" of the document, setting forth the premises, purposes, and principles that inform the rest of the text. The rule of law is woven into the structure of the UDHR from the very beginning, starting with the third clause of the preamble:

4 *Id.* at 271 (setting forth Humphrey's draft).

5 MARC AGI, RENÉ CASSIN: FANTASSIN DES DROITS DE L'HOMME 317 (1979).

6 Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.⁷

¶ 7 This clause, with its allusion to the right to revolt against tyranny, emphasizes the fragility as well as the importance of the rule of law. It reminds the powerful that they ignore human rights at their peril. If human beings are not "to be compelled" to resort to violence against oppression, "human rights should be protected by the rule of law."

¶ 8 The proclamation clause at the end of the preamble makes clear, however, that the Declaration as such does not create binding legal obligations.⁸

Now, Therefore, THE GENERAL ASSEMBLY proclaims

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.⁹

The document describes itself as a "common standard" toward which "every individual and every organ of society" should "strive." It is a yardstick by which nations and peoples can measure their own and each other's progress. Eleanor Roosevelt, who presided over the drafting process as chair of the U.N.'s first Human Rights Commission,

⁷ Universal Declaration of Human Rights, *supra* note 2, at prmb. (3).

⁸ The term "declaration" has since been officially defined by the U.N. Secretariat as: "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting significance are being enunciated." U.N. Doc. E/CN.4/L.610 (1962). Though not legally binding, a declaration "may by custom become recognized as laying down rules binding upon States." *Id.*

⁹ Universal Declaration of Human Rights, *supra* note 2, at prmb.

called special attention to this point when she presented the document to the General Assembly for its final vote:

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.¹⁰

¶ 9 Though the Declaration as such is not binding, most of its rights had already received a significant degree of recognition by 1948 in the constitutions of many nations, if not in their practices. Since that time, most of its rights have been incorporated into the domestic legal systems of most countries.¹¹ That is especially true of the rights in the Declaration's first "column" where several basic elements of the rule of law are set forth as rights. This column contains the best-known human rights: rights to life, liberty, and personal security; bans on slavery and torture; rights to legal recognition, equality before the law, and effective remedies for violation of fundamental rights; freedom from arbitrary arrest and detention; guarantees of fair criminal procedures, the presumption of innocence, and the principle of non-retroactivity in criminal law.¹²

10 *Statement by Mrs. Franklin D. Roosevelt*, DEPARTMENT OF STATE BULLETIN 751 (Dec. 19, 1948).

11 See Hurst Hannum, *The Status of the Universal Declaration in National Law*, 25 GA. J. INT'L & COMP. L. 287 (1995). Several parts are regarded as having become part of "customary international law," though the extent to which this has occurred is much disputed. See Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 365, 366, 371 (1998).

12 Universal Declaration of Human Rights, *supra* note 2, at 71.

Article 3. Everyone has the right to life, liberty and security of person.

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6. Everyone has the right to recognition everywhere as a person before the law.

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. (1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

¶ 10 This group of provisions, aimed at subjecting the exercise of power to legal rules, protecting individuals from aggression, and assuring fair procedures, is at the heart of the most widely publicized human rights disputes in the world today. These norms had abundant antecedents in existing constitutions, provoked little controversy in the drafting process, and were approved unanimously without abstentions when the General Assembly took them up one by one just before it voted on the Declaration as a whole.¹³ They are also the most tightly drafted sections of the Declaration, leaving far less room for local variation than the rights set forth in subsequent articles.

¶ 11 The rights in the Declaration's second column are primarily concerned with the liberties of people as they live and interact with one another in civil and political society. They include the right to be free of arbitrary interference with one's "privacy, family, home, or correspondence" and from arbitrary attacks upon one's "honor and reputation"; freedom of movement and the right of return; the right to seek and enjoy political asylum; the right to a nationality; the right to marry and to found a family, the right of the family as such to "protection by society and the State," and the right to own property.¹⁴ These rights are significantly more open-ended than the protections against violent and arbitrary treatment with which the Declaration begins—thus leaving larger scope for variation in different social and political contexts, (*e.g.*, individuals everywhere have the right to be free of torture, but different countries may legitimately come to different conclusions about the conditions under which private property may be taken for public use).

¶ 12 The third column comprises a familiar group of freedoms that the drafters thought of as "political": freedom of religion and belief; freedom of opinion, expression, and communication; freedom of assembly and association; and the "right to take part in government . . . directly or through freely chosen representatives."¹⁵

13 In the final vote, however, eight countries abstained: the six Soviet bloc nations, South Africa and Saudi Arabia.

14 Universal Declaration of Human Rights, *supra* note 2, at Arts. 12-17.

15 *Id.* at Art. 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others, and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

¶ 13 The fourth and last column of the Declaration contains the social, economic and cultural rights.¹⁶ Despite much controversy over their details and the manner of their implementation, it is worth recalling that no nation opposed these “new” rights in principle. Such rights, after all, were already present in many twentieth century constitutions and in legislation like that of the New Deal period in the United States—rights to a minimum standard of living, to work, to social security in the event of unemployment or disability, to form and join unions, and to education. The official U.S. position, as explained by Eleanor Roosevelt, was that it “favored the inclusion of economic and social rights in the Declaration, for no personal liberty could exist without economic security and independence.”¹⁷ Unlike the Soviet bloc nations, however, the United States did not consider these rights to “imply an obligation on governments to assure the enjoyment of these rights by direct governmental action.”¹⁸ Methods for ensuring the realization of those rights, Mrs. Roosevelt said, “would necessarily vary from one country to another and such variations should be considered not only inevitable but salutary.”¹⁹

¶ 14 The role of the state in implementing these rights was the subject of heated arguments among the members of the Human Rights Commission. As Mrs. Roosevelt had once written about the problem of managing the tension between freedom and social security, “No one as yet seems to know just how to do this without an amount of planning which will be considered too restrictive for freedom.”²⁰ Representatives both of the Truman Administration in the United States and the United Kingdom's Labor Government were concerned not to dampen private initiative or to give too much power to the State. The Soviet bloc representatives, on the other hand, maintained that these rights were meaningless without a strong central State in charge of health, education and welfare.

¶ 15 It was in the context of a prolonged debate over these issues that one of the Declaration's most unusual articles was produced, an article that highlighted the importance of the rule of law. The drafting process had stalled while representatives of the United States and the Soviet Union wrangled over the merits of central planning versus approaches that left room for the free operation of the market. Commissioners

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20. (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.

Article 21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

¹⁶ *Id.* at Arts. 22-27.

¹⁷ Human Rights Commission, 3d Sess., at 5-6, E/CN.4/SR.64 (1947).

¹⁸ *Statement by Mrs. Franklin D. Roosevelt*, DEPARTMENT OF STATE BULLETIN, 751-752 (Dec. 19, 1948).

¹⁹ Human Rights Commission, *supra* note 16, at 5-6.

²⁰ ELEANOR ROOSEVELT, THE MORAL BASIS OF DEMOCRACY 49-50 (1940).

from Egypt and India, for their part, balked at endorsing *any* claim that social and economic rights were fundamental. They pointed out that governments of poor countries could not possibly put these rights into effect in the near future. In an effort to move the discussion along, Lebanon's Charles Malik proposed a new article to deal with the conditions that would need to be in place before the Declaration's rights could be fully realized.

¶ 16 The language that Malik drafted met with general approval, and ultimately it became the Declaration's Article 28 ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.") But it did not resolve the impasse over the role of the state. Cassin then tried his hand at an introductory "chapeau" article to serve as a mini-preamble to the social and economic rights. He came up with: "Everyone as a member of society has the economic, social, and cultural rights enumerated below, whose fulfillment should be made possible by the State separately or by international collaboration." The Egyptian representative, Omar Loutfi, then proposed an amendment to make clear that the state was not the only institution through which these rights might be promoted, and that the rights in question could be implemented gradually.

¶ 17 The end result, accepted by all but the Soviet bloc representatives, was Article 22 which introduces the social, economic and cultural rights and which, by describing them as "indispensable" for human dignity, links them to the traditional political and civil rights.

Article 22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and for the free development of his personality.²¹

21 Universal Declaration of Human Rights, *supra* note 2, at Art. 22.

The reference in the chapeau to the “organization” of each State was key, because it left room for choice among a range of *means* of striving toward the common social and economic goals—governmental programs and policies, international initiatives, market dynamics, voluntary action, or various combinations of these approaches. The reference to “resources” was equally crucial. By signaling that implementation would be in accordance with each state’s capacity, it responded to the concerns of Egypt, India, and other developing countries about arousing unrealistic expectations.

¶ 18 The new article proposed by Malik became the first of the three concluding sections of the Declaration—the articles that Cassin saw as the “pediment” or roof of the portico. Like the Preamble and Articles 1 and 2, the last three articles contain general principles that are meant to inform the interpretation of the document as a whole. They address the prerequisites for the realization of the rights and freedoms enumerated in the Declaration. Article 28’s affirmation of the right to a certain kind of order harks back to the Preamble’s insistence on the rule of law. Some essential features of such an order are then sketched out in Article 29, where the Declaration speaks of duties and limits, morality and public order (a reference to the civil-law concept of *ordre public*, another echo of the rule of law). Article 29’s reference to a “democratic society” reinforces the democratic rights set forth in Article 21.²²

Article 28. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.²³

¶ 19 A final limit on rights is the subject of the thirtieth and last article: “Nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²⁴

²² *Id.* at Art. 21.

²³ *Id.* at Arts. 28, 29.

²⁴ *Id.* at Art. 30.

¶ 20 When read as it was meant to be, namely as a whole, the Universal Declaration is an integrated document where rights are meant to be seen in relation to each other and to certain over-arching principles, including the rule of law. The question arises, however: what did the framers mean by the rule of law? Today, many human rights supporters think of enforcement mainly in terms of international law and institutions. But the very nature of the Declaration as a “common standard” for “all peoples and all nations” testifies to the importance the framers attached to incorporation of its principles into national law. Beyond that—and its general references to international cooperation and the need for an international order in which rights can be realized—the Declaration is silent on the problem of how and by whom its vision of better standards of life in larger freedom was to be enforced.

¶ 21 That silence was intentional. When the Human Rights Commission began meeting in 1947 to discuss an “international bill of rights,” the precise character of the document they were about to draft was an open question. In those early sessions, there seems to have been confusion in the minds of some Commissioners (most of whom were not lawyers) about the difference between a non-binding declaration of principles by the U.N. General Assembly, and instruments such as treaties, conventions and covenants that impose enforceable legal duties on the States that sign and ratify them.

¶ 22 The members of the Commission had divergent views on how they should proceed. The United Kingdom’s representative urged his fellow Human Rights Commissioners to prepare a binding covenant rather than a statement full of high-sounding generalities. The United States and France disagreed, favoring an initial broad declaration of principles to be followed eventually by conventions on particular subjects.²⁵ The Australian and Indian Commissioners were the chief proponents of another approach emphasizing international enforcement machinery such as an international tribunal which could hear complaints from individuals that their rights had been infringed by their own governments.²⁶ The Soviet bloc representatives, unwilling to state openly that they desired none of these proposals, bent all their efforts toward delay.

25 U.N. ESCOR, 1st Sess., 15th mtg. at 5, U.N. Doc. E/CN.4/SR.15 (1947). For the full U.S. position, see DEPARTMENT OF STATE BULLETIN 277 (Feb. 16, 1947).

26 *Id.* at 2-3; U.N. ESCOR, 1st Sess., 16th mtg. at 2, U.N. Doc. E/CN.4/SR.16 (1947).

In the end, the Commission decided to proceed on all three fronts, but the Declaration soon acquired priority.

¶ 23 That was a fortunate development, for the UDHR was completed on schedule, and quickly began to show its influence. It would be eighteen more years before two covenants to implement the Declaration—one on political and civil rights, the other on economic, social and cultural rights—were opened for signature.²⁷ Ten more years went by before those conventions received enough signatures to go into effect, in 1976. The first international tribunal where individual complaints could be heard did not appear until the European Court of Human Rights opened its doors in 1959 to persons in States that had accepted its jurisdiction. And it was not until 1976, when the Covenant on Political and Civil Rights went into effect, that individuals were given the opportunity to present complaints to a U.N. body against nations that had agreed to this procedure.

¶ 24 At the time the Declaration was adopted, human rights supporters were of different minds about its worth and prospects. Many regarded it as a milestone in the history of freedom, but to others it seemed to be just a collection of pious phrases—meaningless without courts, policemen and armies to back them up. The latter view was common among men impatient for action and progress, including Rafael Lemkin, the chief promoter of the U.N.'s Genocide Convention, and Hersch Lauterpacht, the most famous international law scholar of the day. Commenting disparagingly that "the Declaration is not in itself an achievement of magnitude," Lauterpacht judged that it would have "no legal force and probably only inconsiderable moral authority."²⁸

¶ 25 Eleanor Roosevelt was more hopeful, and more prescient. Her confidence was due in part to her lively sense of the Declaration of Independence as a bright thread running through American history. That document, too, was non-binding. Perhaps for that reason, the U.S. State Department chose to explain its view of the Universal Declaration by referring to what Abraham Lincoln had said about the assertion in the Declaration of Independence that "all men are created equal." It was as a fine a statement as could have been found to counter the idea that a non-binding declaration would have little influence:

They [the drafters] did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which should be familiar to all: constantly looked to, constantly labored for, and . . . thereby constantly

27 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

28 HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 425 (Fredrick A. Praeger, 1950).

spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere.²⁹

¶ 26 To an impressive degree, the confidence of the Universal Declaration's supporters proved justified. The document rapidly became a model for many new constitutions and rights instruments that were adopted in the active period of constitution-making that followed World War II. And contrary to expectations of self-styled realists, the Declaration's authority made itself felt over the years in a variety of other ways. The most dramatic advances in human rights—the fall of apartheid in South Africa and the collapse of the East European totalitarian regimes—owed more to the Declaration whose principles served as rallying points for non-violent rights movements than to the many covenants and treaties that were then in force. The UDHR's non-binding principles, carried far and wide by activists and modern communications, vaulted over the political and legal barriers that impeded international enforcement mechanisms. Most, though not all, flagrant and repeated instances of rights abuse now are brought to light, and most governments now go to great lengths to avoid being blacklisted as notorious violators.

¶ 27 By 1986, Charles Malik, who had been one of the staunchest supporters of international human rights covenants, had come around to Roosevelt's view, admitting that, "Whenever the question of human rights has arisen throughout the world, the appeal has been far more to the Declaration than to the covenants."³⁰ He now appreciated, he said, that, "In the long run, the morally disturbing or judging is far more important than the legally binding."

¶ 28 It would be a mistake, however, to infer that the principal framers of the Declaration attached little importance to law. What many of today's internationalists have forgotten, or chosen to ignore, is that Roosevelt, Malik, and Cassin saw the rule of law at the *national* level as the best and surest legal means for protecting human rights. René Cassin was a vigorous opponent of the Soviet Union's insistence on *exclusive* national sovereignty. As a French Jew who had lost twenty-nine relatives in

29 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301 (Roy P. Bassler, 1953).

30 Charles Malik, *1948—The Drafting of the Universal Declaration of Human Rights*, U.N. BULL. HUM. RTS. 97 (1986).

concentration camps, he was acutely aware that states themselves are often violators of human rights. But Cassin was equally assertive in rejecting simplistic attacks on national sovereignty. Nation states, he insisted, would always have to provide the *primary* line of legal defense of human rights. The point was so important that he chose to emphasize it his 1968 Nobel Peace Prize acceptance speech. "There is no room for doubt," he said on that occasion, "concerning the essential question whether the nations have retained or lost their traditional exclusive jurisdiction over the treatment of their citizens. That national jurisdiction will always be at the base. It will remain primary. But it will no longer be exclusive."³¹

¶ 29 Subsequent developments have not impaired the validity of Cassin's position. Though the Declaration is rightly hailed for establishing the principle that nation states must be accountable for the way they treat their own people, the fact is that when protection at the national level is absent or breaks down, there are severe limitations on what international enforcement mechanisms can accomplish. The greatest success story for international enforcement—that of the European human rights system established by the 1950 European Convention on Human Rights—only serves to underline the importance of an underlying cultural commitment to the rule of law. The effectiveness of the European system has been largely due to the willingness of the constitutional republics involved to comply promptly and fully with the judgments of the European Court of Human Rights, adapting their laws to its rulings. By contrast, compliance has been a major problem for the Inter-American human rights system, where many of the cases that come before the regional Court in Costa Rica have involved grave violations—disappearances, torture and deaths.

¶ 30 The difficulty with international legal remedies, as historian Brian Simpson has pointed out, is that they work best where there is fairly wide acceptance of their legitimacy or a perception that compliance is in the interests of those subject to the system. They are thus apt to be least effective in the situations where the worst violations occur: "The underlying problem can be stated in a paradoxical way—the function of international legal mechanisms is to establish the rule of law, but legal mechanisms only work satisfactorily when the conditions embodied in the notion of the rule of law already exist."³² It can be expected, therefore, that the strength of the European human rights system will be sorely tested as it assimilates new members from Eastern Europe where the rule-of-law tradition has not been strong.

¶ 31 The most intractable enforcement problems arise where rogue nations are the rights violators, or where anarchy prevails owing to civil war or other conflicts between groups. The responses of other nations to appalling rights violations in such situations have ranged from inaction, to diplomatic initiatives and censure, to economic incentives and sanctions, to arms embargoes, to military intervention, and, in the post-Cold War years, to *ad hoc* international criminal prosecutions and, in 2002, to the establishment of a permanent international criminal court.

31 RENÉ CASSIN, *LA PENSÉE ET L'ACTION* 110 (F. Lalou, 1972).

32 A.W. B. Simpson, *Rights Talk, Rights Acts*, *TIMES LIT. SUPP.*, Aug. 27, 1999, at 9.

¶ 32 Though the framers of the Declaration knew that military intervention was sometimes necessary, and some backed the establishment of a permanent international criminal court, those subjects figured very little in their deliberations about implementation of the Declaration. That was due in part to their conviction that culture is prior to law. Criminal prosecutions, they knew, have little effect on the basic causes of the conduct they aim to punish and deter.

¶ 33 There seems to be no getting around Cassin's point, recently echoed by Michael Ignatieff, the director of the Carr Center for Human Rights at Harvard University's Kennedy School of Government:

Fifty years after the Universal Declaration, state sovereignty remains the main pillar of the international system. It also remains the case that human rights are best protected not by international treaty but by the constitutions of democratic states. International human rights monitoring, in states that have collapsed or in states with authoritarian governments, is a poor substitute for the human rights protection which comes when the people themselves can elect a government they trust.³³

¶ 34 A growing number of scholars have raised their voices against the sort of internationalism that waxes enthusiastic over the idea of supranational institutions in readiness to over-ride national constitutions and democratic legislation in the name of human rights. Robert Araujo has argued that an internationalist program of that type ultimately undermines all human rights, because sovereignty—the exercise of free self-government by a people—is itself a fundamental human right, one that is essential for the protection of all the fundamental rights to which it is inextricably linked.³⁴ In a similar vein, Kenneth Minogue contends that the problem with insufficiently differentiated internationalism is that it aims not only to transcend the nation state but to over-ride the

33 Michael Ignatieff, *Human Rights: The Midlife Crisis*, N.Y. REV. BOOKS, May 20, 1999, at 62.

34 Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L. J. 1477 (2001).

politics of democratically constituted states. This project, he bluntly states, “cannot . . . be anything other than a bid for power by a new class of power holders.”³⁵

¶ 35 What is the impetus for this internationalist hubris? Towards the end of the Cold War, there was a veritable explosion of interest in international human rights. The Universal Declaration became the polestar, the holy writ, of the modern international human rights movement. But like other sacred scripture, it was more cited than studied. The sense of the document as an integrated body of principles was lost; the parts favored by western advocacy groups were selectively promoted, while others (religious rights, family protection, democratic government, economic and social rights) were ignored or pushed into the background. Regrettably, the leading human rights organizations, most of them western-based, had been deeply influenced by the kind of rights talk that gained currency in the United States in the 1960’s and 1970’s. Several features of that new discourse had the potential to wreak havoc with the Declaration: the tendency to think of rights without individual or social responsibilities; to tout one’s favorite rights as absolute while neglecting others; and to ignore the relation of rights to constitutional government and the rule of law.³⁶

¶ 36 To make matters worse, many western human rights activists lost sight of the fact that the Declaration does not purport to offer a single approved model of human rights for the entire world, much less a pretext for top-down regulation by international bodies. The framers never envisioned that the document’s “common standard” would or should produce completely uniform practices. Rather, they expected that its principles would be brought to life in different cultures in a legitimate variety of ways. As Cassin put it, the drafters took care “to prove that the co-existence of States which have differing economic conceptions and differing regimes is possible and that it is not necessary for one conception to triumph over another conception.”³⁷

¶ 37 That pluralist vision was not universally shared by the human rights organizations that came into being in the 1970’s. At their best, these groups have performed heroic public service by training the searchlight of publicity on abuses that would otherwise be ignored. As historian Kenneth Cmiel has observed, Amnesty International and Human Rights Watch “pioneered a new style of reform politics that succeeded by combining thick rivers of fact to influence elites, direct mail and foundation money to keep going, and media savvy to appeal broadly.”³⁸ But as advocacy groups multiplied and became more specialized, some behaved as though the only way to envision and implement human rights was in accordance with their particular agendas. The United Nations’ remoteness from public scrutiny and democratic accountability made its agencies

35 Kenneth Minogue, *Transnational Interest*, AM. OUTLOOK, Spring 2000, at 54.

36 See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

37 Verbatim Record, June 17, 1947, Drafting Committee Meeting (Charles Malik Papers, Library of Congress, Manuscript Division).

38 Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, J. AM. HIST. 1231, 1246 (1999).

especially vulnerable to lobbying by special interest groups whose programs were too controversial to pass muster in ordinary political processes at the national level.

¶ 38 Since the largest and best financed rights advocacy organizations are North American or North European-based, one ironic result of their growing influence has been to make the charge of "Western human rights imperialism" sound plausible. That charge is often made in bad faith by authoritarian rulers when their own citizens claim basic civil and political rights. But similar concerns are also expressed by serious human rights supporters like Nobel-Prize winning economist Amartya Sen, a native of Calcutta who has devoted much of his career to combating inequality and world hunger, has criticized international policy makers for "giving priority to their own ideas" and for exhibiting "a dangerous tendency to treat people in poor countries, not as reasonable beings, [or] allies faced with a common problem, but as impulsive and uncontrolled sources of great social harm, in need of strong discipline."³⁹

¶ 39 Since Sen wrote those words in 1994, the dangers he warned of have increased, as evidenced, for example, by CNN founder Ted Turner's much-publicized billion-dollar "gift" to the U.N. in 1997. Turner initially announced that his donation was to help "the poorest of the poor."⁴⁰ It soon appeared, however, that the U.N. would not have control over the funds, and that it would be required to submit proposals to a foundation headed by former State Department official Timothy Wirth, best known as an advocate of aggressive population control.⁴¹ As its details unfolded, Turner's billion-dollar gesture looked less like a gift than a take-over bid aimed at U.N. agencies with privileged access to populations deemed by Wirth and Turner to be in need of management.

¶ 40 The establishment in 2002 of a permanent International Criminal Court provides another instance of excessively ambitious internationalism. It is undeniable that the effective protection of human rights requires an element of international scrutiny, since

39 Amartya Sen, *Population: Delusion and Reality*, N.Y. REV. BOOKS, Sept. 22, 1994, at 62.

40 Betsy Pisik, *Gift Keeps on Giving*, WASH. TIMES, Jan. 19, 1998, at A1.

41 Barbara Crossette, *Turner Picks State Department Official to Allocate UN Fund*, INT'L HERALD TRIB., Nov. 21, 1997, at 4; Colin Woodard, *Ted Turner Gift Poised to Boost UN*, CHRISTIAN SCI. MONITOR, Apr. 22, 1998, at 1.

the governments that commit the worst human rights violations are the least likely to police themselves. But several features of the ICC give rise to rule-of-law concerns.⁴²

Unlike the courts that play a key role in protecting the liberties of citizens of democratic nation states, the ICC is not subject to any checks and balances. Its judges and prosecutors are not accountable to any democratic authority or even to the U.N. Security Council. There is no political check on the prosecutor's power to investigate and to decide whom to prosecute. It might be claimed that checks on the Court's power will be provided by the quality of people who will become its judges and prosecutors. But these officials will be elected by secret ballot by a majority of the ratifying nations and it does not inspire confidence that this group includes numerous notorious human rights violators. There is a real danger, moreover, that a standing court with eighteen judges, a permanent roving prosecutor, a thirty-million dollar annual budget, and a staff of four-hundred persons, will look around for cases to prosecute to justify its existence.

¶ 41 In sum, the post-Cold War period has been both a time of promise and a time of peril for human rights. The more the Universal Declaration showed its moral force in Eastern Europe and South Africa, the more nations and interest groups sought to cast their agendas or justify their actions in terms of human rights. What forgetfulness did not erase, opportunism eroded—to the point where one might say of the Declaration today what Lincoln once said of the Declaration of Independence: “It has proved a stumbling block to tyrants, and ever will, unless brought into contempt by its pretended friends.”⁴³

¶ 42 Such developments would have disappointed, but not surprised, the Declaration's framers. That group of men and women were well aware that no principles are immune from manipulation: they had personally witnessed the work of the great propaganda machines of National Socialist and Marxist dictatorships. They knew, too, that some of the very features that made it possible for the Declaration's universal principles to be applied in diverse cultures rendered it vulnerable to manipulation: its open texture, its ambiguities, its internal tensions. Nevertheless, they were hopeful that more and more nations would compete in making human rights come alive and in establishing conditions that would promote their realization.

¶ 43 The crucial challenge for friends of human rights today, as in 1948, is: how can the promise of the international human rights project be maximized while minimizing its perils? Whoever can devise a formula for solving that problem would deserve a Nobel Peace Prize. But until that happens, it is worth recalling what the principal framers had to say on the subject. One basic assumption they shared was that poverty and discrimination often set the stage for atrocities and armed conflict. That is why Franklin Roosevelt included the “freedom from want” among his Four Freedoms, and why Harry Truman took the occasion of the signing of the U.N. Charter to warn that, “Experience has shown

42 See generally John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55 (2003).

43 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 1858-1860 79, 195 (Roy P. Basler et. al. eds., 1953).

how deeply the seeds of war are planted by economic rivalry and by social injustice.”⁴⁴ Those ideas found expression in the Declaration’s insistence on the link between freedom and social justice, and on the relation of both to peace. That aspect of the Declaration, unfortunately, is commonly ignored today—just at a time when the poorest people and countries, a quarter of the world’s population, are being increasingly marginalized in the global economic order. A pressing task for the future, therefore, is to reunite the Declaration’s commitment to individual liberty with its acknowledgment of the links among freedom, economic opportunity, and the sense of a single human family for which all bear a common responsibility.

¶ 44 Another important element of the framers’ thinking about human rights is that success would require nothing less than transforming culture—not from the top-down, but from the ground up, person by person. The four principal framers—Eleanor Roosevelt, Charles Malik, René Cassin, and China’s Peng-chun Chang—differed on many points, but they were as one in their belief in the priority of culture. Cassin wrote that, “In the eyes of the Declaration’s authors, effective respect for human rights depends primarily and above all on the mentalities of individuals and social groups.”⁴⁵ Malik agreed. “Men, cultures and nations must first mature inwardly,” he wrote, “before there can be effective international machinery to adjudicate in complaints about the violation of human rights.”⁴⁶ Chang, citing a Chinese proverb that “Laws alone are not sufficient to bring about results by themselves,” said the Declaration’s main goal was “to build up better human beings, and not merely to punish those who violate human rights.”⁴⁷

¶ 45 Eleanor Roosevelt was of the same mind. In 1940, with war on the horizon, she had written a pamphlet, “The Moral Basis of Democracy,” to emphasize that democracy requires a virtuous citizenry nurtured in settings where republican virtues and habits are fostered. “Court decisions, and laws and government administration,” she said, “are only

44 HARRY TRUMAN, CLOSING THE UNITED NATIONS CONFERENCE (1945), reprinted in TRUMAN SPEAKS 56 (Cyril Clemens ed., 1969).

45 CASSIN, *supra* note 30, at 155.

46 Charles Malik, *Introduction*, in O. FREDERICK NOLDE, FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE 12 (1968).

47 Human Rights Commission, Drafting Committee, 2d Sess. at 10, U.N. Doc. E/CN.4/AC.1/SR.11.

the results of the way people progress inwardly.”⁴⁸ She returned to the point in one of her last speeches at the U.N., emphasizing the importance of the small settings where people first learn of their rights and responsibilities:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they *are* the world of the individual persons; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works.⁴⁹

¶ 46 Roosevelt and her colleagues believed that the best protections for freedom and dignity were in the habits and opinions of ordinary citizens and statespersons, reflected in appropriate laws and institutions. They saw the relation between law and culture as a dynamic one: the rule of law is a product of culture, but good laws and institutions set the conditions that foster the habits and attitudes that support good laws and institutions.

¶ 47 Those convictions of the framers undergird another noteworthy feature of the Declaration: its implicit embodiment of the principle of subsidiarity—its attention to the “small places” where people learn about their rights and how to exercise them responsibly—families, schools, workplaces, religious and other associations. These little seedbeds of character and competence, together with the rule of law, political freedoms, social security, and international cooperation are all part of the Declaration’s ecology of freedom.

¶ 48 The ideas of Roosevelt, Malik, Cassin and Chang are worth remembering because their vision of the Universal Declaration is worth preserving. The Declaration, with its small core of principles to which people of vastly different backgrounds can appeal, is the single most important reference point for cross-national discussions of the human future on our increasingly inter-dependent and conflict-ridden planet. As disappointing as those discussions often are, to give up on the possibility of having them would be to give up on the belief of the authors of *The Federalist Papers*: that human affairs are not forever destined to be determined by force and accident, but that they can be affected to some extent by reason and choice.⁵⁰

48 ROOSEVELT, *supra* note 19, at 62.

49 JOSEPH P. LASH, *ELEANOR: THE YEARS ALONE* 81 (1972) (quoting Eleanor Roosevelt).

50 ALEXANDER HAMILTON ET. AL., *THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 9 (1901).