

*The Triumph of Humanity: From 1789 to 1989
and from Natural to Human Rights*

1. THE DECLINE OF NATURAL RIGHTS

It is a common historical lesson that victorious revolutionaries turned rulers can become as oppressive as their predecessors. It is no wonder, therefore, that the years following the publication of the great declarations saw a decline in the popularity of natural rights. The reactions were political and intellectual. Politically, the great monarchies of the nineteenth century treated natural rights as a dangerous, revolutionary doctrine which could be effectively utilised by the emerging democratic and socialist opposition movements. The dominant political forces and social classes of the nineteenth and early twentieth centuries were closely linked with the revolutions of the eighteenth. They had vivid memories of their own victories and appreciated fully the incendiary potential of naturalist ideas which had been successfully used against the old regimes in France and America. As Bentham insisted, these rights were not just nonsense and fallacies, they were also mischievous and anarchical.¹ Their use in political discourse, during that period, was extremely limited and they were almost unknown to law. The gradual evolution and eventual domination of a combination of limited democracy and unlimited legal positivism meant that the sovereign people (defined in an extremely restricted way) could do no wrong. All assertions of human rights by the groups and classes excluded from citizenship, women, blacks, workers or political and social reformers, were dismissed as selfish attacks against the common good and the democratic will. This was the era of state and empire-building, of utilitarianism and social engineering, the time of emergence of nationalism,

¹ Jeremy Bentham, *Anarchical Fallacies: being an examination of the Declaration of Rights issued during the French Revolution* in Jeremy Waldron (ed.), *Nonsense upon Stilts* (London, Methuen, 1987) 46-76.

racism and sexism. It was not that these ideas and practices were unknown before the nineteenth century but they now became theorised and respectable elements of European culture. Individual rights and the associated legal constraints were not part of the first phase of modernity.

The intellectual reasons for the decline were more complex. We will examine in the second part the devastating critiques of natural rights by some of the finest minds of the late eighteenth and nineteenth centuries.² Edmund Burke denied their abstraction and rationalism, Jeremy Bentham their obscurantism and indeterminacy, Karl Marx their close link with class interests which, despite the theory's apparent claims, made them antipathetic to human emancipation. They all contributed to the fatal undermining of the intellectual presuppositions of naturalism alongside many other factors at work. The most important intellectual force in law was positivism. The positivist approach and empiricism, its handmaiden, already dominant in the natural sciences and triumphant in technology with its many marvels, migrated to law and the emerging social sciences. As Hobbes had accurately predicted, the most important political consequence of the positivisation of natural rights was the emergence of the legislative Leviathan. The power of free will to shape the world according to its preferences was shadowed by the unlimited competence of the state to shape individuals according to the dictates of *raison d'état* and political expediency and, individual freedom was reflected in the legislative and administrative ability of the state to interfere with and regulate all aspects of social life. The free and willing individual finds no inherent restrictions to his world making power; similarly, the state finds no limits to the scope, reach and breadth of its sovereignty. The beginnings of all modern law, which is by definition posited law, can be traced in this mirroring: positivism, the claim that valid law is exclusively created by acts of state will, is the inescapable essence of legal modernity, the mirror image of the claim that the individual legislates the ends and aims of his action and arranges his life plan through sovereign acts of choice. One could argue, by paraphrasing Foucault, that the ideal of emancipation was shadowed by the technology of legislation and the aim of self-fulfilment by techniques of disciplining the subject and of shaping the body politic and the docile and productive individual body.

The process of positivisation united the major Western legal systems. In England, John Austin and A. V. Dicey removed all

remaining naturalist fallacies from jurisprudence and proclaimed the absolute primacy of state law. Dicey's classic *Introduction to the Law of the Constitution* arrogantly dismissed the ability of the French tradition with its Bills of Rights and special *droit administratif* to constrain public power. With us "the principles of private law have . . . been by the action of the Courts and Parliament so extended as to determine the position of the Crown and its servants . . . The constitution is the result of the ordinary law of the land . . . the law of the constitution is not the source but the consequence of the rights of the individuals".³ Dicey's Victorian combination of English parochialism and imperial triumphalism expressed a wider turning away from moral principle and natural right, seen as metaphysical abstractions and myths, towards a more pragmatic appreciation of the great potential of state power left to its untrammelled resources. Burke's aggressive traditionalism had finally become the principle of the Constitution. In the United States, race relations were defined for a century by the apartheid principle of "separate but equal" which was set aside as late as 1954.⁴ The free speech guarantee of the First Amendment, the most litigated right in the history of the American Constitution, would have to wait until 1919 for its first outing before the Supreme Court.⁵ In continental Europe, Hannah Arendt noted that, before the Second World War, human rights "were invoked in a *perfunctory* way to defend individuals against the power of the state and to shield them from the social insecurity". Those jurists and philanthropists who tried to use human rights to protect minorities "showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals".⁶ And the German legal theorist Otto Gierke, writing in 1934, as the Nazis were taking hold, lamented that in Germany, "natural right" and "humanity" "have now become almost incomprehensible . . . and have lost altogether their original life and colour".⁷

This process was facilitated and accelerated by the transformation of political philosophy and jurisprudence into political science, the

² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 1885; 10th edn, 1950) with introduction by E. C. S. Wade, 1981-9.

³ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954). The judicial part of the struggle for desegregation is told in Richard Kluger, *Simple Justice* (London, Andre Deutsch, 1977).

⁴ *Schenck v. United States*, 249 U.S. 47 (1919).

⁵ Hannah Arendt, *The Origins of Totalitarianism* (San Diego, Harvest Books, 1979) 293, 292.

⁶ Otto Gierke, *Natural Law and the Theory of Society* (translated with introduction by Ernest Baker) (Cambridge, Cambridge University Press, 1934) 201-2.

⁷ See Chapter 7.

turn of history into the philosophy of history and by the evolution of grand social theory. Hegel, Comte, Durkheim, Marx, Weber and Freud replaced the earlier interest in individual rights with an examination of the social processes and structures which shape subjectivity and action. As the creator of sociology, Auguste Comte put it, the spirit of the rights of man

was useful in demolishing old feudal-military policy and in exploding the myth of divine rights by insisting on the rights of man. But it was totally incapable of projecting any positive conceptions to replace those it had destroyed; every so-called liberal principle was in fact only a "dogma" created by trying to erect some criticism of the theological into a positive doctrine, e.g., the dogma of liberty of conscience — mere abstract expression (like metaphysics), of the temporary state of unbounded liberty in which the human mind was left by the decay of the theological philosophy.⁸

In this intellectual climate the idea of society was invented, it was given priority over the individual and became the main object of scientific inquiry. Durkheim's collective conscience, Marx's primacy of the economic over the moral aspects of historical development and Weber's process of rationalisation delivered severe blows to the nationalist idea, which had placed individuals and their rights higher than societal claims or had asserted that society was the outcome of contractual agreements. Societies were no longer seen as the product of deliberate individual action nor was the protection of natural rights their main task. As historian Joan Scott put it, "by the end of the nineteenth century, the individual was defined by social theorists not in opposition to the social or society, but as its product".⁹ For the emerging social theory, structure became politically and cognitively more important than agency, individuals had low epistemological value and were the targets of multiple external determinations and internalised constraints. The newly liberated individual soon became the object of disciplinary power and his putative sovereignty and right gave way to techniques of normalisation.¹⁰

An important effect of this theoretical turn, was the creation of the concept of ideology. Ideology was defined either as false consciousness-

⁸ *The Positive Philosophy of Auguste Comte* (Harriet Martineau ed. and trans.) (London, 3rd ed., 1893) Vol. 2, 51.

⁹ Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge Mass., Harvard University Press, 1990), 10.

¹⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth, Penguin, 1979); Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (Harmondsworth, Penguin, 1981).

ness, which could be corrected by science, or as a set of ideas representing narrow, sectional interests but claiming the dignity of the universal. Natural rights became a prime example of ideological illusion; against their absolutist pretensions, they were now seen as conventional and interested discourse of the most dubious character. Reinterpreted ideologically, natural rights turned from eternal into historically and geographically local inventions, from absolute into contextually determined, from inalienable into relative to cultural and legal contingencies. No longer the basis of society or the main purpose of its action, natural rights became disputed entities, objects of historical analysis and ideological debunking. The new morality was a morality of groups, classes, parties and nations, of social intervention, legal reform and utilitarian calculations. Natural rights were reduced to the scrapheap of ideas, their relevance exhausted with the end of the Napoleonic adventures. They placed no obstacle into the path of power and could be removed or restricted at will in order to promote state purposes and social engineering.

Hegel's philosophy of history, although antithetical to utilitarianism, further undermined natural rights. The historicist reaction to the French Revolution had insisted that all knowledge is situated and can be acquired only within clear historical constraints. The historical horizon cannot be transcended, because it forms the absolute presupposition of all understanding. Hegel radicalised historicism; while Burke had argued that the attempt to resolve fundamental philosophical problems from a transcendent perspective was absurd, Hegel turned this insight into the spirit of history. The claim that the rational, the actual and the real had finally coincided in the Hegelian system meant that the quest for wisdom had finally been transformed into wisdom itself and that the search for the "ideal polity" had come to an end.¹¹ When Hegel heard, from his study, the fury of the battle of Jena, he famously declared that he saw in Napoleon "reason on horseback". Napoleon's and "reason's" defeat led Hegel to diagnose the completion of the system closer to home and to identify it with the Prussian State. Either way, the spirit had been incarnated in history and reason had subjected power to the demands of right. Rights had triumphed in the *Rechtsstaat* and there was no need to fight for their realisation any longer.

Natural rights passed away alongside the abstract man of the eighteenth century whose nature they had defined. When an idea or

¹¹ Leo Strauss, *Natural Law and History* (Chicago, University of Chicago Press, 1965) 33.

But see Chapter 10 for a response to this criticism from a Hegelian position.

concept is entrusted in the hands of historians or sociologists, its vitality has been lost, its usefulness has migrated from history to historiography and its excitement displaced from political battles to academic disputes. Even more, when an ideal becomes law and a dissident movement governmental legitimisation, it often turns into its opposite. As the great philosopher E. M. Cioran put it, "the man who proposes a new faith is persecuted, until it is his turn to become a persecutor: truths begin by a conflict with the police and end by calling them in; for each absurdity we have suffered for, degenerates into a legality, as every martyrdom ends in the paragraphs of the Law . . . An Angel protected by a policeman – that is how truths die, that is how enthusiasms expire".¹²

Radical natural law, on the other hand, from the Stoics to early modernity had used nature as the marker of the future in the present and had always suspected the reduction of right to the rational or the real. As Heidegger put it, from a different perspective, "higher than actuality stands possibility".¹³ What is cannot be true or self-identical, because at the heart of the present lurks what is still to come. But the historicist rejection of natural right meant that

all right is positive right, and this means that what is right is determined exclusively by the legislators and the courts of the various countries. Now it is obviously meaningful, and sometimes even necessary, to speak of "unjust" laws and "unjust" decisions. In passing such judgements we imply that there is a standard of right and wrong independent of positive right and higher than positive right: a standard with reference to which we are able to judge of positive right. Many people today hold the view that the standard in question is in the best case nothing but the ideal adopted by our society or our "civilisation" and embodied in its way of life or its institutions . . . If there is no standard higher than the ideal of our society, we are utterly unable to take a critical distance from that ideal.¹⁴

The loss of the critical ideal and the legal translation of the utopian perspective had catastrophic effects. The road between the demise of natural rights in the nineteenth and early twentieth centuries, and the recent pronouncements of the final triumph of human rights, passes through two world wars, a huge number of local wars and innumerable atrocities and humanitarian disasters. It is lit by the fires of the Holocaust.

¹² E. M. Cioran, *A Short History of Decay* (R. Howard trans.) (London, Quartet Books, 1969) 74.

¹³ Martin Heidegger, *Being and Time* (New York, Harper and Row, 1963) 63.

¹⁴ Strauss, *op. cit.*, supra n. 11, 2–3.

II. THE IRRESISTIBLE RISE AND RESISTIBLE WEAKNESSES OF INTERNATIONAL HUMAN RIGHTS

Human rights entered the world scene after the Second World War. The history of their invention has been repeatedly and exhaustively told and will not be attempted here.¹⁵ Its symbolic moments include the Nuremberg and Tokyo Trials, the signing of the Charter of the United Nations (1945) and the adoption of the Universal Declaration of Human Rights (1948). Following these foundational acts, the international community launched a long campaign of standard-setting. Hundreds of human rights conventions, treaties, declarations and agreements have been negotiated and adopted by the United Nations, by regional bodies, like the Council of Europe and the Organisation of African Unity, and by states.¹⁶ Human rights diversified from "first generation" civil and political or "negative" rights, associated with liberalism, into second generation, economic, social and cultural or "positive" rights, associated with the socialist tradition and, finally, into "third generation" or group and national sovereignty rights, associated with the decolonisation process. The first generation or "blue" rights are symbolised by individual freedom, the second, or "red" rights by claims to equality and guarantees of a decent living standard, while the third or "green" rights by the right to self-determination and belatedly the protection of the environment. But what lies behind this apparently unstoppable proliferation of human rights?

The most obvious change in the transition from natural to human rights was the replacement of their philosophical ground and institutional sources. The belief that rights could be protected either through the automatic adjustment of the entitlements of human nature and the action of legal institutions, or through the legislative divinations of popular sovereignty, proved unrealistic. As Hannah Arendt put it "it is quite conceivable that one fine day a highly organised and mechanised humanity will conclude quite democratically –

¹⁵ Amongst many, see the following theoretically minded introductions to the history and philosophy of human rights: Louis Henkin, *The Age of Rights* (New York, Columbia University Press, 1990); Norberto Bobbio, *The Age of Rights* (Cambridge, Polity, 1996); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 1989).

¹⁶ The most comprehensive compendium of the fast proliferating international law of human rights, see Ian Brownlie (ed.), *Basic Documents on Human Rights* (Oxford, Clarendon, 1994).

namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof”.¹⁷ Her statement, phrased as a prediction, has already become a terrible historical fact. The “market” of human dignity and equality did not conceal a “hidden hand” and people voted and still vote for regimes and parties determined to violate all human rights, as the examples of Hitler’s Germany and Milošević’s Yugoslavia show. If the French Revolution and the first proclamation of rights were reactions against monarchic absolutism, the international law of human rights was a response to Hitler and Stalin, to the atrocities and barbarities of the War and to the Holocaust. In this latest mutation of naturalism, humanity or civilisation was substituted for human nature, the Frenchmen of the *Déclaration* were enlarged to include the whole humanity, international institutions and law-makers replaced the divine legislator or the social contract and international conventions and treaties became the Constitution above constitutions and the Law behind laws. An endless process of international and humanitarian law-making has been put into operation, aimed at protecting people from the putative assertions of their sovereignty. To paraphrase Nietzsche, if God, the source of natural law, is dead, he has been replaced by international law.

The higher status of human rights is seen as the result of their legal universalisation, of the triumph of the universality of humanity. The law addresses all states and all human persons *qua* human and declares their entitlements to be a part of the patrimony of humanity, which has replaced human nature as the rhetorical ground of rights. And yet human rights declarations have little value as a descriptive tool of society and its bond. The French and American revolutionaries were aware of the gap between their universal claims and their local jurisdiction and used it to legitimise their actions. International legislators have lost that historical awareness and discretion. Comparing their documents with those of the eighteenth century is like comparing a Jane Austen novel with its period costume adaptation for television. “It was clearly understood” said an American delegate to the San Francisco conference which drafted the UN Charter “that the phrase ‘We the Peoples’, meant that the peoples of the world were speaking through their governments at the Conference, and that it was because the peoples of the world are determined that those things shall be done which are stated in the preamble that the governments have

negotiated the instrument”.¹⁸ The rhetorical organisation of this passage is instructive because it represents admirably the logic of international human rights. What the “people” have determined is what the governments have expressed and negotiated and what has been put in the Charter. State power, public and private domination and oppression have been dissolved in this perfect chain of substitutions; peoples and states have finally merged and the governments or the international organisations speak for both, as there is no other way for that mythic beast, the “people of the world”, to express itself.

Every state and power comes under the mantle of the international law of human rights, every government becomes civilised as the “law of the princes” has finally become the “universal” law of human dignity. But this is an empirical universality, based on the competitive solidarity of sovereign governments and on the pragmatic concerns and calculations of international politics. The variable universalism of classical natural law or the Kantian universalisation acted as regulative principles: they gave a perspective from which each particular action could be judged, in theory at least, in the name of the universal. The empirical universality of human rights, on the other hand, is not a normative principle. It is a matter of counting how many states have adopted how many and which treaties, or how many have introduced which reservations or derogations from treaty obligations. When normative universality becomes a calculable globalisation, it turns from a lofty, albeit impossible ideal, into the lowest common denominator of state interests and rivalries. The community of human rights is universal but imaginary; universal humanity does not exist empirically and cannot act as a transcendental principle philosophically.

Universal positivised rights close the gap between empirical reality and the ideal left open by the French split between man and citizen, despite its obvious problems. A state that signs and accepts human rights conventions and declarations can claim to be a human rights state. Human rights are then seen as an indeterminate discourse of state legitimisation or as the empty rhetoric of rebellion; it can be easily co-opted by all kinds of opposition, minority or religious leaders, whose political project is not to humanise oppressive states but to replace them with their own equally murderous regimes.

¹⁷ Arendt, *op.cit.*, supra n. 6, 299.

¹⁸ Leo Pasovsky in Committee on Foreign Relations, *The Charter of the United Nations Hearings* quoted in Norman Lewis, “Human rights, law and democracy in an unfree world” in Tony Evans (ed.), *Human Rights Fifty Years on: A reappraisal* (Manchester, Manchester University Press, 1988) 88.

Let us now turn from foundations to institutions. The weaknesses and inadequacies of international law, particularly when faced with individuals, are well-known. Traditionally, the law of "civilised princes" had no interest and gave no *locus standi* to ordinary people. This has certainly changed since the adoption of the Universal Declaration, but the conceptual problems remain. First, human rights are still predominantly violated or protected at the local level. They were created as a superior or additional protection from the state, its military and police, its political and public authorities, its judges, businesses and media. These are still the culprits or – rarely – the angels. Irrespective of what international institutions say or how many treaties foreign secretaries sign, human rights are violated or upheld in the street, the workplace and the local police station. Their reality is Burkean not Kantian. Even at the formal level, the provisions of national constitutions and laws are much more important than international undertakings.

This leads to a related point. Human rights treaties and codes are a new type of positive law, the last and most safe haven of a *sui generis* positivism. Codification, from Justinian to the *Code Napoléon*, has always been the ultimate exercise of legislative sovereignty, the supreme expression of state power. We examined above, how the early declarations of rights helped bring into legitimate existence the sovereignty of the nation-state with its accompanying threats and risks for individual freedom. Something similar happened with the post-war expansion of international law into the human rights field. National sovereignty and non-intervention in the domestic affairs of states were the key principle on which the law was built, from the UN Charter to all important treaties. While the major powers fought tooth and nail over the definitions and priorities of human rights, they unanimously agreed that these rights could not be used to pierce the shield of national sovereignty. Human rights were a major tool for legitimising nationally and internationally the post-war order, at a point at which all principles of state and international organisation had emerged from the War seriously weakened. The contradictory principles of human rights and national sovereignty, schizophrenically both paramount in post-war international law, served two separate agendas of the great powers: the need to legitimise the new order through its commitment to rights, without exposing the victorious states to scrutiny and criticism about their own flagrant violations. As Lewis put it, "the debate about human rights and the upholding of human dignity, was in reality a process of re-legitimation of the prin-

ciples of sovereignty and non-intervention in the domestic affairs of sovereign states. The most powerful states, through the human rights discourse, made their priorities the universal concern of others".¹⁹ Once again human rights were a main way for underpinning the power of states.

Law-making in the huge business of human rights has been taken over by government representatives, diplomats, policy advisers, international civil servants and human rights experts. This is a group with little legitimacy. Governments are the enemy against whom human rights were conceived as a defence. Undoubtedly, the atrocities of this century shook and shocked some governments and politicians as much as ordinary people. But the business of government is to govern not to follow moral principles. Governmental actions in the international arena are dictated by national interest and political considerations and, morality enters the stage always late, when the principle invoked happens to condemn the actions of a political adversary. When human rights and national interest coincide, governments become their greatest champions. But this is the exception. The government-operated international human rights law is the best illustration of the poacher turned gamekeeper.²⁰

Problems in law-making are confounded by difficulties in interpretation and implementation. The international mechanisms are rudimentary and can scarcely improve while national sovereignty remains the paramount principle in law. The main method is the drawing of periodic or *ad hoc* reports about human rights violations; the main weapon, adverse publicity and the doubtful force that shame carries in international relations. There are various types of

¹⁹ Norman Lewis, *ibid.*, 89. For the relationship between domestic policies and international attitudes, see P. G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Oxford, Westview Press, 1996 (2nd edition)).

²⁰ An extreme illustration of this problem existed until 1998, in the most successful human rights machinery, the European Human Rights Convention. While the Convention provided for a semi and a fully judicial body (the Commission and the Court), the final decision in cases not referred to the Court was taken by the Committee of Ministers. As a result, many politically controversial cases were left to the Ministers who, often, rather than accept the decisions of the investigatory Commission put them on hold. The problem was compounded by the fact that the individual who had launched the complaint was not entitled to refer the case to the Court for final determination. This has changed with the implementation of the 11th Protocol to the Convention and the merging of Commission and Court. But the members of the new unified Court are still nominated by the governments and, from past experience, are reluctant to vote against perceived national interests. Indeed, many of the new appointees to the new Court are former diplomats or civil servant giving rise to serious doubts about their independence. It may sound impossible but, unless governments are removed from the running of human rights institutions, these will have little legitimacy.

reporting: monitoring, the most common, is carried out usually by volunteers and experts around the world under the auspices of the UN Human Rights Commission. "Special rapporteurs" appointed by the Commission draw up reports about specific areas of concern, like torture, or about individual countries with a poor human rights record. Under another model, states are invited to submit periodic reports about their compliance with certain treaty obligations, to committees created for that purpose (the most famous being the Human Rights Committee under the International Covenant for Civil and Political Rights).

Weak implementation mechanisms ensure that the shield of national sovereignty is not seriously pierced, unless the interest of the great powers dictates otherwise, as recent events in the Balkans have proved. The war crimes tribunal for the former Yugoslavia issued, early in its life, indictments against Karadjic and Mladic, the genocidal leaders of the Bosnian Serbs. But the International Force for Bosnia has not been allowed to take steps to arrest them. In a symbolic illustration of the status of human rights law, the Force has been authorised to arrest them, if they happen to come across them, but not to seek them out.²¹ Finally, in a few instances international courts or commissions investigate complaints by victims of human rights abuses and conduct quasi-judicial proceedings against states. But the jurisprudence of human rights courts is extremely restricted and dubious and its rapid changes in direction confirm some of the worst fears of legal realism: barristers appearing before international bodies such as the European Court of Human Rights quickly learn that it is better preparation to research the political affiliations of the government-appointed judges than to read the Court's case-law. It is well-known that changes in the political orientation of the appointing governments are soon reflected in the personnel of international human rights courts and commissions.²²

²¹ A similar outcome followed the indictment of Milosevic during the Kosovo war. As President Clinton admitted after the end of the war, the NATO Kosovo force has not been authorised to arrest Milosevic and his arraignment is not imminent.

²² Only the European system follows a fully-fledged judicial procedure and has a developed case-law. Even in Europe, however, for most of its existence the Strasbourg organs declared "admissible" and examined fewer than 3% of all the applications submitted to them. This percentage has slightly increased since the admission of the Eastern European states in the nineties. The jurisprudence of the European Commission and, even more of the Court, has followed the political views of the appointing governments which have ensured that their nominees are ideologically sympathetic to their views. For a considered view of the political priorities and methods of human rights courts and institutions, see Rolando Gaete, *Human Rights and the Limits of Critical Reason* (Aldershot, Dartmouth, 1993) Chapters 6, 7 and 8.

In this light, the creation of a permanent war crimes tribunal acquired increased significance. A treaty setting up an International Criminal Court (ICC) was adopted in Rome by representatives of 120 countries, in July 1998. The Court will have jurisdiction over war crimes and crimes of aggression, crimes against humanity and genocide. It will replace *ad hoc* war crimes tribunals, like those of Nuremberg, Tokyo, Yugoslavia and Rwanda and will be in a better position to defend its actions from the standard criticism that international criminal liability amounts to a particularly vindictive case of "victors' justice". Undoubtedly, all measures which remove human rights and their administration from governments, the main villains of the piece, are welcome. Independent judges, sensitive to the plight of the oppressed and dominated of the world and appointed for long periods with security of tenure, are better qualified to judge war criminals than diplomats and *ad hoc* governmental representatives.

This is not the place to examine in detail the many criticisms of the use of criminal responsibility as a method of promoting human rights, nor of the specific shortcomings of the treaty of Rome.²³ A few general comments are, however, necessary. The symbolic value and the emotional force generated by war crime prosecutions are undoubtedly considerable, particularly for those on the "right" side of the conflict which led to the crimes. But as we know from domestic experience, the individualisation and criminalisation of politics has rarely ended political conflict. Similarly, one suspects that not many wars or atrocities were prevented because leaders feared for their fate, if defeated, and, not many dictators were deterred by Nuremberg or will be deterred by Pinochet's sojourn in Surrey. Criminal punishment, like all individualised legal procedures, is likely to have little effect on massive human rights violations, particularly if the minimal media coverage of the Yugoslav War Crimes Tribunal and the non-existent of the Rwandan one are an indication of popular interest.

One incident in the process of setting up the ICC deserves mention. The United States was the greatest enthusiast for setting up the tribunals for Yugoslavia and Rwanda. When it came to negotiations for the criminal court, however, the American position was reversed. The Americans fought hard, using threats and rewards, to prevent the

²³ Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford, Clarendon, 1996) Chapter 15 review the debate leading to the establishment of the Court. For early criticisms of the Treaty of Rome, see Steve Tully, "A van Cortright? The Rome Statute of the ICC and the Enforcement of Human Rights", 11 *Wg & Cnd* 1999, 16-20; Morten Bergsmo and David Tolbert, "Reflections on the Statute of the ICC", 11 *Wg & Cnd* 1999, 21-6.

universal jurisdiction of the court.²⁴ They claimed that the court would be used for politically motivated prosecutions against American soldiers when, as the world's last superpower with global interests, they invade or intervene on foreign soil. The Americans tried to restrict the court's jurisdiction to nationals of states which have ratified the treaty, something which would have undermined the premise behind the new court. David Scheffer, the American representative, stated that, if the conference approved universal jurisdiction for the court, the United States would "actively oppose" it from its inception.²⁵ The conference, anxious to include the major international military power in the treaty, seriously restricted the court's powers and weakened its independence, but did not give the absolute guarantee that no American soldier would ever be brought before the court. As a result, the United States was one of seven countries, which included Iraq, Libya and China (states which American foreign policy has often demonised), to vote against the final and much compromised version.

The United States usually promotes the universalism of rights. Its rejection of the world criminal court was a case of cultural relativism which took the form of an imperial escape clause. It was also an implicit admission that war crimes and atrocities are not the exclusive preserve of "rogue" regimes.²⁶ It should not surprise us. Universalism, domestically and internationally, comes with an opt out facility. This is not just a question of the hypocrisy of power; a claim to universality can be made, if one power at least is not covered by it and is able to define the parameters of the universal. This was France in the early modern order and the United States in the new world order.

III. HUMAN RIGHTS AND STATE HYPOCRISY

The history of human rights has been marked by ideological point-scoring and intense conflict between Western liberal and other

²⁴ "US troops will quit, allies warned", *The Guardian*, July 10, 1998, 3.

²⁵ "Self-interest brings court into contempt", *The Guardian*, July 14, 1999, 15.

²⁶ Recent historiography has shown that atrocities are a common occurrence in wars and have been committed by allied forces in both world wars and in Vietnam. See Joanna Bourke, *An Intimate History of Killing: Face to Face Killing in 20th Century Warfare* (London, Granta, 1999) Chapter 6. The concern was therefore to avoid having American soldiers tried for atrocities by an international body and try them, if necessary, under American military and criminal law, as in the case of Colonel Callan after the My Lai massacre.

conceptions of human dignity. Both problems were evident from the inception of the international human rights code. The ideological colours of the Universal Declaration were evidently Western and liberal. The members of the preparatory committee were Mrs Eleanor Roosevelt, a Lebanese Christian and a Chinese, John Humphrey, the Canadian Director of the UN Division of Human Rights, who was asked by the committee to prepare a first draft, recalls that the Chinese member suggested at a party that he should "put [his] other duties aside for six months and study Chinese philosophy, after which [he] might be able to prepare a text for the committee". Humphrey prepared the text, which was substantially adopted by the committee, but his response to the suggestion indicates the Western attitude which eventually became the universalist side of the debate in opposition to cultural relativism: "I didn't go to China nor did I study the writings of Confucius".²⁷ The *travaux préparatoires* he used to prepare his draft came, with only two exceptions, from Western English language sources with the American Law Institute submission a main influence.²⁸ Only one of the seven principal drafters was not Christian and, as Stephen Marks remarks, "the level of the group [of drafters] as philosophers and moralists falls short of their eighteenth century predecessors".²⁹

Humphrey thought that his draft "attempted to combine humanitarian liberalism with social democracy."³⁰ The social democratic component of the Declaration consisted in a number of economic, social and cultural rights which, according to Antonio Cassese, "considerably reduced the impact of Western ideas by securing approval for some fundamental postulates of the Marxist ideology."³¹ That is not how the Soviet delegate saw it, for whom the Declaration was just "a collection of pious phrases". The Soviet bloc and Saudi Arabia abstained from the final vote in the General Assembly, while South Africa voted against. But the Soviet position was not unique. Similar sentiments have been expressed by the American representative to the United Nations during President Reagan's administration, who called the Declaration "a letter to Santa Claus" and, by US Ambassador Morris Abram, who addressing the UN Commission on

²⁷ John Humphrey, *Human Rights and the United Nations* (Trenton, 1984) 29.

²⁸ *Ibid.*, 32.

²⁹ Marks, "From the 'Single Confused Page' to the 'Dialogue for Six Billion Persons': The Roots of the Universal Declaration of Human Rights in the French Revolution", 20 *Human Rights Quarterly* 490 (1998).

³⁰ Humphrey, *op. cit.*, supra n. 27, 40.

³¹ Antonio Cassese, *Human Rights in a Changing World* (Cambridge, Polity, 1990) 44.

Human Rights, dismissed the right to development as "dangerous incitement" and "little more than an empty vessel into which vague hopes and inchoate expectations can be poured".³²

Following this inauspicious beginning, human rights became a main ideological weapon during the Cold War. The battlelines were drawn around the superiority of civil and political over economic and social rights. As a result, the attempt to produce an inclusive and binding Bill of Rights was abandoned and two separate covenants were drawn and eventually adopted, in 1966, some eighteen years later. Human rights, following Western priorities were hierarchised. The Civil and Political Rights Covenant creates a state duty "to respect and ensure to all" the listed rights (art. 2, ICCPR). The Economic and Social Rights Covenant is much more flexible and equivocal: member states undertake "to take steps, individually and through international assistance and co-operation . . . with a view to achieving progressively the full realisation" of the Covenant rights (art. 2, ICESCR). Still, while the Americans have taken a leading role in setting standards and use human rights violations to criticise other countries, it took twenty-six years for the United States to ratify the Civil and Political Rights Covenant, forty years for the Genocide Convention and twenty-eight for the Convention against racial discrimination. The State Department publishes annually huge country reports on human rights practices.³³ Congress has not ratified, however, the Economic and Social Rights Covenant, the Convention banning discrimination against women and, it is the only country, with Somalia, that has not ratified the Convention on the rights of children. In April 1999, human rights organisations led by Amnesty International launched an unprecedented appeal with the UN Human Rights Commission, asking it to take action against human rights abuses in the United States. "When we use international human rights standards, then clearly the US is failing the test daily" stated Amnesty Director Andre Sané launching the appeal. Human rights groups point to a consistent pattern of violations which include unchallenged police brutality, the treatment of asylum seekers, prison

³² Quoted in Noam Chomsky, "A letter to Santa Claus", *The Times Higher Education Supplement*, 19 February 1999, 3; Noam Chomsky, *The Unholy of US Power* (New York, Seven Stories, 1999).

³³ A much more modest British annual report on human rights was published for the first time by the Department for International Development, in April 1998. Part of new Labour's "ethical" foreign policy, it was compared "in style and format [to] a big public company announcing its results", with "upbeat" tone and "corporate and glossy" mood. *The Guardian*, April 22, 1998, 11.

conditions and the death sentence and explain that these and other violations "disproportionately affect racial minorities".³⁴

But the United States does not have exclusive rights to hypocrisy. During the Cold War, any criticism of human rights abuses by the communist states was followed by a ritual Soviet denunciation of British policies in Northern Ireland and of American racism, and a similar approach has been adopted by many developing countries after the fall of communism. The Europeans and their Union have not fared much better. In 1997, the EU launched an initiative entitled a "Human Rights Agenda for the New Millennium". A committee of *sages* or "wise men" was asked to draw up a set of European human rights policies to mark the 50th anniversary of the Universal Declaration. A group of academics and human rights activists was convened, as part of this initiative, under the auspices of the European University Institute, to draw up detailed reports on various human rights concerns and advise the *sages*. At a meeting of the advisory group held in Florence, in October 1997, as part of the programme, a respectable researcher presented an early draft of the report he had been asked to prepare on the work of European "supervisory bodies". The rapporteur proposed to look into the European Convention of Human Rights, the European Convention against Racism and Intolerance and the reports of the European Commission against Torture and the reports of the European Commission against Racism and Intolerance and summarise problems identified by the respective organs. At that point, the European Commission representatives strongly objected to the inclusion of a report of this kind, although it would be based on official, published and widely available materials. The Brussels official funding the luxurious conference threatened to withdraw the funding, prompting a delegate to inquire whether she could wait until after lunch. It became clear, during heated exchanges, that the official political purpose behind the "agenda" was to present a rosy European picture, to link aid and trade to Western human rights priorities and to give European representatives in international bodies something to say, as one delegate put it, when Europe was (justifiably allegedly) criticising others for human rights violations and was (unjustifiably) attacked in return for applying double standards. The exercise was not about washing European

³⁴ "Amnesty urges curb on US 'human rights abuse'", *The Guardian*, April 14, 1999, 9. It is noticeable that the European Court of Human Rights has ruled that the conditions of detention in American death rows amount to a violation of Article 3 of the Convention which prohibits torture, inhuman and degrading treatment. *See* *v. UK* (1989) 11 EHRR 439.

"dirty linen" in public but, about showing how seriously Europeans view human rights.

The respected researcher and a few academics found the position of the Brussels officials unpalatable. The metaphorical lunch was saved, however, through a rather strange compromise: the researcher would be allowed to present the report but, instead of cataloguing the violations under an alphabetical list of European states (which was thought unacceptably critical), he would present them thematically thus minimising the embarrassment of the culprits. After this incident, it was no surprise that the publication of the final report of the *sages* was accompanied by controversy. It was widely reported that European governments moved before publication to downgrade proposals that the European Union should set up a special department headed by a new commissioner to co-ordinate human rights work throughout Europe. References to the inhumane and degrading treatment of detainees and details of deaths of asylum-seekers in police custody in the initial report were deleted from the final version. But the report did conclude, despite the efforts of the Claret-pinchin eurocrats, that Europe's "strong rhetoric on human rights is not matched by the reality".³⁵

If ideological point-scoring is the symbolic prize behind human rights controversies, trade and market-penetration is often the real stake. An interesting example comes from the flourishing Sino-Western relations. These were allegedly seriously disrupted, after the Tiananmen square massacre of hundreds of protesting students in May 1989 and the widespread repression of dissidents which still takes place in China. But this cooling of relations lasted for a limited period and normal relations were soon resumed. It has been repeatedly reported that every time a Western leader visits Beijing, lists of well-known dissidents are handed to the Chinese authorities. "Cynical diplomats say it keeps the human rights lobby quiet at home. From time to time, China earns diplomatic credit by releasing a big name".³⁶ China has been particularly adept in using trade deals to avoid international opprobrium. As a result, no resolution criticising Chinese violations has been passed by the UN Human Rights Commission. Similarly, the British Government, despite its "ethical"

³⁵ "Europe's human rights rhetoric at odds with reality", *The Guardian*, October 10, 1988. The final report "Leading by example: A Human Rights Agenda for the European Union for the Year 2000" is published in Philip Alston, "The European Union and Human Rights" (Oxford University Press, 1999) appendix.

³⁶ "The price of dissent", *The Guardian*, May 31, 1999, G2.

foreign policy, went ahead, in 1997, with the deal to sell Hawk jets to the genocidal Indonesian regime of President Suharto during whose long and repressive reign half a million East Timorese were killed. As an opposition politician put it, "other governments will give Robin Cook pretty short shrift, if he goes around the world lecturing them about human rights when they know the British Government has issued eighty-six new export licenses [for arms] to Turkey and twenty-two to Indonesia [between May 1997 and April 1998]".³⁷ According to recent revelations, the United States trained the Indonesian military, including an elite anti-insurgency force involved in East Timor massacres until late 1998 despite the official suspension of the programme after earlier massacres in 1991. Britain too made a significant contribution to Indonesian military training which was suspended a few days before the UN peacekeeping force arrived in East Timor.³⁸

The fashionable moral turn in the foreign policies of Western governments, which characterised the late nineties, indicates that the symbolic capital of human rights has increased in the West. Clinton, Blair and Schroeder, despite their differences, claim to be united in the pursuit of ethically informed international relations. But we have little evidence of such a turn, which is historically and theoretically improbable. American and British-led NATO was prepared to take military action against Iraq and against the Serbs over Kosovo, while little protest was heard about the killing of some 250,000 Kurds by Turkish forces over the last twenty-five years, the genocide of the people of East Timor by Indonesian forces for over thirty years, or the ethnic cleansing of Serbs from Croatia. Saddam Hussein and Slobodan Milosevic are old-time dictators steeped in Cold War anti-American rhetoric. Successive Turkish governments, on the other hand, whether military dictatorships or democracies supervised by the armed forces, have always been strongly pro-American and a valued ally in the sensitive eastern Mediterranean. Similarly, the Indonesian dictator Suharto had been a reliable Western ally and major anti-communist force in south-east Asia, until he was overthrown by the daily protests of people who took to the streets for months, despite being killed and maimed by the dictator's security forces.

These discrepancies give rise to criticisms of the hypocrisy or cynicism of the great powers. But these accusations would be valid, if

³⁷ "Robin Cook's tour of the global badlands", *The Guardian*, April 22, 1998, 6.

³⁸ "US aided butchers of Timor", *The Observer*, September 19, 1999. See also John Pilger, "Under the influence", *The Guardian*, September 21, 1999, 18.

one accepted, counterfactually, that foreign policy is guided by the consistency of Kantian moral principles. To paraphrase Richard Rorty, if that was possible, moral foreign policy, like ethnic cleansers, would wash the world clean of prejudice and oppression. But the moral claim is either fraudulent or naive. Experience tells otherwise: human rights, like arms sales, aid to the developing world and trade preferences or sanctions, are tools of international politics used, according to the classical Greek saying, to help friends and harm enemies. Every good diplomat boasts that principled consistency in foreign affairs is impossible in practice, undesirable in negotiations but indispensable in the public presentation of policy. Moral consistency requires the existence of a common international and transcultural morality which would underpin policy initiatives to the satisfaction of humanity's conscience. But none of these elements exists or can come about in inter-state relations. As Noam Chomsky put it, "the sophisticated understand that to appeal to legal obligations and moral principles is legitimate, but as a weapon against selected enemies".³⁹ The criticism of hypocrisy is valid, therefore, only in relation to governmental claims that foreign affairs can be guided by ethics or human rights. The foreign policy of governments is interested and as alien to ethical considerations as the investment choices of multinational corporations.

It is therefore unconvincing to present the *status gentis* positivism of government-legislated international codes, government-appointed commissions and politically motivated enforcement mechanisms as the remedy for the positivism of national law, its persistent inhumanity and its divorce from ethics and justice. People are still murdered, tortured and starved by national governments, laws and institutions. The greatest crimes by and against humanity have been carried out in the name of nation, order or the common good and there is no convincing evidence that this is likely to come to an end because humanity has been declared sacrosanct. The Rousseauian *droits de l'homme* and the Burkean "rights of the Englishman" were the legal facet of the enlightenment promise of emancipation. They have clearly proved insufficient and their international re-statement cannot be the sole answer to man's inhumanity to man.

IV. HUMAN RIGHTS AND THE USE OF FORCE

These criticisms have acquired great urgency in the wake of the war over Kosovo, the first war officially conducted to protect human rights. According to Tony Blair, this was a just war, promoting the doctrine of intervention based on values, while Robin Cook declared that NATO was a "humanitarian alliance". The war gave us the opportunity to witness and evaluate these claims and the recent ethical turn in western foreign policy in full action.

Throughout history, people have gone to wars and sacrificed themselves at the altar of principles like nation, religion, empire or class. Secular and religious leaders know well the importance of adding a veneer of high principle to low ends and murderous campaigns. This is equally evident in Homer's Iliad, in Thucydides' chilling description of the Athenian atrocities in Melos and Mytilene, in the chronicles of the crusades and in Shakespeare's historical plays. In the most famous passage of the *Peloponnesian War*, the defeated Melians argued unsuccessfully that, if the Athenians slaughtered them after winning in battle, they would lose all claim to moral superiority and legitimacy amongst their allies and citizens. For the pragmatist Athenians, however, a limited genocide would give a clear lesson to their wavering allies and would be of great political value, unlike the moral and humanitarian position. The Athenians compared terror and moral principle according to their likely effect, chose the former and provided an early example of *realpolitik*. Stalin's turn to the Orthodox patriarch and his use of religious themes in the defence of the Soviet fatherland against the Nazi attack in 1941, despite decades of religious persecution, was a good illustration of the moral and metaphysical turn often taken by pragmatic or scared dictators. The theory of the "just war", on the other hand, developed in the Middle Ages, was an attempt by the Church to serve Caesar without abandoning fully its pledges to God.⁴⁰

⁴⁰ The contemporary religious theory of just war has a number of components: force should be used to defend unjust aggression; there should be proportionality between harms inflicted through the use of force and ends hoped for; the targets chosen should be military; force should never be an end in itself. It is arguable that two elements of the definition of just war (the second and third) were missing in the Kosovo war. The churches, with some reservations, either supported the war or remained silent. After the end of the war, a report by the Church of England's Board of Social Responsibility stated that the "scale of the human tragedy has created the perception that NATO's action precipitated rather than prevented the human catastrophe". "Church of England questions air campaign". The

³⁹ Chomsky, *op. cit.*, supra n. 32, 24.

The cynicism of the powerful is well-known and has been treated with wry smiles by writers and poets. Shakespeare as much as Brecht was fascinated by the way in which the hawks of war put on the fleece of moralist and preacher, better to persuade soldiers and citizens about the value of dying and killing for the cause. The moralisation of war is relatively easy when the moralisers are victims of external aggression, but the crusaders, the empire builders, the colonialists and the Nazis were not lacking in moral high ground either. The ability to present most wars as just and the lack of a moral arbiter who could sift through conflicting rationalisations has made the just war one of the hardest moral mazes. The question of the justice of a war (or of a liberation struggle a.k.a. campaign of terror) has always presented an interesting paradox: for the warring parties there is nothing more certain than the morality of their cause, while for observers there is nothing more uncertain than the rightness of the combatants' conflicting moral claims. As C.H. Waddington put it, "the wars, tortures, forced migrations and other calculated brutalities which make up so much of recent history, have for the most part been carried out by men who earnestly believed that their actions were justified, and, indeed, demanded, by the application of certain basic principles in which they believed".⁴¹ War is the clearest example of what Lyotard has called the "differend".

As distinguished from a litigation, a differend would be that case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits that rule).⁴²

All this seems to have changed in the late twentieth century. We are told that the new world order is based on respect for human rights, that universal moral standards have been legislated and accepted by the international community and that legal tribunals and moral directorates have been set up to navigate through conflicting moral claims. One may be slightly suspicious of the moral probity of

Guardian, 13 July 1999, 14. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (London, Penguin, 1980) is the best introduction to the topic.

⁴¹ C.H. Waddington, *The Ethical Animal* (London, Allen & Unwin, 1960) 187.

⁴² Jean-François Lyotard, *The Differend* (G. Van den Abbeele trans.) (Manchester, Manchester University Press, 1989) xi.

the Security Council of the United Nations, which includes a state which only a few years ago slaughtered its own demonstrating students (China), or another which has ratified the smallest number of human rights treaties and has voted against setting up the new permanent War Crimes Tribunal (USA). These concerns become even more serious when one realises that the United States and Britain went ahead with the bombing of Iraq in 1998 and of Serbia in 1999 without the authorisation of the Security Council of the United Nations, the only body entitled to order military action in defence of international peace and security. The willingness of Western powers to use force for apparently moral purposes has become a central (and worrying) characteristic of the post-Cold War settlement. But Waddington's law still stands. The Serbian brutalities were carried out in the name of national sovereignty, territorial integrity and the defence of history and culture against terrorist and foreign aggression. Nations owe their legitimacy to myths of origin, narratives of victory and defeat, borders and imagined or real historical continuities but not to humanity. On the Western side, Waddington's "basic principles" have been re-defined as reason, emancipation and cosmopolitanism and have helped generate an "ethical impulse" in public opinion⁴³ which has put some pressure on Western governments. But who authorises the discourse of the universal? Will universal human rights overcome moral disagreement or are they one side of the conflict? Are they a "rule of judgment" which can reconcile the differends, in Lyotard's terms, or, are they one more differend in the conflict?

Three instances which stand out in the 1990s, can help us consider this question. First, the continuing sanctions against Iraq and the renewed bombing of that country since 1998. The economic embargo, imposed by the UN after the end of the Gulf War in order to force the regime to destroy its weapons of mass destruction, had already taken its toll by that time. The sanctions were slightly eased in 1996, under the "oil for food" programme, after the World Health Organisation found that most Iraqis had suffered from near starvation for years and 32 per cent of all children were seriously malnourished. Operation Desert Fox, which involved the blanket bombing of military and associated targets, was launched in December 1998, on the

⁴³ This was particularly evident in Britain during the Kosovo conflict, where consistently high majorities supported the war. The American reaction was more muted. A majority opposed the war when respondents were asked to contemplate more than fifty American casualties.

even of the vote to impeach President Clinton by the American Congress. The United Nations were not consulted before the presidential decision to start the bombing, although the Security Council was in session discussing the latest report of the United Nations weapon inspectors when the decision was taken. The daily bombing of Iraqi sites has continued relentlessly, after the end of that operation, but has gone largely unreported.

The combined effects of ten years of sanctions, bombing and mismanagement of food and medical supplies by Saddam's regime have brought the country to the brink of collapse. Repeated reports describe how Iraqi urban society has been ruined and the social fabric seriously degraded. According to a Western reporter, "the west is conducting a monstrous social experiment with the people of Iraq. A once prosperous nation is driven into the pre-industrial dark ages. It will take years to fathom the harm being done to the lives of 21.7 million people by a policy intended . . . to bring Iraq back into the international community of nations by toppling Saddam Hussein".⁴⁴ Dennis Holloway, the UN humanitarian co-ordinator in Iraq, resigned his post in the summer of 1998, stating that the sanctions had killed one million Iraqis, half of whom were children. When this statistic was put to Madeleine Albright, in 1996, she responded: "I think this is a very hard choice but the price – we think the price is worth it".⁴⁵ Currently, according to UNESCO estimates, four to five thousand children die every month because of poor water supplies, inadequate food and lack of medicines.

It is interesting to compare the willingness of the West to blockade and bomb its erstwhile allies in Iraq with the response to the Rwandan genocide. During a few long months, in 1994, one million people were slaughtered, in what remains with Cambodia the greatest genocide of the twentieth or "human rights" century, after the Holocaust. According to the minutes of informal Security Council meetings which have recently emerged, the United Nations peacekeepers sent detailed messages about the developing genocide, early in April 1994, and warned that the situation would quickly worsen without the presence of United Nations officers. General Dallaire, the commander of the UN peacekeeping force sent six messages to New York, the first as early as January 11, warning of the impending crisis and requesting permission to act but received a routine answer from the secretariat

⁴⁴ "Iraq is falling apart. We are ruined", *The Guardian*, April 24, 1999, 14.

⁴⁵ Quoted *ibid.* For a recent and moving presentation of the damage sanctions have inflicted on the Iraqi people, see James Buchanan, "Inside Iraq" *67 Ganta* (1999), 109–92.

ordering him not to act.⁴⁶ The first priority of the United States and Britain, was to withdraw the peacekeepers because any casualties would have a "negative impact on public opinion". According to the historian Linda Melvern, Karl Inderfurth, the American UN representative, stated that the peacekeeping force "was not appropriate now and never will be" and that the United States had "no stomach for leaving anything there".⁴⁷ Having spent 80 per cent of the time deciding whether to withdraw the peacekeepers and only "20 per cent trying to get a ceasefire", the Council finally voted, on April 24, to withdraw the peacekeepers, except for a token force of 270. Five days later, the Council President proposed a resolution declaring that a genocide was taking place and putting into effect the sanctions of the Genocide Convention. The western powers objected; the British representative did not want the word genocide used because it would make the Council "a laughing stock".⁴⁸ The lives of the few hundred western peacekeepers were clearly more important than the hundreds of thousands of Africans. General Quesnot, a French general who knew the Rwandan situation well, estimated that "2,000 to 2,500 'determined' soldiers would have sufficed to halt the slaughter".⁴⁹ As the Nigerian ambassador rhetorically asked, "has Africa dropped from the map of moral concern?"

Finally, Kosovo. Since the collapse of Yugoslavia, in 1991, the United States played a "curious poker game" with the Serb President Slobodan Milosevic, trying to isolate him, on the one hand, and treating him as the "deal cutting guarantor of its peace plans" on the other.⁵⁰ According to *The Economist*, at the end of 1998, American thinking was "if you can't bomb, at least support democracy", a policy of the "ballot box and the cruise missile", one could say. No help or support was given, however, to the Serbian opposition which for many months in 1996 and 1997 had mobilised huge crowds daily calling for democratic reforms. The preference for democracy came too late. A few weeks later, NATO warplanes started bombing targets in

⁴⁶ Alison des Forges, *Leave None to tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999) 172–7.

⁴⁷ Linda Melvern, "How the system failed to save Rwanda", *The Guardian*, December 7, 1998, 10.

⁴⁸ Alison des Forges, *op.cit.*, 618–9. When the US was asked by various NGOs to join RTLM, a radio station which was inciting genocide, the State Department, after receiving legal advice, responded that "the traditional American commitment to freedom of speech was more important than disrupting the voice of genocide", 641.

⁴⁹ The full story is chillingly told in Alison des Forges, "Ignoring Genocide", *op.cit.*, 593–635 and 607.

⁵⁰ "Will Slobodan Milosevic fall?", *The Economist*, December 5, 1998, 51.

Kosovo, Serbia and Montenegro. Was there still time for negotiations and sanctions? Was further talking pointless, as NATO claimed? We will never know but Mary Robinson, the UN High Commissioner for Human Rights, has stated that Western attitudes in 1998 "represented a fundamental failure of the international community". Despite the efforts of her office to alert governments to the looming crisis "none was listening".⁵¹

A strict hierarchisation of the value of life was again evident during the conflict. The United Nations monitors were withdrawn, in March 1999, before the bombing campaign started. More importantly, every precaution was taken during the war to eliminate the likelihood of NATO casualties. The possibility of engaging ground troops was repeatedly and categorically denied by NATO spokesmen until late in the campaign. The bombers flew at extremely high altitudes (some 15,000 feet) which put them beyond the reach of anti-aircraft fire. The tactic was successful: NATO forces concluded their campaign without a single casualty. But there were serious side-effects too: first, total air domination without the willingness to engage in a ground war did not stop Serb atrocities. Evidence emerging after the war shows that the worst massacres occurred after the start of the bombing campaign. According to NATO sources, several hundred Albanians were killed by Serbs after March 1999 and the flight of Albanians was dramatically accelerated. It is reasonable to conclude that the declared war aim of "averting a humanitarian catastrophe" failed badly. Secondly, as a result of the high flight altitudes of the bombers, the likelihood of civilian "collateral damage" increased significantly. Civilians were killed in trains and buses, in TV stations and hospitals, in the Chinese Embassy and other residential areas. One of the most grotesque mistakes was the killing of some 75 Albanian refugees whose ragtag convoy was hit repeatedly, on April 14. Part of the explanation offered by a contrite NATO was that tractors and trailers cannot be easily distinguished from tanks and armoured personnel carriers at an altitude of 15,000 feet.

From Homer to this century, war introduces an element of uncertainty, the possibility that the mighty might lose or suffer casualties. Indeed, according to Hegel, the fear of death gives war its metaphysical value, by confronting the combatants with the negativity that encircles life and helping them rise from their daily mundane experi-

ences towards the universal.⁵² In this sense, the Kosovo campaign was not a war but a type of hunting: one side was totally protected while the other had no chance of effectively defending itself or counter-attacking. Many (retired) army and armchair generals argued during the campaign that it could not be won swiftly without ground troops. They were proved partly wrong. A war without casualties for your side, an electronic game type of war or Reagan's unbeatable "star wars", may be the dream of every military establishment. But a war in which a soldier's life is more valuable than that of many civilians cannot be moral or humanitarian. In valuing an allied life at many hundred Serbian lives, the declaration that all are equal in dignity and enjoy an equal right to life was comprehensively discredited.

Finally, as we learned after the end of the war, the total protection of Western aircrews meant that the success of bombing was extremely limited. Despite NATO's cautious triumphalism during the campaign, only thirteen Serbian tanks were hit in eleven weeks of intensive bombing and the vast majority of Serbian surface to air missiles survived. Civil targets were easier to identify and destroy. A few weeks after the start of the war, General Michael Short of the US Air Force told journalists that what was necessary for success was to hit civilian morale. His tactic was going to be "no power to your refrigerator. No gas to your stove, you can't get to work because the bridge is down – the bridge on which you held your rock concerts and all stood with targets on your heads. That needs to disappear".⁵³ According to first estimates, some fifty bridges were destroyed as well as a number of TV and radio stations, hospitals, schools and nurseries, cultural, economic and industrial sites, computer networks and electricity generating plants.⁵⁴ The targeting of the civilian infrastructure

⁵² "In order not to let [people] become rooted and set in this isolation, thereby breaking up the whole and letting the community spirit evaporate, government has from time to time to shake them to their core by war. By this means the government upsets their established order, and violates their right to independence, while the individuals who, absorbed in their way of life, break loose from the whole and strive after the inviolable independence and security of the person, are made to feel by government in the task laid on them their lord and master, death." Hegel, *The Phenomenology of Spirit* (A. V. Miller trans.) (Oxford, Oxford University Press, 1977) 272–3. Jacques Derrida, *Glas* (Lincoln, University of Nebraska Press, 1986) comments: "So war would prevent people from rotting; war preserves 'the ethical health of peoples', as the wind agitating the seas purifies them, keeps them from decomposing, from the corruption, from the putrefaction with which a 'continual calm' and a 'perpetual peace' would infect health", 101 and 131–49.

⁵³ *The Observer*, 16 May, 1999, 15.

⁵⁴ Professor Ian Browne, the eminent human rights expert, in evidence to the International Court of Justice said, on May 10, 1999: "There is no general humanitarian purpose to the [bombings] . . . the pattern of targets indicates political purposes unrelated to

⁵¹ Quoted in "Kosovo: the Unfold Story", *The Observer*, 18 July 1999, 16.

and the repeated mistakes led Mary Robinson to state, after four weeks of bombing, that the campaign had "lost its moral purpose".⁵⁵

None of this explains or justifies the atrocities committed by Serbs and the systematic ethnic cleansing of the Kosovo Albanians. The actions of the Serbian police, paramilitaries and army will enter the annals of twentieth century barbarism alongside those of Hitler, Stalin, Saddam Hussein and Pol Pot. No moral arithmetic exists to allow us to compare the number of massacred Albanians with that of the maimed Serbs, or of the gassed Kurds with that of starving Iraqis. Nor would a few Texan or Scottish dead soldiers in Kosovo balance out the hundreds of killed civilians. To paraphrase the Holocaust survivor Emmanuel Levinas, in every person killed the whole humanity dies.

This could be the beginning of an answer to the universalism *versus* relativism debate. Serbs massacred in the name of threatened community, while the allies bombed in the name of threatened humanity. Both principles, when they become absolute essences and define the meaning and value of culture without remainder or exception, can find everything that resists them expendable. We can see why by briefly exploring their structure, as they move from the moral to the legal domain. The universalist claims that all cultural value and, in particular, moral norms are not historically and territorially bound but should pass a test of universal consistency. As a result, judgments which derive their force and legitimacy from local conditions are morally suspect. But as all life is situated, an "unencumbered" judgment based exclusively on the protocols of reason goes against the grain of human experience, unless of course universalism and its procedural demands have become the cultural tradition of some place. The US would be a prime candidate; but even die-hard liberal Americans cannot claim this for their country, as they die in the hands of their rightful gun-toting compatriots, a good example of the murderous nature of a cultural relativism which has turned the possession of guns into the most sacrosanct right and vivid expression of American parochialism. The counter-intuitive nature of universalism can lead its proponent, to extreme individualism: only myself as the real moral agent or as the ethical alliance or as the representative of the universal can understand what morality demands. Moral egotism

humanitarian reasons". *The Guardian*, May 11, 1999, 8. The Court declined the Serbian Government's application to declare the bombing illegal, although it expressed concerns about its effects on civilians.

⁵⁵ "Shift in bombing a warning to Serbs", *The Canadian*, May 29, 1999, 4.

easily leads into arrogance and universalism into imperialism: if there is one moral truth but many errors, it is incumbent upon its agents to impose it on others. What started as rebellion against the absurdities of localism ends up legitimising oppression and domination.

Cultural relativism is potentially even more murderous, because it has privileged access to community and neighbourhood, the places where people are killed and tortured. Relativists start from the obvious observation that values are context-bound and use it to justify atrocities against those who disagree with the oppressiveness of tradition. But the cultural embeddedness of self is an unhelpful sociological truism; the context, as history tradition and culture, is malleable, always under construction rather than given and unchanging. Kosovo is a good example of this process. It was only after Milosevic withdrew its autonomy in 1994 and declared that it would remain forever in the Yugoslav state, as the cradle of the Serb nation, that Serb oppression started and the KLA, the Albanian Liberation Movement, became active. Between that point and 1999, a fratricidal nationalism took hold of the two communities but it was not the result of ancient enmities; it was created and fanned by the respective power-holders. This process was even more evident in Rwanda. The genocide there was not committed by monsters but by ordinary people who were coaxed, threatened and deceived by bureaucrats, the military, politicians, the media, intellectuals, academics and artists into believing that killing was necessary to avoid their own extermination in the hands of their victims. The tribal rivalry between Hutus and Tutsis was re-defined, fanned and exaggerated to such a point that the "action" became eventually inevitable.⁵⁶

Too often respect for cultural differences, a necessary corrective for the arrogance of universalism, has turned into a shield protecting appalling local practices. When the Malaysian Prime Minister Mahathir Mohamad attacked the Universal Declaration because it "was formulated by the superpowers which did not understand the need of poor countries" adding that the West "would rather see people starve than allow for stable government. They would rather have their government chasing demonstrators in the street... there are other things in human rights other than mere individual freedom",⁵⁷ he was expressing not his cultural tradition but his dismay that human rights may be used in opposition to his regime, one of the most oppressive in the world. The same ambiguity is evident with

⁵⁶ See Alison des Forges, *supra*, n. 46, Chapter 2.

⁵⁷ Quoted in Murksa, *op. cit.*, *supra* n. 28, 461.

respect to minorities within minorities. Ethnic groups, like the French in Quebec, religious sects, like the scientologists, and political parties, like some Western communist parties, demand autonomy, human rights and respect for their practices only to use them to suppress smaller minorities in their body, the English speakers, heretics, traitors, those who do not conform. Again, the cause of the problem is not the truism that values are created in historical and cultural contexts but, an exclusionary construction of culture as immanent to belonging and the interpretation of majority values as the absolute truth; these traits mimic, at the local level, state disdain and oppression of all minorities. According to the French philosopher Jean-Luc Nancy, communitarian authoritarianism is catastrophic because "it assigns to community a *common being*, whereas community is a matter of something quite different, namely, of existence inasmuch as it is in common, but without letting itself be absorbed into a common substance".⁵⁸ The difference between a universalism premised on the essence of man and a relativism premised on the essence of community is small; in their common determination to see man and community as immanent, they form "the general horizon of our time, encompassing both democracies and their fragile juridical parables".⁵⁹

Both universal morality and cultural identity express different aspects of human experience. Their comparison in the abstract is futile, as the endless debates have shown, and usually proves, in a self-fulfilling fashion, the position from which the comparer started.⁶⁰ The universalism and relativism debate has replaced the old ideological confrontation between civil and political, and economic and social rights, and is conducted with the same rigour. Yet the differences between the two are not pronounced. When a state adopts "universal" human rights, it will interpret and apply them, if at all, according to local legal procedures and moral principles, making the universal the handmaiden of the particular. The reverse is also true: even those legal systems which jealously guard traditional rights and cultural practices against the encroachment of the universal are already contaminated by it. All rights and principles, even if parochial

⁵⁸ Jean-Luc Nancy, *The Inoperative Community* (P. Connor ed.) (Minneapolis, University of Minnesota Press, 1991) xxxviii. See chapter 8 below.

⁵⁹ *Ibid.*, 3.

⁶⁰ Hillary Lim and Kate Green, "What is this Thing about Female Circumcision?", 7/1 *Social and Legal Studies* 365–87 (1998); Henry Steiner and Philip Alston, *op.cit.*, supra n. 23. Chapter 4 gives an overview of the debate.

in their content, share the universalising impetus of their form. In this sense, rights carry the seed of dissolution of community and the only defence is to resist the idea of right altogether, something impossible in the global capitalist world. Developing states which import Hollywood films, Big Macs and the Internet, import also human rights willy nilly. As Prime Minister Mohammad's comments make clear, his ends and those of American foreign policy are identical, after all, even though the means may differ at times: "The people cannot do business, cannot work because of the so-called expression of the freedom of the individual".⁶¹ The claims of universality and tradition, rather than standing opposed in mortal combat, have become uneasy allies, whose fragile liaison has been sanctioned by the World Bank.

One could conclude, that both positions can become aggressive and dangerous. When their respective apologists become convinced about their truth and the immorality of their demonised opponents, they can easily move from moral dispute to killing. At that point, all differences disappear. From the position of the victim, the bullet and the "smart" bomb kill equally, even if the former travels a few yards only from the gun of the ethnically proud soldier, while the latter covers a huge distance from the plane of the humanitarian bomber. Bauman comments that:

while universal values offer a reasonable medicine against the oppressive obtuseness of parochial backwaters, and communal autonomy offers an emotionally gratifying tonic against the stand-offish callousness of the universalists, each drug when taken regularly turns into poison. Indeed, as long as the choice is merely between the two medicines, the chance of health must be meagre and remote.⁶²

One could only add that the name of the common poison is self-satisfied essentialism: whether communal, state or universal it suffers from the same heterophobia, the extreme fear and demonisation of the other.

Are there any circumstances in which forceful intervention is justifiable? This author's answer is a highly qualified *yes*, in extreme cases and only to prevent genocide. The United Nations Security Council can and has authorised the use of force to prevent or stop threats to international peace and security, in other words, to prevent substantial risk to the interests of the intervening powers. There is no greater

⁶¹ Quoted in Marks, *op.cit.*, supra n. 29.

⁶² Zygmunt Bauman, *Postmodern Ethics* (Oxford, Blackwell, 1993) 219.

threat to peace than genocide and no greater threat to the national interests of third states than the disintegration of a state with the resulting conflicts, mass migration and loss of markets. If the international community were to legitimise such "humanitarian" interventions on a permanent basis on something more than the contingent and often interested agreement of a few great powers, a new institutional framework is needed. The role of governments and governmental organisations, like NATO, should be minimised.⁶³ Even consistent liberals are weary of regional groupings, power blocs and less than universal alliances intervening as representatives of the universal. As Bauman argued, "with the universalism-promoting agencies well short of truly universal sovereignty, the horizon of 'actually existing' (or, rather, realistically intended) universality tends to stop at the state boundary... Consistently universalistic can be only a power bent on identifying the human kind as a whole with the population subjected to its present of prospective rule".⁶⁴ This typically French eighteenth century position perfectly encapsulates the current American mood, as shown in the opposition to the International Criminal Court.

Representatives of the victims and of non-governmental organisations operating in the area of intervention should be actively involved in decision-making. The aims and methods of the campaign should be removed from the power games of presidents, prime ministers and generals and focus on protecting individuals. The military should be in close contact with local democratic organisations and observers and should aim to enable them to protect civilians and help them overthrow the murderous regime. No person or community can gain their dignity or freedom through foreign intervention or a gift from above. The intervening powers can only help local people re-assert their rights against their government. Finally, a clear set of guidelines should regulate the conduct of the war and minimise casualties on all

⁶³ Kofi Annan, the UN Secretary-General, reminded the General Assembly of the organisation, after the approval of the East Timor peace-keeping force, of the inaction in Rwanda in 1994 and added: "The inability of the international community in the case of Kosovo to reconcile... universal legitimacy and effectiveness in defense of human rights can be viewed as a tragedy". "Annan pays tribute to swift action", *The Guardian*, September 21, 1999, 14. Annan's statement is a warning to the West: the universal has to be authorised by the global (the UN) or it will lose its persuasive force. But this is a demarcation and status dispute between UN and NATO, not one about the meaning of universals. If a normative universal exists, it makes no difference whether it is put forward by the whole world or a single soul. Conversely, if it does not, putting a strong majority behind it will make no difference to its status.

⁶⁴ Bauman, *op.cit.*, supra n. 62, 41.

sides. Such a war aims to rescue the victims and prevent putting more people at risk and not to engage another government. None of these conditions exists today and it would be pious to expect that they will develop soon.

But the most important point is this: "humanitarian" war is a contradiction in terms. War and its consequences, bombing and maiming people can never be part of human rights and morality. Even if we were to accept that a large part of the motive for the Kosovo campaign was humanitarian, the war was not and could not be "moral". Bombing does not protect people and does not prevent atrocities. A destructive war, by definition a devastating negation of human rights, can be seen as humanitarian only because human rights have been hijacked by governments, politicians and diplomats and entrusted in the hands of those against whom they were invented. In a world in which humanity's dues are decided by the powerful, the inhumanity of dictators can only be confronted with the inhumanity of semi-"smart bombs" and civilian "collateral damage". But in these circumstances, the righteous commit the crime they set out to prevent.

V. THE "TRIUMPH" OF HUMANITY

It is arguable, therefore, that the grandiose claims about the importance of international human rights are a little exaggerated. These rights, by being presented as a description or statement about the state of law, present the legislator (humanity or its self-appointed representatives in New York, Geneva or Strasbourg) as co-extensive with the right-holders (all concrete people in the world). Writing in 1951, Hannah Arendt expressed with typical acuity this dilemma:

Man of the twentieth century has become just as emancipated from nature as eighteenth century man was from history. History and nature have become equally alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category. On the other hand, humanity, which for the eighteenth century, in Kantian terminology, was no more than a regulative idea, has today become an inescapable fact. This new situation, in which "humanity" has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible.⁶⁵

⁶⁵ Arendt, *op.cit.*, supra n. 6, 298

This dilemma is best exemplified by the treatment of refugees and other populations fleeing natural or man-made disasters. This is the greatest human catastrophe of the twentieth century outside war and, in ethnic cleansing, it reaches the nadir of the many evils of nationalism. Refugees have replaced foreigners as the main category of otherness in our postmodern and globalised world. The foreigner was the political precondition of the nation-state and the other the ontological precondition of individual identity. When the roving foreigner arrives at the borders of the state, the assumptions of national and personal integrity come under severe pressure. For national law, the refugee is a threat to the principle of territorial jurisdiction. But she also represents the violence at the inception of the modern state, the exclusion of other peoples, nations and minorities necessary for the creation of territorial and legislative sovereignty. For the citizen of our globalised world, the refugee represents a threat to jobs and amenities, but also a deeper threat to the construction of national identity. As we saw, the modern subject reaches her humanity by acquiring political rights which guarantee her admission to the universal human nature, by excluding from that status those who do not have such rights. It is the law of the nation state which defines the alien as alien and the refugee as refugee. The alien is not a citizen. She does not have rights because she is not part of the state and she is a lesser human being because she is not a citizen. In the terms of the French Declaration, the alien is the gap between man and citizen, between human nature and political community lies the moving refugee. To have citizens we must have aliens, to have a home or a home country others must not share it, or they must be in movement or in transit, in perpetual flotation or in orbit, like those medieval mad people who were travelling the rivers of Europe in the ships of the fools.⁶⁶ Unable to speak our language, having left her community and with no community, the refugee is the absolute other. She represents in an extreme way the trauma that marks the genesis of state and self and puts to the test the claims of universalisation of human rights.

The absolute otherness of the refugee is evident in a number of ways. Hannah Arendt reviewing the great movement of refugees and stateless persons after the First World War, people who today would have been called "economic migrants", concludes that "they

⁶⁶ Refugees are commonly put "in orbit" under the "first safe country" rule which allows a state to send back a refugee to a state she comes from in which she does not have a fear of persecution.

were persecuted not because of what they had done or thought, but because of what they unchangeably were – born into the wrong kind of race or the wrong kind of class or drafted by the wrong kind of government".⁶⁷ People become refugees not for their criminal or revolutionary acts, but for who they are. Most of them have done nothing wrong, except to flee, to move across frontiers, to cross boundaries. Their rightlessness, the absence of legal personality, is not a consequence of severe punishment or the sign of extreme criminality but the accompaniment of utter innocence and of movement, of a sacrificial circulation. The refugee is defined not by what she has done or does – the defining characteristic of modern human nature – but for who she is, for her being rather than for her action and becoming. In this, she joins the other great dangerous beings of modernity, the mad, the homosexual, the Jew. But as her threat is on the move she also represents the great postmodern danger, the virus.

Refugee status is not the result of the lack or loss of this or that right but of the total loss of community and of the legal protections associated with it. Rightlessness accompanies the lack of community and the globalisation of national law and right. Refugees have been removed from their own community and are kept outside the bounds of all potential receiving ones. It is not so much that they are not equal before the law, but that there is no law for them. It is not that they are not persecuted, but that none wants to persecute them. "The world of barbarity thus comes to a head in a single world composed of states, in which only those people organised into national residences are entitled to have rights. The 'loss of residence', a 'loss of social framework' worsened by the 'impossibility to find one' are characteristics of this new barbarity issued from the very core of the nation-state system" in a globalised world.⁶⁸ The rightlessness that accompanies removal from the community shows the deep truth of the critique of human rights by Edmund Burke and the communitarians who insist that only national law can create and effectively protect rights. In a globalised world, in which nothing is exempt from state sovereignty, and human rights have become posited and universal, the refugee is the representative of the non-representable, she has no state or law, no nation or party to put forward her claims. "Only in a completely organised humanity", comments Arendt,

⁶⁷ Arendt, *supra* n. 6, 204.

⁶⁸ Kristeva, *Strangers to Ourselves* (Leon Roudiez trans.) (Columbia University Press, 1991) 151.

"could the loss of home and political status become identical with expulsion of humanity altogether".⁶⁹ The refugee is the total other of civilisation, the zero degree of humanity. She represents the state of nature in all its stark nakedness and the world finds nothing sacred in the abstract nakedness of being human. But as Lyotard argued, "to banish a stranger is to banish the community, and you banish yourself from the community thereby".⁷⁰

All this does not mean that human rights treaties and declarations are devoid of value. At this point in the development of international law, their value is mainly symbolic. Human rights are violated inside the state, the nation, the community, the group. Similarly, the struggle to uphold them belongs to the dissidents, the victims, those whose identity is denied or denigrated, the opposition groups, all those who are the targets of repression and domination. Only people on the ground and local action can improve human rights; outsiders, including human rights organisations, can help by supporting them. From this perspective, international conventions are of use to human rights activists, by offering a standard for criticising their governments. When a state has adopted a particular set of rights, it will be harder, although by no means impossible, for its government, to deny committing obvious abuses. Similarly, external monitoring and reporting may raise awareness about a state's violations and the shaming that accompanies exposure may lead to improvements. But the successes of monitoring are limited and the adverse effects of publicity are intangible and take long in coming.

When Greece was forced to leave the Council of Europe in 1969, after the European Commission of Human Rights found that every article of the Convention was violated by the colonels, the response of the dictators was characteristic. They stated with great fanfare that the European Council and Commission were a conspiracy of homosexuals and communists against hellenic values and dramatically increased repression. Similarly, while Pinochet's Chile and the South Africa of apartheid were repeatedly condemned by UN human rights bodies and the General Assembly, the regimes attacked 'meddling foreigners' and survived for decades. Nigel Rodley, the United Nations special rapporteur on torture since 1993, saw the uses of his task as follows:

⁶⁹ Arendt, *op. cit.*, supra n. 6, 297.

⁷⁰ Jean-François Lyotard, "The Other's rights", in *On Human Rights* (Stephen Shute and Susan Hurley eds), New York: Basic Books, 1993, 136.

The information gets to families that someone outside is investigating or appealing to the government. Occasionally the prisoner learns of this too. And I feel that somehow the drip, drip of external demands that a government do something or stop things like torture will have an effect . . . It's not the UN that can change things directly. It's groups in the country itself. International monitoring gives these forces, both non-governmental and within government, some support.⁷¹

If the victims of repression become recognised in the eyes of the international community as actors, the value of international human rights will increase for those who matter.

The tradition of human rights, from the classical invention of nature against convention to contemporary struggles for political liberation and human dignity against state law, has always expressed the perspective of the future or the "not yet". Human rights have become the cry of the oppressed, the exploited, the dispossessed, a kind of imaginary or exceptional law for those who have nothing else to fall back on. In this sense, human rights are not the product of legislation but precisely its opposite. They set limit to "force, declared laws and 'founded' rights (regardless of who has, or demands, or usurps the prerogative to found them authoritatively)".⁷² Human rights, as the principle of hope, work in the gap between ideal nature and law, or real people and universal abstractions. The promise of a future in which, in Marx's memorable phrase, people are not "degraded, enslaved, abandoned, or despised" does not belong to governments and lawyers. It certainly does not belong to international organisations and diplomats. It does not even belong to the abstract human being of the declarations and conventions or of the traditional humanist philosophy, including the Kantian subject which, for Derrida, is "still too fraternal, subliminally virile, familial, ethnic, national etc".⁷³ The energy necessary for the protection, horizontal proliferation and vertical expansion of human rights comes from below, from those whose lives have been blighted by oppression or exploitation and who have not been offered or have not accepted the blandishments that accompany political apathy. In the meantime, we can leave the United Nations and their diplomats to their standard setting and their lunches and return to the state or the community, the only territory where human rights are violated or protected.

⁷¹ "The world is watching: A survey of human rights law", *The Economist*, December 5, 1998, 6.

⁷² Jacques Derrida quoted in *La Liberation*, November 24, 1994, 8.

⁷³ Quoted in Bauman, *Postmodernity and its Discontents* (Cambridge, Polity, 1997) 33.